

OVERALL CONCLUSIONS OF THE SPECIAL COMMISSION OF OCTOBER 1989
ON THE OPERATION OF THE HAGUE CONVENTION OF 25 OCTOBER 1980
ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

(These Conclusions incorporate the "Conclusions on the main points discussed by the Special Commission", adopted on 26 October 1989)

drawn up by the Permanent Bureau

INTRODUCTION

1 In the Final Act of the Sixteenth Session of the Hague Conference on private international law, signed 20 October 1988, among the Decisions set out on page 13 is the following:

"The Sixteenth Session,

Having regard to the proposals and suggestions advanced within the First Commission -

...

7 Instructs the Secretary General to convene a Special Commission on the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction."

2 Pursuant to this instruction, the Secretary General convened during the period of 23-26 October 1989 a Special Commission in which all of the Member States of the Hague Conference on private international law, whether or not they had already become Parties to the aforesaid Convention, were invited to participate, as well as certain intergovernmental and non-governmental international organizations having an interest in the operation of this treaty. Thirty States, two IGOs and seven NGOs were in attendance. The Conclusions on the main points discussed by the Special Commission and the final list of participants are attached hereto as annexes.

3 All participants were furnished with *Preliminary Document No 1* "Checklist of issues to be considered by the Special Commission of October 1989 to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction", *Preliminary Document No 2* "Case law decided under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction" and *Addendum I* thereto, *Preliminary Document No 3* "Select bibliography", *Preliminary Document No 4* "Observations de l'Autorité centrale française et bilan statistique" and *Preliminary Document No 5* "Remarques de l'Autorité centrale suisse sur le Document préliminaire No 1 d'août 1989".

4 Mr J.C. Schultsz, President of the Netherlands Standing Government Committee on Private International Law, opened the meeting and welcomed all participants. Mr Peter Pfund, Expert of the United States of

America, was unanimously elected to serve as Chairman of the Special Commission and Mr Alfredo Meneres Barbosa, Expert of Portugal, was unanimously elected to serve as Vice-Chairman.

5 The questions set out in Preliminary Document No 1 were adopted in principle as the agenda for the meeting, it being understood that additional points could be raised in the course of the discussions. At the beginning the Chairman invited the experts to offer general remarks; these remarks have been incorporated into the Overall Conclusions which follow (see, in particular, Nos 59-63, below).

CONCLUSIONS OF THE SPECIAL COMMISSION

I Scope of the Convention (Articles 1-5)

Question A: Have the formulations of the title, preamble and Article 1 of the Convention given rise to any questions of interpretation or application?

6 The term "international child abduction" as used in the title did not seem to have given rise to any difficulty and indeed appeared to some experts to have been helpful to the operation of the Convention, even though it did not reappear in the text. The reference to "civil aspects" seemed to be adequate; thus the absence of a special provision similar to Article 25 of the Inter-American Convention on the Return of Minors, which indicates that that Convention will not preclude the competent authorities from ordering the immediate return of the minor when its removal or retention is a criminal offence, caused no disadvantage.

7 In general, the civil and criminal aspects of international child abduction by parents did not seem to interfere with each other. However, certain specific problems which have arisen in this context are discussed in connection with Questions F (Central Authorities - No 17, below) and M (Return of Children - No 30, below).

Question B: Have any problems arisen concerning the definition of the tort of wrongful removal or retention of a child, as set out in Article 3?

8 The reference to the *habitual residence* of the child, a concept which remains undefined in this Convention as in other Hague Conventions, seemed to have offered little difficulty in practice. However, the more novel reference to "rights of custody", used in framing the tort of wrongful removal or retention of a child in Article 3, and partially defined in Article 5 of the Convention, had given rise to more delicate issues. In particular there had been litigation concerning the question of whether or not certain specific legal situations created under the laws of different countries constituted a

form of joint holding by the two parents of "rights of custody" within the meaning of the Convention.

9 The first point to be clarified was that "rights of custody" as referred to in the Convention on the Civil Aspects of International Child Abduction constitute an autonomous concept, and thus such rights are not necessarily coterminous with rights referred to as "custody rights" created by the law of any particular country or jurisdiction thereof. Thus, for example, in Australia it is customary for "custody" to be granted to one parent, but even in such case Australian law leaves "guardianship" of the child in the hands of both parents jointly; the parent who has not been awarded "custody" under this legal system nonetheless has the right to be consulted and to give or refuse consent before the child is permanently removed from Australia. It was pointed out that this is largely a matter of education for the Central Authorities and judges of other countries which do not have the Australian two-tier system in which co-guardians have "rights of custody" within the meaning of the Hague Convention; therefore the Australian Central Authority should, when forwarding an application for return of a child from abroad, include specific information as to the rights of such a co-guardian which fall within the contemplation of the treaty. Nonetheless it was hoped that the inclusion of this description of the Australian system in the Overall Conclusions of the Special Commission might serve to sensitize Central Authorities in other countries to the fact that the award of what is called "custody" to only one parent under domestic law, does not necessarily mean that all "rights of custody" within the intent of the Hague Convention have been granted to that parent. Since each domestic legal system has its own terminology for referring to rights which touch upon the care and control of children, and even some English-language systems do not employ the term "custody", it is necessary to look to the content of the rights and not merely to their name.

10 A case decided by the Court of Appeal in Aix-en-Provence (France)¹ involving children brought from England illustrates this point. The father had been granted temporary custody by the English court pending a final determination of custody, but the father had been ordered not to take the children outside of the territory of England and Wales without consent of the mother. The father took the children to France without obtaining the consent either of the mother or of the court and opposed the request for return, in part, on the grounds that the mother allegedly had had no "rights of custody" under English law immediately before the removal of the children, and that even if her right to give or refuse consent to their removal had constituted "rights of custody" within the meaning of Article 5 a of the Hague Convention, she had not in any case been actually exercising any such right. The Court of Appeal held that the right of the mother to give or refuse consent to removal of the children, coupled with the father's award of "custody", had created a form of joint custody within the meaning of the Convention, since "rights of custody" as contemplated therein referred

¹ *Affaire WARD/BAUME*, arrêt du 23 mars 1989 (see Preliminary Document No 4, p. 4).

specifically to the right to determine the child's place of residence. Moreover, the court found that the mother had been exercising such rights, since she objected promptly when the father removed the children without consulting her and pursued in a timely manner a request for return of the children under the Hague Convention. The result and the reasoning of the Court of Appeal of Aix-en-Provence in this case were broadly approved as being in the spirit of the Convention.²

11 One expert raised the question of whether Article 3 of the Convention could be invoked to obtain the "return" of a child to the custodial parent when the child was wrongfully retained in the country of his habitual residence. In this case custody had been granted to the mother by the courts of the child's habitual residence and she had been granted permission to take the child abroad. She moved abroad, leaving the child for a temporary visit with the father, who refused to return the child to her abroad at the end of the access period. There was no definitive conclusion as to whether the country which remained, for the moment, the place of the child's habitual residence, should accept an application for return to the mother abroad under the Convention.³

Question C: *Have any cases occurred in which the child attained the age of 16 years while an application for his or her return was pending? If so, was the application dismissed or were other, non-treaty remedies applied?*

12 A few cases had occurred where the child had almost attained the age of 16 years at the time of filing of the application, or at the time of the wrongful removal. It appeared that the actual practice of States differed in respect of this situation. While in some States procedures are suspended when the child attains the age of 16, other States continue to apply the Convention's principles, but obviously in the

² *Note by the Permanent Bureau.* Compare the decision of the High Court (England) in the case of *In re J.* (ABDUCTION; WARD OF COURT), [1989] 3 *W.L.R.* 825, *The Weekly Law Reports*, 20 October 1989, in which the child had been declared a "ward of court", the mother had been granted care and control of the ward, and the father had been granted weekly access. The court held that, since the court had the right under English law to determine the child's place of residence, the court would (on application by the father) declare that the mother, by removing the child to the United States without the court's consent, had wrongfully removed the child within the meaning of Article 3 of the Hague Convention.

³ *Note by the Permanent Bureau.* It is relevant to this issue that the Convention never specifies that the "return" of the child is to be made to his or her habitual residence. This was intentional, since it was contemplated that the custodial parent might change habitual residences before return of the child could be achieved. However, it does not seem to have been specifically foreseen that a country might be asked under the Convention to enforce the custody decree entered by its own courts in order to send the child away from his or her place of habitual residence.

latter case the child's view tends to become a factor of crucial importance. In conclusion, while Article 4 makes it clear that the obligation to apply the Convention ceases at the day when the child reaches the age of 16, nothing in the Convention prevents States from applying the Convention's mechanisms under its own laws in cases in which the child has attained the age of 16.

Question D: Have any problems arisen concerning the application of the term "rights of custody" as employed in Article 3 a and as partially defined in Article 5 a?

13 The issues involved here had been fully discussed in connection with Question B and therefore the Commission passed on to Question E.

II Central Authorities (Articles 6 and 7)

Question E: Have any problems arisen concerning the designation or the responsibilities of Central Authorities under the Convention?

Question F: Do the Central Authorities co-operate effectively with each other in practice? What can be done to improve such co-operation?

14 It was broadly agreed that the role of the Central Authorities is the key to the successful operation of the Convention. Each Central Authority must assume a real, dynamic role in order to expedite and facilitate the Convention's procedures. One of the essential tasks of the Central Authority should be to inform the courts, attorneys, the public at large and parents, in particular, not only about the Convention's mechanisms but, even more importantly, about its spirit.

15 In Working Document No 4, submitted by the Austrian delegation to the Special Commission, the proposal was made to discuss the impact if any of secrecy (data protection) on the obligations of Central Authorities according to Article 21 of the Convention. This matter, however, was seen as a general question which also had to do with the ability of Central Authorities to seek out and locate children within their territories in connection with an application made under Article 8 of the Convention. Thus, the issue of confidentiality of information held by the governmental agencies and authorities was also dealt with in the Conclusions on the main points discussed by the Special Commission (see No 16, below).

16 Since the role and effectiveness of the Central Authorities constitutes the heart of the Convention, the Conclusions on the main points discussed by the Special Commission as adopted on 26 October 1989 are centred on these issues. The first five of these are therefore reproduced in full immediately below, and also in an annex to these Overall Conclusions:

"CONCLUSIONS ON THE MAIN POINTS DISCUSSED BY THE SPECIAL COMMISSION"

adopted on 26 October 1989

I There was broad consensus that in general the Convention works well in the interests of children and meets the needs for which it was drafted.

II Nonetheless, it was recognized that considerable further effort had to be made in order to promote fuller understanding of the Convention on the part of judges, lawyers and administrative authorities, as well as parents and other persons exercising responsibility for children.

III In light of the fundamental difficulties of a structural, legal and procedural nature encountered by States Parties in the handling by Spain of incoming requests for the return of children during the two years since the Convention entered into force for that country, Spain is strongly encouraged without further delay to take all appropriate measures to ensure that its Central Authority and its judicial and administrative authorities are provided the necessary powers and adequate resources to enable it fully to comply with its obligations under the Convention.

IV Moreover, the Special Commission encourages States, whether contemplating becoming Parties to the Convention or already Parties, to organize their legal and procedural structures in such a way as to ensure the effective operation of the Convention and to give their Central Authorities adequate powers to play a dynamic role, as well as the qualified personnel and resources, including modern means of communication, needed in order expeditiously to handle requests for return of children or for access.

V Central Authorities, in seeking to locate children within their territories, should be able to obtain information from other governmental agencies and authorities and to communicate such information to interested persons. Where necessary, their enquiries should be exempted from legislation or regulations concerning the confidentiality of such information."

17 Certain issues which were discussed at some length by the Special Commission did not receive specific treatment in the draft of the Conclusions on the main points, as set out above. Notably these were the questions propounded by the United States delegation in Working Document No 1, paragraph 1, concerning the possible existence and scope of a duty on the part of a requesting Central Authority to disclose the pendency or the likelihood of criminal proceedings, in the courts of the country which it represents, against the alleged abducting or wrongfully retaining parent. Many experts did not perceive any duty on the part of a Central Authority specially to disclose the existence of such criminal proceedings, or to enquire into their existence, and there was broad consensus that no question on this point should be added to the model form recommended by the Fourteenth Session for use in making applications for return of children.

18 The other point discussed was a proposal by the Netherlands delegation, supported by the Expert of Finland, that specific reference be made to the need for implementing legislation to translate the Convention's provisions into practice, even in those countries where treaties of this type are regarded as self-executing. Although the examples offered of implementing legislation (Work. Doc. No 2, the Netherlands; Work. Doc. No 3, Norway; Work. Doc. No 5, Greece; as well as copies informally circulated of the Swedish and United States implementing laws as well as the draft law for implementation in the Federal Republic of Germany) were illustrative of this argument, no consensus was achieved on the idea of an imperative need for implementing legislation in all States Parties. There was some indication that the failure to adopt specific legislation or rules in Spain had contributed to the difficulties experienced by that country in effectively carrying the Convention into practice, as reflected in paragraph III of the Conclusions on the main points discussed by the Special Commission.

III Return of Children (Articles 8-20)

Question G: Have any problems arisen concerning the sufficiency of an application for return of a child or the documentation joined to such an application? (Cf. Article 8)

19 One expert pointed out again that where the domestic law of the child's habitual residence contains nuances which make it difficult in some cases to identify "rights of custody" within the meaning of the Convention (as is the case in Australia), that an explanation of the relevant law should accompany the request for return of the child. Furthermore, he suggested that certified copies of all documents should be used, as these were more likely to command respect than were photocopies.

Question H: Has any application been forwarded to another Contracting State under Article 9? If so, please give the details.

20 The discussions during the meeting showed that the normal procedure in most cases was for the application to be prepared by the applicant in consultation with the Central Authority of the child's habitual residence and for it then to be forwarded to the Central Authority of the other Contracting State in which the child was believed to be staying. Considerable advantages accrue from having the application prepared in consultation with the Central Authority of the child's habitual residence and screened by that Central Authority, then forwarded by it to the Central Authority which must take charge of locating and seeking the return of the child. This process is implicit in the co-operative system created under Articles 7, 8 and 9 of the Convention.

21 Incidental discussions disclosed that the removal of a child from one territorial unit to another of the same federal Contracting State was not seen to cause any particular problems. A decision made under the Convention by a court in any jurisdiction would in principle be binding in all of the other territorial units of the country, in States with such diverse federal systems as Australia, Canada, Switzerland and the United States of America.

Question J: Has the voluntary return of any child been obtained pursuant to Article 10? Have any case studies been prepared by the Central Authority or by social services in this connection?

22 Many experts felt that the voluntary return of the child should be discussed after the court procedures have been started, but before the case is heard. This would prevent the voluntary processes delaying the court procedures and might persuade the parent who abducted the child to accept a voluntary solution. This had happened in diverse cases. The appropriate strategy to be pursued, however, varied from case to case.

Question K: Has any request been made under the second paragraph of Article 11? If so, please give details.

23 There was no indication that any formal request had been made under the second paragraph of Article 11. Some discussions took place concerning the causes of delay in the proceedings. One expert suggested that one of the main reasons for delay would be the unfamiliarity of judges with the Hague Convention. He suggested therefore that this could be resolved by Central Authorities explaining the Convention.

Question L: Have there been any cases in which the proceedings were commenced more than one year after the wrongful removal or retention? (Cf. Article 12, second paragraph.) If so, what were the results?

24 Most experts interpreted Article 12 to mean that if the proceedings had been started within a year of the abduction, then the child had to be returned. In cases where more than one year had elapsed the court could consider whether the child was now settled in his or her new surroundings and would be harmed more by being returned than by remaining in the new country. If the child had been removed from country to country, was unhappy in the new country, or would be psychologically damaged by remaining in the new environment, then that child should probably be returned even if a year had elapsed.

25 Some experts pointed out that there was conflict over when the time should begin to run and when it should stop running. If the child was abducted within a State and only after, say, six months taken to a new State did the time run from the abduction or from the time the child was taken across the border? Experts disagreed on this point. If the return of a child was requested within a year but court proceedings were begun more than a year after the abduction (possibly because the child

could not be found), had the year elapsed or not? Experts also disagreed on this point.

Question M: Has the return of a child been refused on any of the grounds set out in -

- i) Article 13 a?
- ii) Article 13 b?

26 Concerning both paragraphs a and b of Article 13, it was observed that they may lead to dilatory tactics on the part of the defendant. This obviously was not their purpose, however, and the Central Authorities had a task here to educate the parties and the courts on the proper role of those grounds of refusal.

27 In this connection the question was posed as to whether in the Contracting States the order for return was subject to appeal. It appeared that this was generally the case, but that often (a) the delay for appeal was very short, and/or (b) the order given in the first instance was immediately enforceable (*i.e.* notwithstanding appeal) or could be made immediately enforceable by the court at the request of the applicant, and/or (c) the procedures in the first instance left limited room to the abductor for calling witnesses.

28 Article 13 a seemed to be invoked rarely in practice. In contrast, the largest part of case law so far known involves an asserted Article 13 b defence. However, in most cases the courts had found that this defence was in fact a matter of the welfare of the child to be decided by the courts of the habitual residence. Questions were raised as to the degree of grave risk required and the meaning of "intolerable situation". It appeared that the courts in general had given a strict interpretation to the words "grave risk" and it was suggested that the word "intolerable" also indicated that a high degree of risk was required. Possible examples given of "intolerable situations" included the situation where, for example, an abducting mother ran the risk of being put to jail following criminal proceedings in the requesting country (*cf.* No 17, above) or would face immigration problems in that country; however, many delegations thought that the possibility of criminal prosecution of the abductor was irrelevant to Article 13 b.

29 Experts agreed that Central Authorities may have a role to play even in apparent Article 13 b cases, for example by providing some social work assistance for the abducting parent who is to take the child back to the requesting country. Reference was made in this connection to Article 7 h of the Convention.

30 It appeared that no cases were known where the return had been refused on grounds other than those permitted by the Convention; more specifically no case was known where the fact that the child had the

nationality of the requested State had been used as a ground for refusal of the return of the child.⁴

Question M: Has the return of a child been refused on any of the grounds set out in -

iii) Article 13, second paragraph?

31 In several recent cases which had not been received in time to be mentioned in the Checklist, the return of a child has been refused on the grounds of the child's objection to being returned. These are notably the Serrurier/de Moulin case and the Coppens de Northland/Lebris case, mentioned on page 4 of Preliminary Document No 4, involving children respectively 11 and 12 years of age. The Australian case mentioned in the Checklist: decision of 27 June 1988 by the Family Court of Australia, Brisbane, in the *Marriage of Malcolm John Turner and Elizabeth Gladys Diane Turner*, has been included in Preliminary Document No 2, Addendum I at page 4. The court in that case, based on the objection by a 13-year old girl to return from Australia to England, refused an application for return under the Hague Convention. In the case of *Navarro v. Bullock* (Superior Court of the State of California, Placer County, 1 September 1989), included in Preliminary Document No 2, Addendum I, at pages 30-47, a girl of 11 years of age (almost 12) and a boy 9 years of age (almost 10) were ordered return to their father in Spain, despite their stated objection to being returned. The court found that both children were of insufficient age and maturity to express a view to the court which would be meaningful (Preliminary Document No 2, Addendum I, at page 46).

Question N: Have the provisions of Article 14 been invoked? If so, please give details.

32 A few cases were mentioned where foreign decisions had been invoked under this article. In one case a Central Authority had had to intervene in the court proceedings in order to explain that this article had nothing to do with enforcing foreign decisions.

⁴ Note by the Permanent Bureau. In a few cases, courts have undertaken a broader enquiry into the merits of the cases and into the general interests of the child who had been abducted than seems to be justified by the more concrete criteria set out in Article 13 b of the Convention. Here reference can be made to the decision of 13 July 1989 by the Court of Appeal of Lisbon, summarized in Preliminary Document No 2, at pages 64-65, and the decision of the *Bezirksgericht Uster* (Switzerland) of 19 September 1989 set out (in German) in Preliminary Document No 2, Addendum I, at pages 90-107. In the great majority of cases from all countries, however, the courts have interpreted Article 13 b strictly and have adhered closely to the spirit of the Convention.

Question P: *Has a request been made under Article 15? If so, what was the result?*

33 Contrary to what some of the drafters of the Convention had expected, this article has not, it seems, in practice led to delay. It was felt that this article related both to Article 8 *f* and Article 14 in that the more information was presented concerning the state of the law in the requesting State, the less Article 15 would have to be used.

Question Q: *Has notice of a wrongful removal or retention been given pursuant to Article 16 to judicial or administrative authorities of your country? If so, please give details. How can the giving of such notice be handled administratively in your country?*

34 This article in general seems to be well understood by the courts. Some Central Authorities reported that they would call the court by telephone giving it notice of the wrongful removal and, if necessary, explain the operation of this article, in particular in light of Article 19.

Unscheduled Question:

"Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention."

35 The Permanent Bureau's Checklist, Preliminary Document No 1, had posed no question about this provision.

36 Nonetheless several experts posed theoretical questions concerning its potential implications. In light of the fact that discussion of this article had not been contemplated in the Checklist the Permanent Bureau suggests that, concerning the meaning and intent of this article, reference should be made to the official Explanatory Report by Professor Elisa Pérez-Vera (*Actes et documents de la Quatorzième session, 1980, Tome III, Child Abduction, p. 464*), paragraphs 122-123.

Question R: *Has the return of any child been opposed on the grounds stated in Article 20? If so, what was the result?*

37 There are no cases in which this article has been successfully relied upon: each time that a party has tried to invoke a defense drawn from Article 20, it was an attempt to use it in favour of the kidnapper and not of the child, this has never been allowed by the courts.

38 Article 20 was incorporated into the Convention after a long discussion and was intended to enact a very strictly qualified form of *ordre public*. For this reason two countries - Finland and the United Kingdom - have not included this article in their internal legislation; they consider that any possible situation would be covered by Article 13.

39 Two cases have involved defensive claims which were grounded in human rights, although Article 20 was not expressly invoked: *Affaire Ward/Baume, Cour d'appel d'Aix-en-Provence, arrêt du 23 mars 1989*, cited in Preliminary Document No 4 at page 4; *Parsons v. Styger*, Supreme Court of Ontario, 67 O.R. (2d) 1, 6 January 1989. In each case the plea for refusal to return the child, based on an alleged infringement of the abducting parent's right to freedom of mobility, was denied by the court. (In the first case the right invoked was guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms, in the second by the Canadian Charter of Rights and Freedoms.)

IV Rights of Access

Question S: *Have any requests for organizing access been made under Article 21? If so, what were the results?*

40 This article is considered to be very important because it shows that the Convention tends to view the rights of access as corollary to rights of custody; in this way it permits harmonization of the rights of the parents.

Several reported court cases have involved requests for the organization or enforcement of access rights.

Question T: *Have any problems arisen concerning the translation requirements of Article 26? If so, please give details.*

41 Whenever possible it is considered preferable to translate documents into the language of the requested State.

Question U: *Have any problems arisen in the application of the provisions of Article 26? If so, please give details.*

42 There was extensive discussion of the problems of implementation which were posed in countries which had taken the reservation set out in the third paragraph of Article 26 of the Convention - in respect of costs resulting from the participation of legal counsel or advisors or from court proceedings, except in so far as those costs may be covered by that Contracting State's system of legal aid and advice. While this provision gave little difficulty in those countries which had

comprehensive national legal aid systems, it could pose formidable financial barriers to the effective application of the Convention in countries which had no legal aid system, or had geographical disparities because legal aid was broken down into separate systems among its territorial units.

43 It was pointed out that the two federal countries Parties to the Convention which did not have a unified national system of legal aid - Canada and the United States of America - were precisely the countries which had during the negotiations at the Fourteenth Session insisted upon the necessity of this reservation in order for them to be able to ratify the Convention. In Canada the anomaly was pointed up by the fact that the reservation had not been taken for the Province of Manitoba, but had been taken for all the other provinces and territories.

44 In cases where legal aid as such was not available for the institution of court proceedings in the territorial unit in which the child was located, the Central Authorities had undertaken within the context of Article 7 *f* of the Convention to seek to obtain legal representation for the applicant on a *pro bono* or a reduced-fee basis. Because of the extreme importance of rapid action under the Convention in the interest of the child for his or her return to the place of habitual residence, Central Authorities were encouraged to pursue their efforts to obtain *pro bono* counsel where needed; moreover because of the difficulties of long-distance communication, Central Authorities could perform a valuable function in helping to maintain contact with *pro bono* counsel with a view to avoiding unnecessary delays in the institution and prosecution of legal proceedings.

45 The discussion showed that the Central Authorities of the federal States which were in this latter situation had undertaken extensive efforts within the context of their responsibilities under Article 7 *f* of the Convention to obtain legal counsel on a *pro bono* basis or at a reduced fee for applicants who could not afford to pay the customary legal fees in the locality in question. It was hoped that contact with organizations of the bar at the international, national and local levels could be expanded in order to expedite the obtaining of legal counsel in such cases and to promote the rapid handling of such cases. Representatives of bar groups present at the Special Commission meeting indicated their willingness to assist in this endeavour, in particular by entering into inter-bar agreements designed to facilitate at the local level prompt action to carry out the Convention's purposes.

46 The Conclusions on the main points discussed by the Special Commission dealt with this problem in the following terms:

"VI The Special Commission saw a correlation between the obligations of Central Authorities under Article 7 f to assist in the initiation of court proceedings for return of a child and the reservation under Article 26 concerning lawyers' fees, made by a number of States. Countries with broad territories and either no legal aid system or territorially non-unified legal aid had experienced or might

experience in the future difficulties in obtaining legal representation for applicants who could not afford legal fees. The Special Commission encourages such States to intensify their efforts to obtain legal counsel or advisers in order to avoid serious prejudice to the interests of the children involved."

47 A special problem was mentioned by Australia: in the case where a request for the return of the child is made to the Australian Central Authority they ask that the requesting authority or the requesting parent should, where possible, ensure that the considerable fare for the return trip of the child from Australia is available before the request is made so that, when the return of the child is ordered by the judge, this can be carried out immediately. In some cases a delay in finding travel funds had resulted in extensive sojourns of children in foster homes in Australia after a return had been ordered.

Question V: Have you refused to accept an application under Article 27? If so, what were the grounds?

48 There are few cases in which the Central Authority of a country has used Article 27 to refuse a request. The refusal of a Central Authority to accept a request does not prevent the applicant from applying directly to the court for a decision under the Convention and the court would not be bound by the decision of the Central Authority.

Question W: Do you systematically require written powers of attorney under Article 28? If so, please submit to the Permanent Bureau a copy of any standard form which you use.

49 Austria, Spain and Sweden all stated that their Central Authorities needed a power of attorney but that this need not be in any special form.

50 The Central Authorities of Switzerland and the United Kingdom submitted to the Permanent Bureau the forms which they used for powers of attorney.

Question X: Have any questions arisen concerning the concurrent application of the 1980 Hague Convention and any other international convention, pursuant to Article 34? If so, please give details.

51 The discussion showed that there is in principle no conflict between the Hague Convention and the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, when both can apply. The Checklist cited a French case in which an issue as to the relationship between these two Conventions had been raised and resolved (*Tribunal de grande instance de Toulouse*, decision of 20 March 1987 published in *Gazette du Palais*, 9-10 October 1987, together with a note by P. Monin-

Hersant and B. Sturlese; *Revue critique de droit international privé*, 1988, p. 67).

52 Copies of the Council of Europe informational document DIR/JUR (89)1 of 25 May 1989, cited in the Checklist, have been made available to the Permanent Bureau for distribution to those experts attending the October 1989 Special Commission who do not already have this document.

53 The Inter-American Convention on the International Return of Children, adopted at Montevideo, Uruguay, on 15 July 1989, contains in its Article 34 the following provisions on the relationship between that Convention and the Hague Convention on the Civil Aspects of International Child Abduction:

"Article 34

Among the Member States of the Organization of American States that are parties to this Convention and to the Hague Convention of October 25, 1980 on the civil aspects of international child abduction, this Convention shall prevail.

However, States Parties may enter into bilateral agreements to give priority to the application of the Hague Convention."

Question Y: *Have any issues arisen concerning the temporal application of the Convention? (Cf. Article 35.)*

54 Firstly it was stated that the wording of Article 35 is very clear: if the abduction occurs before the Convention is put into force between States, then these States have no contractual obligation under the Convention, but nothing prevents a State from invoking that Convention if it wishes.

55 One way of reducing the full effects of Article 35 is to consider a wrongful abduction which occurred before the Convention came into force as if it were a continuing wrongful retention extending beyond the Convention's entry into force between the two countries involved, and thus choosing to invoke the Convention. This line of reasoning was rejected by the Scottish Court of Session in *Kilgour v. Kilgour*, 1987 SCLR 344, decided 24 December 1986, cited in the Checklist, Preliminary Document No 1.

56 The Central Authority of the United States of America indicated that it is willing to receive and process applications for return of children who were abducted to, or first wrongfully retained in, the United States before the Convention entered into force between the United States and the State of the child's habitual residence. In case of court action, this would leave it up to the courts of the United States and of its component states ultimately to determine whether

retroactive application of the Convention would be made in particular cases. In this connection it should be noted that all fifty states of the United States of America have adopted and brought into force the Uniform Child Custody Jurisdiction Act, which also can in principle apply to international cases.

Question Z: Have any agreements been entered into pursuant to Article 36? If so, please furnish the Permanent Bureau a copy of such agreement.

57 No special agreements have been entered into pursuant to Article 36 since the Hague Convention on the Civil Aspects of International Child Abduction entered into force. However, notice should be taken of the bilateral Convention between France and Portugal, concluded 20 July 1983, relating to protection of minors, referred to in Preliminary Document No 4 at page 4.

58 Moreover, a trilateral Convention is pending between Belgium, France and Luxembourg which was signed on 20 April 1987 and is presently in the process of ratification, as noted in Preliminary Document No 4, page 4.

GENERAL OBSERVATIONS

59 In summary, the general remarks offered at the beginning of the Special Commission gave rise to the following points:

a Most speakers stressed the particular importance of the deterrent effect of the Convention, which helps to discourage parents from abducting a child. All experts agreed that in order to enhance this effect the widest possible publicity should be given to the Convention both in respect of countries which were not yet Parties to the Convention and within Member States.

b The Convention's simplicity and the speediness of its procedures were acclaimed across the table as major factors contributing to its effectiveness. Some experts mentioned that their countries had used the Convention's mechanisms in concluding bilateral and even trilateral conventions.

c The two major problems which had been encountered in the application of the Convention were the following:

- the search for the abducted child and the abducting parent, in particular where the applicant parent does not provide any address;
- the problem of legal aid to be given to the applicant. Although the majority of the States Parties have made the reservation of Article 26, the effect of this reservation is different depending on the legal system in question.

d Financing the return of the child raises an important problem. Certain countries have assumed the burden of paying for the return of the child in cases where neither the abductor nor the applicant can assume these costs.

e Several countries, which are not yet Parties to the Convention, indicated that the procedures for ratification of the Convention were well advanced and that they hoped to ratify in 1990. Several experts felt that it would be desirable for the three Conventions concerning the protection of minors - the Hague Convention of 1961 on the Protection of Minors, the Council of Europe Convention of 1980 and the Hague Child Abduction Convention - to be widely ratified, because of their complementary character.

60 These Overall Conclusions, edited by the Permanent Bureau, which reflect the specific discussions arising from the Checklist, Preliminary Document No 1, broadly reflect these different aspects of the remarks offered at the beginning of the meeting. The Special Commission thought that the Permanent Bureau should continue its role of co-ordination and promotion of good communication among the Central Authorities; it recognized however that the Permanent Bureau could not go so far as to publish a practical handbook on this Convention, nor could it systematically collect and disseminate case law decided under the Convention. Nonetheless, the Permanent Bureau wished to be kept informed of significant cases decided under the Convention, and it might in appropriate circumstances disseminate information on particular cases.

61 Valuable experience was to be gleaned from meetings held under the auspices of other international organizations, such as the Council of Europe's Custody Convention Committee, studying the impact of parallel or related provisions in other treaties, as well as the relations between international instruments with related or complementary purposes. Such co-operation and liaison with other international organizations, including the Inter-American Children's Institute, could contribute significantly to the Permanent Bureau's preparation for the next periodic meeting to study the operation of the Hague Convention on the Civil Aspects of International Child Abduction.

62 Paragraph VII of the Conclusions on the main points discussed by the Special Commission, dealing with further periodic meetings, is set out below:⁵

"VII The Special Commission agreed that periodic meetings on the operation of the Convention would be particularly useful as a means

⁵ Note by the Permanent Bureau. Information received during and after the October 1989 Special Commission meeting indicates that the opportunity for the personnel of Central Authorities designated under the Convention to meet each other in person and to engage in both formal and informal discussion of problems arising in practice has contributed to a greatly improved set of working relationships

of improving the co-operation and effectiveness of Central Authorities and would thereby help to ensure the appropriate operation and implementation of the Convention. It recommends therefore that the Secretary General convene a second session of the Special Commission before 1993."

63 One of the purposes served by the Council of Europe's Custody Convention Committee meetings had been to standardize the format for presentation of statistics concerning cases handled by the Central Authorities. Periodic Hague Conference review meetings could draw inspiration from this example to seek harmonization of the statistical information compiled by various Central Authorities under the Hague Convention on the Civil Aspects of International Child Abduction.

CONCLUSIONS ON THE MAIN POINTS DISCUSSED BY THE SPECIAL COMMISSION

adopted on 26 October 1989

I There was broad consensus that in general the Convention works well in the interests of children and meets the needs for which it was drafted.

II Nonetheless, it was recognized that considerable further effort had to be made in order to promote fuller understanding of the Convention on the part of judges, lawyers and administrative authorities, as well as parents and other persons exercising responsibility for children.

III In light of the fundamental difficulties of a structural, legal and procedural nature encountered by States Parties in the handling by Spain of incoming requests for the return of children during the two years since the Convention entered into force for that country, Spain is strongly encouraged without further delay to take all appropriate measures to ensure that its Central Authority and its judicial and administrative authorities are provided the necessary powers and adequate resources to enable it fully to comply with its obligations under the Convention.

IV Moreover, the Special Commission encourages States, whether contemplating becoming Parties to the Convention or already Parties, to organize their legal and procedural structures in such a way as to ensure the effective operation of the Convention and to give their Central Authorities adequate powers to play a dynamic role, as well as the qualified personnel and resources, including modern means of communication, needed in order expeditiously to handle requests for return of children or for access.

V Central Authorities, in seeking to locate children within their territories, should be able to obtain information from other governmental agencies and authorities and to communicate such information to interested persons. Where necessary, their enquiries should be exempted from legislation or regulations concerning the confidentiality of such information.

VI The Special Commission saw a correlation between the obligations of Central Authorities under article 7 *f* to assist in the initiation of court proceedings for return of a child and the reservation under article 26 concerning lawyers' fees, made by a number of States. Countries with broad territories and either no legal aid system or territorially non-unified legal aid had experienced or might experience in the future difficulties in obtaining legal representation for applicants who could not afford legal fees. The Special Commission encourages such States to intensify their efforts to obtain legal counsel or advisers in order to avoid serious prejudice to the interests of the children involved.

VII The Special Commission agreed that periodic meetings on the operation of the Convention would be particularly useful as a means of improving the co-operation and effectiveness of Central Authorities and

would thereby help to ensure the appropriate operation and implementation of the Convention. It recommends therefore that the Secretary General convene a second session of the Special Commission before 1993.