GENERAL CONCLUSIONS
of the Special Commission of November 1995
on the operation of the Hague Conventions
relating to maintenance obligations
and of the New York Convention of 20 June 1956
on the Recovery Abroad of Maintenance

INTRODUCTION

1 Subsequent to the Decision contained in the Final Act of the Seventeenth Session, under B, 5, by which the Seventeenth Session instructed the Secretary General to convene a Special Commission to study the operation of the Hague Conventions on the law applicable to maintenance obligations and of those on the recognition and enforcement of decisions relating to maintenance obligations, as well as of the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*, the Secretary General of the Hague Conference convened, for the period from 13 to 17 November 1995, a Special Commission, to which all the Member States of the Hague Conference were invited, whether or not they are already Parties to one or other of the aforesaid Conventions, as well as the States Parties to the New York Convention which are not Members of the Hague Conference. Of the latter States – nineteen in all – only two accepted the invitation, namely Monaco, which in the meantime has asked to become a Member of the Hague Conference and whose admission procedure will be concluded in July 1996, and the Holy See. Furthermore, an intergovernmental organization, the International Commission on Civil Status, and a non-governmental organization, the International Law Association, took part in the Special Commission.

The Special Commission unanimously elected, by acclamation, Mr Michel Verwilghen, a Belgian Expert, and Mr Fausto Pocar, an Italian Expert, as Chairman and Vice-Chairman respectively. The Permanent Bureau acted as Reporter.

2 The participants in the Special Commission had only one document before them, Preliminary Document No 1: "Note on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance", drawn up by the Deputy Secretary General of the Conference, Mr Michel Pelichet. But a large number of delegations took advantage of the Special Commission to provide valuable information, in a series of working documents, on the operation in their countries of the various Conventions relating to maintenance obligations, often accompanied by statistical data. The Special Commission recognized that the information provided in Preliminary Document No 1 corresponded to reality and that the difficulties or problems listed in it were in fact those which the States Parties to the various Conventions encountered in practice. At the outset, the Chairman first of all invited the experts to submit observations of a general kind, firstly concerning the four Hague Conventions in an initial round table, then on the New York Convention of 1956 in a second round table, before tackling the difficulties outlined in Preliminary Document No 1.

I CONCLUSIONS OF A GENERAL NATURE

A 3 The delegations unanimously considered that the Special Commission had been a success from various points of view and stressed the usefulness of such meetings. The latter in fact encourages profitable contacts between authorities and provides an opportunity for those responsible for implementing the Conventions to get to know one another, thereby undoubtedly facilitating future exchanges of information, both at the formal and the informal level. Hence the Special Commission recommends that the Eighteenth Session of the Conference should institutionalize the meetings on the operation of the Conventions relating to maintenance obligations, including the New York Convention of 1956, by holding such meetings on a regular basis every four or five years.

B 4 With the exception of the United Kingdom – but solely in regard to England and Wales – all the delegations consider that the New York Convention of 1956 is complementary to the Hague Conventions and is not to be applied as an alternative to them.

5 With reference to the position of England and Wales, whose interpretation of the New York Convention of 1956 is directly derived from the law introducing the Convention into those countries, the United Kingdom delegation expressed itself willing to reexamine this interpretation, in a spirit of compromise. However, the United Kingdom delegation cannot guarantee that such a reexamination will culminate in the adoption of a different position.

C 6 The Special Commission acknowledges that, generally speaking, the four Hague Conventions on maintenance obligations and the New York Convention of 1956 are sound treaties. The difficulties in applying the Hague Conventions on the recognition and enforcement of decisions and the New York Convention are to a much greater extent due to differences in the standard of living between the countries Parties to those Conventions, as well as to frequently incompatible religious or philosophical convictions and, above all, to the systematic bad faith of maintenance debtors. Hence the Special Commission considers that in the present state of affairs, it seems pointless to propose a revision of any of those Treaties.

However, with a view to ironing out certain difficulties highlighted during the discussions, the Special Commission is proposing to the Eighteenth Session two techniques which will be examined below (*cf. infra*, Nos 38 to 44).

D 7 One of the problems discussed at length during the Special Commission was that of legal assistance, seen not only from the point of view of the upper limit imposed on aid in certain States or the reimbursement of solicitors' charges, but also in relation to the enumeration of the various treaty provisions applicable in this domain (the two Hague Conventions of 1958 and 1973 on recognition and enforcement of decisions, the New York Convention of 1956, but also the *Hague Convention of 1 March 1954 on Civil Procedure* and that *of 25 October 1980 on International Access to Justice*).

8 The discussion shows how difficult it is to reach agreement on this point, in view of the fact that States have such different practices in regard to legal assistance. In connection with the co-ordination between the various Conventions, the Special Commission acknowledges that if a request for recognition is submitted in a State addressed, the Hague Conventions have to be considered as a "*lex specialis*" *vis-à-vis* the other Conventions. The procedure of the New York Convention of 1956 only comes into play if the creditor institutes proceedings in the country of residence of the debtor.

9 With regard to the determination of the amount of legal aid which it is appropriate to grant, several countries recognize the child alone as having the capacity of creditor of the maintenance obligation and they accordingly calculate the legal assistance solely in relation to the assets of this child. However, barring exceptional cases, a minor never has assets of his own and hence always benefits from legal aid. But such an approach is not adopted in all countries.

10 The French approach, whereby an upper limit is placed on the aid granted, gives rise to considerable difficulties in relations between this country and other ones. The French delegation announces that a new law will make it possible to depart from the system of imposing an upper limit in cases where this is considered appropriate, which might make the system more flexible and constitute the first step towards a solution.

11 When the assistance has to be granted at the stage of recognition and enforcement of a decision, the Special Commission suggests reverting to the system provided for in Article 47, paragraph 2, of the Brussels/Lugano Conventions, proposing that a certificate testifying that the creditor has received legal aid in the State of origin is sufficient for the State addressed to grant him the same advantage.

12 Apart from those few suggestions, and in view of the substantial differences of opinion existing between States on the subject of legal assistance, the Special Commission finds that it cannot reach more positive conclusions.

E 13 An even more negative conclusion becomes apparent in regard to one of the most difficult problems encountered in applying the Conventions which have been considered, that of the translations. The Special Commission is aware that in this domain, it has virtually nothing to suggest.

14 What should be accomplished is to confine the requirement to furnish a translation to the essential part of a judgment alone, the operative clause and the reasoning, *i.e.* the part which solely concerns the maintenance obligation; with regard to the other documents, only those which are absolutely essential should be translated. But the difficulty is to find a specific way of achieving this result, while at the same time providing the authority addressed with the necessary information. At the present stage of the discussions, the sole approach envisaged is that which public international law offers, not necessarily through the adoption of an additional protocol to the Conventions on recognition and enforcement of decisions or to the New York Convention of 1956 – a system which is too cumbersome owing to the obligation of ratification it implies – but possibly through an *evolutionary interpretation* of the Conventions, by which an attempt would be made to attenuate the rigidity of the requirement to provide a translation. Such an evolutionary interpretation might be adopted within a Special Commission of the Hague Conference, in a form which would have to be examined.

15 The Special Commission finds only one point on which a positive conclusion can be proposed, but this is merely a suggestion: in regard to the translation of texts of laws, it ought to be possible to use the translations already existing in books, manuals or compendia of laws, rather than requiring that a translation certified as being accurate has to accompany the original text.

F 16 In connection with the problems created by the debtor, the Special Commission was not able to find a solution, because of the fact that the difficulties are partially psychological in nature. With regard first of all to locating a debtor who is evading his obligations, the Special Commission can but ascertain that that is a purely factual problem, for which no treaty solution exists.

17 The same is true when a debtor stages his own insolvency: nothing can be done, except to have recourse to criminal proceedings existing in certain States (delict of abandoning the family, failure to comply with a maintenance obligation, etc.). Criminal proceedings often constitute a powerful means of bringing pressure to bear on the debtor, but care should be taken to avoid pushing the logic of this to its ultimate consequences, which might go so far as to damage the interests of the creditor.

G 18 The final conclusion of a general nature takes the form of a wish: certain Member States of the Hague Conference are unwilling, for reasons of internal judicial organization or even in view of their very concept of maintenance obligation, to become Parties to one or other of the Conventions which have been studied. With regard to transnational maintenance obligations, those States are familiar with legislative systems based on bilateral recognition negotiated between one State and another. That is in particular the case with Australia, Canada and the United States.

19 The Special Commission expresses the wish that the States Parties to the Hague Conventions and to the New York Convention should take account of the systems of those States and envisage the possibility of entering into bilateral relationships conducive to providing a solution to transnational maintenance obligations.

II CONCLUSIONS IN REGARD TO THE CONVENTIONS ON THE RECOGNITION AND ENFORCEMENT OF DECISIONS

20 Apart from the difficulties in applying the two Hague Conventions on the recognition and enforcement of decisions which have already been examined in the conclusions of a general nature, and in particular the fact that those difficulties were primarily due to bad faith on the part of maintenance debtors, the Special Commission examined three specific questions which were, moreover, taken up in Preliminary Document No 1, namely:

1 *Temporal application of the 1958 Convention* (Prel. Doc. No 1, Nos 62-66)

21 The Special Commission discussed at length the difference in court practice between the German, Dutch or Austrian position, where dual ratification is required prior to the enforcement of a judgment being granted in accordance with the 1958 Convention, whereas Italian courts consider that Article 12 of the 1958 Convention refers not to the entry into force of the Convention in the State in which the decision was rendered, but solely to the point at which the Convention entered into force for the State in which application was made for recognition of the decision. After some discussion, a trend became apparent within the Special Commission in favour of the Italian solution, by which the 1958 Convention would apply to decisions made after its entry into force in the State *addressed.* This solution has been established under private international law by the new Italian law of 31 May 1995.

2 *Review of the merits* (Prel. Doc. No 1, Nos 90-96)

22 The problem of a review of the merits of a foreign decision was the subject of lengthy discussion. At the outset, the possibility contained in the law introducing the 1973 Convention in the United Kingdom, providing for a systematic modification of the content of a decision registered in application of the Convention, was criticized by the Special Commission as being contrary to the letter and spirit of the two Hague Conventions of 1958 and 1973. The United Kingdom delegation announced that a forthcoming legislative reform would be geared to eliminating this practice. The Special Commission stressed the importance of recognizing foreign decisions while respecting the integrity of their content, even if immediate enforcement was rendered impossible by the financial situation of the debtor; that would pave the way to a possible later enforcement in the State addressed.

23 As regards an application for revision of a maintenance decision brought before the courts of a State other than the one which had originally fixed the allowance, it was stressed that Article 2, paragraph 2, of the 1973 Convention provided for the application of the latter to decisions modifying an earlier decision: hence the Convention expressly acknowledges the recognition of decisions involving a "revision" of a maintenance allowance. But the Special Commission stressed the fact that a revision presupposed a change of circumstances, and consequently a modification of the object of the dispute, which precluded a "revision of the merits" at the stage of recognition of the original decision.

24 However, the Special Commission did not express its views on the difficulty created by the drafting of Article 7, paragraph 1, of the 1973 Convention, as mentioned in Preliminary Document No 1, in paragraph 95: if the maintenance *debtor* brings proceedings to revise the maintenance allowance in view of new circumstances, is he entitled to seize the court of his own habitual residence (forum of the applicant)? Although the text of the 1973 Convention itself seems to indicate a positive answer at the stage of recognition and enforcement of the decision, that does not seem to correspond to the spirit of the Convention, and above all to what was intended by the authors of the latter. Certainly, it should be pointed out here that the 1973 Convention does not include a rule for the direct assumption of jurisdiction; the maintenance debtor therefore must find in the judicial law of the State of his or her residence a rule of international jurisdiction authorizing an action for revision to be brought be4fore a court of that State. But might it not be possible that this court would see Article 7, sub-paragraph 1, as an encouragement to accept its jurisdiction? However this may be, the Special Commission did not reach any conclusion on this point.

3 *Limitation period*

25 A sensitive problem concerning the limitation period was raised during the discussions: in certain countries, including Italy, the limitation period under national law rules out any action for enforcement, which means that when a debtor has voluntarily fulfilled his maintenance obligation before the expiry of the limitation period, the creditor can no longer demand the execution of a writ if this debtor stops his payments. Hence this solution deprives the Conventions of their effects, by obliging, several years after an allowance has been fixed, to open proceedings on the merits.

26 In other countries, in France in particular, the limitation period under national law precludes an action for *recovery*, even if the decision delivered in the State of origin is covered by the enforcement. In those countries, such practice is based on Article 13 of the 1973 Convention, by which the procedure for the recognition or enforcement of a decision shall be governed by the law of the State addressed. Hence the question is whether the limitation period either of the action for enforcement, or of the action for recovery, falls under procedural law.

27 After a lengthy discussion, the Special Commission decided to interpret Article 13 of the 1973 Convention as follows:

a the limitation period of a maintenance action is governed by the law of the maintenance obligation;
b the limitation period of an action for enforcement is governed by the law of the country of origin of the judgment;
c the limitation period for the execution of a writ is governed by the law of the place of recovery.

III CONCLUSIONS ON THE HAGUE CONVENTIONS ON THE APPLICABLE LAW

28 The discussions on the two Hague Conventions on the law applicable to maintenance obligations primarily centred on three domains which had been covered in Preliminary Document No 1, on which it was possible to reach the following conclusions:

1 *The incidental question*

29 The Special Commission first of all noted with satisfaction and unanimously approved the convergence of the national court rulings of the States Parties to the Conventions, by which the incidental question is governed by the law applicable to the maintenance obligation.

30 With reference to the problem raised by the *Peney* judgment delivered by the Swiss Federal Court (Prel. Doc. No 1, Nos 50-51), the Special Commission approves the ruling of the Federal Court, to the effect that the question of the parent/child relationship may be treated as an incidental question, even if the law designated to govern the maintenance obligation requires that the question of status should be decided as a main issue.

31 On the other hand, the Special Commission considered that it was not possible to find a remedy for the practice of certain States, in particular Spain, which consists in refusing to recognize orders to pay maintenance on the grounds of irregularity in the settlement of the incidental question. This practice does not seem to be ascribable to the texts of the Conventions, but rather to moral or religious views prevalent in those States, where there is reluctance to accept that a natural, or even supposed parent/child relationship should have maintenance effects. A convention seems powerless to settle such a problem.

2 *The connection with divorce law* (Article 8 of the 1973 Convention – Prel. Doc. No 1, Nos 30-33)

32 The Special Commission unanimously approved the solution contained in Article 8 embodying the exceptional connection with the law governing the divorce in regard to questions of maintenance obligations between spouses. It did, of course, become apparent during the discussions that this solution might result in the designation of a substantive law which makes no provision for a maintenance obligation between former spouses, or sets a ridiculously low amount, but the Special Commission agreed to recognize the existence of corrective mechanisms to combat successfully such a risk: the exception of public policy contained in Article 11, first paragraph, and the substantive rule in Article 11, second paragraph, by which the court in any event has to take account of the needs of the creditor in determining the amount of maintenance.

33 Despite unfavourable opinions in legal writing, the Special Commission acknowledged that *perpetuatio juris* had the chief merit of guaranteeing the foreseeable nature of maintenance relationships between former spouses in the long term. It considers that the philosophy underlying Article 8 of the 1973 Convention should be retained and consequently abandons any idea of proposing a modification to the Convention on this point at the Eighteenth Session of the Conference. It goes on to note that States which might be reluctant to further, by dint of the rule in Article 8, the continuity of decisions rendered by default had (or still have, in the case of States intending to accede to the Convention) the possibility of recourse to the reservation provided for under Article 14 of that Convention.

3 *Party autonomy* (Prel. Doc. No 1, Nos 53-57)

34 The Special Commission underscored the importance of this question. In fact the 1973 Convention does not expressly authorize spouses to choose the law which is to govern their maintenance relationship. However, it was pointed out that since the drafting of this

Convention, there had been a considerable change of opinion in favour of the freedom of the parties to settle the consequences of the dissolution of their marriage. Hence in the course of the discussions, the possibility was envisaged of recognizing that the parties have this right, by dint of a mere recommendation or by its inclusion in an additional protocol.

35 However, during the discussions, certain delegations expressed their disagreement with such a hypothesis, stressing in particular that it was essential to provide the courts with the flexibility necessary to ensure that any law of autonomy, were it to be adopted, would nothave a negative impact on the protection of the weaker party. Hence the Special Commission concluded that for the time being, no majority existed in favour of proposing to the Eighteenth Session of the Conference a revision of Article 8 of the 1973 Convention on this point.

36 At the conclusion of the discussions concerning the two Hague Conventions on the applicable law, the question was raised as to whether or not a maintenance obligation on the part of a second spouse acting *in loco parentis* on behalf of children from a first marriage fell within the scope of the Conventions. It was recalled that, according to the Report on the 1956 Convention, this Convention does not expressly cover this form of maintenance obligation. However, in view of the fact that such a situation had become more widespread, the Special Commission proposed that this question should be settled by the *lex causae*; this latter possibility is certainly not ruled out by the Conventions.

IV THE NEW YORK CONVENTION OF 1956

37 It is in connection with the New York Convention of 1956 that the discussions of the Special Commission were most fruitful, since the meeting brought together persons who, in the States Parties to this Convention, are responsible for its operation and represent the transmitting and receiving agencies for which it makes provision. The exchange of information brought to light the practical difficulties encountered in applying the Convention, which are due to several factors: inadequate staffing in relation to the number of files, lack of suitable equipment, in particular computers, costs and slowness of translations, etc.

38 In an attempt to find some solution to the inadequate operation of the New York Convention, the Special Commission considers that it is able to recommend to the Eighteenth Session of the Hague Conference the adoption of two techniques which ought to facilitate its operation. Naturally, the Special Commission is aware that the recommendations which it submits to the Hague Conference for adoption have no binding effect and are solely addressed to those Member States of the Conference which are Parties to the New York Convention. It realizes that it is not empowered either to modify this Convention or to propose solutions which would be addressed to the States Parties as a whole; but it considers that it may propose to the Member States of the Hague Conference measures allowing this Convention to be more readily and directly applied. Hence the Special Commission makes the following proposals:

1 *Periodical updating of the list of the authorities provided for under the New York Convention*

39 Drawing inspiration from what has been done during the past few years by the Secretariat of the Hague Conference in regard to the *Hague Convention on the Civil Aspects of International Child Abduction*, the Special Commission proposes that a detailed list of the authorities provided for under the New York Convention should be drawn up, giving the names, addresses, telephone and fax numbers of the persons representing those authorities in all the Member States of the Conference. This list should be updated and sent out regularly, once or twice a year, to all the authorities of the New York Convention in the Member States of the Conference.

40 You will find appended hereto the list drawn up at the Special Commission, together with additional information obtained by the Permanent Bureau relating to the authorities of the States which did not take part in the meeting.

2 *Model forms*

41 During the discussions, the idea was put forward of drafting multilingual model forms to facilitate the transfer of information between the authorities with responsibility within the meaning of the New York Convention. As some doubts had nevertheless been expressed as to the usefulness of such forms, a working group was set up to outline a draft form for the exchange of information, to accompany the file containing an application for a maintenance allowance, as well as a draft form for acknowledging its receipt.

42 Those two draft forms were presented to the Commission in a Working Document No 15, which immediately provoked an extremely lively discussion. Certain delegations criticized the proposed model forms as being in their opinion too detailed and containing too many points which were entirely superfluous in practice. Furthermore, the forms were presented in a computerized code which gave rise to certain doubts.

43 Other delegations, on the other hand, found the form of great interest, but immediately criticized its content, certain delegations wanting to delete some headings, while others were in favour of adding a great deal of supplementary information to the list.

44 Ultimately, it became apparent that it was not possible to draft definitive model forms during the Special Commission and that the whole matter would have to be studied much more thoroughly before useful and appropriate forms could be adopted. Hence the Special Commission asked the Hague Conference to authorize the Secretary General to convene an informal *ad hoc* working group, with instructions to prepare model forms which might be discussed and adopted in the course of the next Special Commission on the operation of the Conventions.

45 Apart from those two recommendations, the Special Commission was able to reach the following conclusions on the subject of the New York Convention:

3 *The scope* ratione personae

46 It is well known that one of the difficulties in applying the New York Convention consists in the fact that in certain States, the benefit of this Convention is solely reserved to the person of the creditor himself, but does not extend to cover the body under public law which may intervene on his behalf (*cf.* Prel. Doc. No 1, Nos 118-119). After a lengthy discussion, the Special Commission was unable to reach any positive conclusion on the possibility for a public body subrogated to the rights of the claimant to submit an application for recovery under the New York Convention. It seems that in this domain, State practice is inconsistent: certain States acknowledge subrogation and extend the benefit of the New York Convention to public bodies, others abide strictly by the letter of Article 1 of the Convention and the spirit of its Preamble and regard as the beneficiary of the Convention the creditor of the obligation alone. However, those latter States accept the intervention of a public body, if it is the holder of a power of attorney.

47 Hence the Special Commission recommends that any application addressed by a public body through the channels instituted by the New York Convention should be accompanied by a power of attorney furnished by the maintenance creditor, even if the latter has already received allowances and the public body has been legally subrogated to his rights.

4 *The requirement of a "decision" prior to the implementation of the Convention*

48 Despite the opposition of two delegations, those of Belgium and France, which consider that the intermediary authorities of their countries cannot be required to pursue judicially the payment of maintenance in the absence of a previous decision taken abroad, there was almost unanimous agreement within the Special Commission on the fact that a decision previously rendered in the State of origin is not necessary in order for the intermediary authorities of the State addressed to attempt to obtain the payment of maintenance, either out of court or by judicial means. On this point, the Special Commission did not manage to iron out the difficulties in the relations between Belgium or France and the other States.

5 *Obligation in family relationships*

49 The Special Commission unanimously considers that the New York Convention applies to maintenance obligations in "family relationships", within the broad meaning of the term, as envisaged in the *travaux préparatoires* of the Convention, including maintenance payments after divorce.

6 *State responsibility*

50 The Special Commission draws the attention of States to the international responsibility arising out of their ratification of the New York Convention. It is essential that those States should provide the financial means and staff necessary to fulfil the treaty obligations.

7 *Requirement to provide a photograph*

51 In regard to the requirement that the application shall be accompanied by a photograph, as stipulated under Article 3, paragraph 3, of the New York Convention, the Special Commission considers that such a requirement has become obsolete in most of the States, because of the practical impossibility of obtaining one. The Special Commission thought that such a requirement could constitute a hindrance for the applicant and concluded that files no longer have to be systematically accompanied by a photograph.

8 *Immunities of staff members of the United Nations*

52 At the end of the discussions, the Special Commission was informed by the Permanent Bureau about the particular and often dramatic situation which existed in the United Nations: a great number of the wives and children of staff members of the United Nations are unable to obtain the payment of the maintenance which is owed to them, even where this has been incorporated in a judgment, because of the possibility for the debtor to invoke his or her immunity as an international official.

53 The Special Commission, while deploring this situation which is contrary to the spirit of the Hague and New York Conventions, could only recognize its powerlessness to offer a solution; it expressed the hope that by negotiations within the United Nations an outcome might be reached which would result in obliging maintenance debtors to fulfil their obligations.

V RECOMMENDATIONS

54 The Special Commission wishes to recommend that the Eighteenth Session of the Hague Conference –

a invite the Secretary General to convene regularly, with a meeting to be held every four or five years, a Special Commission instructed to examine the operation of the Hague Conventions on maintenance obligations and the New York Convention of 1956;

b ask the Secretary General to keep an up-to-date list of the authorities provided for under the New York Convention of 1956 and to communicate this list, once or twice a year, to all those authorities in the Member States of the Hague Conference;

c invite the Secretary General to convene an informal working group in order to draft model forms to accompany the files and to ensure receipt of the latter in application of the New York Convention of 1956. Such draft forms would have to be examined and ultimately adopted at the next Special Commission on the operation of the Conventions in regard to maintenance obligations.