# Convention on Contact concerning Children

(ETS No. 192)

Français

## Explanatory Report

### I. Introduction

1. The Third European Conference on family law on the subject "Family law in the future" (Cadiz, Spain, 20-22 April 1995) noted that with the continuing internationalisation of family relationships within a unified Europe, the question of transfrontier access to children was becoming more and more topical. The Conference noted that additional work should be considered by the Council of Europe in order to improve matters relating to access. Therefore, the Conference recommended the Council of Europe to give further consideration to these matters, in order to improve the machinery for international co-operation especially as regards transfrontier access to children in order to establish safeguards for the return of children after a period of access.

2. Following this proposal, the Committee of experts on family law (CJ-FA), under the authority of the European Committee on legal co-operation (CDCJ), was instructed to consider the means of improving the right of children to maintain personal relations and direct contact with both parents on a regular basis as well as the means to improve the machinery for international co-operation in cases of custody and transfrontier access. In order to carry out its terms of reference, the CJ-FA set up in 1996 the Working Party on custody and access (CJ-FA-GT1). Mr Sjaak JANSEN (Netherlands), Ms Nathalie RIOMET (France), Mr Miloš HATAPKA (Slovakia) and Mr Laurence QUINTANO (Malta) chaired the CJ-FA. Mr Sjaak JANSEN and Mr Werner SCHÜTZ (Austria) chaired the CJ-FA-GT 1.

3. The Working Party on custody and access prepared the draft Convention on contact concerning children and its draft explanatory report. When preparing these drafts, they were discussed with the Convention Committee on the Custody Convention (T-CC) and full account has been taken of its views and of the information provided by the replies to the questionnaire on access prepared by the CJ-FA (document CJ-FA (99) ACCESS).

4. The draft Convention was approved on 14 September 2001 by the Committee of experts on family law (CJ-FA) at its 34th meeting and on 6 December 2001 by the European Committee on legal co-operation (CDCJ) at its 76th meeting.

5. The draft Convention was then submitted by the European Committee on legal co-operation (CDCJ) to the Committee of Ministers which adopted the text of the Convention and authorised the publication of its explanatory report at its 110th Session on 3 May 2002 and decided to open the Convention for signature, in Strasbourg, on 14 October 2002, on the occasion of the 6th European Conference on family law.

### II. Commentary on the provisions of the Convention

**General comments**

6. The change of the terminology in the Convention by replacing the notion of "access to children" by the notion "contact concerning children" strengthens the fact that children are holders of certain rights. Therefore, it seems more appropriate to refer to contact concerning children with different persons rather than just to the rights of certain persons to access to children. The notion of "contact" is more in line with modern concepts such as "parental responsibility" or "parental responsibilities". Another important reason is the frequent use in the case-law relating to the Convention for the Protection of Human Rights and fundamental freedoms of 1950 (henceforth the ECHR) of the "right of both parents and children to maintain contact". For these reasons, the text uses the term "contact" instead of "access" for those cases where the child has contact with a person with whom he or she does not usually live.

7. A parent with whom the child usually lives may be reluctant to allow some or even any national or transfrontier contact to take place as he or she may fear, in some cases not without reason, that the child will not be returned by the other parent (or by another person having family ties with the child, see paragraph 34 below). On the other hand a parent (or any other person having family ties with the child) who has no or very limited contact with a child, may disregard the custody right of the other parent including the right to determine the place where the child is supposed to live and take the child in order to ensure regular contact with him or her. It is therefore clear that an improved system of contact would assist children to remain in regular contact with their parents, including parents having joint or shared custody and other appropriate persons. An improved system could also considerably reduce national and transfrontier problems relating to custody and contact, including the improper removal or retention of the child.

8. Different international legal instruments concerning children refer to the right of the child to maintain contact with his or her parents. The United Nations Convention on the rights of the child of 20 November 1989 (henceforth 1989 United Nations Convention) mentions expressly the right of the child "to maintain personal relations and direct contact with both parents on a regular basis" (see Article 9). The ECHR establishes in its Article 8 that " everyone has the right to respect for his private and family life (...)". This provision guarantees, according to the case-law relating to the ECHR, the right of a parent and his or her child to maintain regular contact with each other. The organs of implementation of the ECHR, the European Court of Human Rights and, in the past the former Commission of Human Rights, have recognised the existence of this right in their case-law and considered that this right could only be restricted or excluded on serious grounds in the best interests of the child (e.g. as a measure necessary to protect the morals or the health of the child, etc.).

9. The determination of the persons, in addition to parents, with whom a child may have contact, subject to the best interests of the child, is of crucial importance. In this respect, it is noted that the European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children of 1980, ETS No. 105, (henceforth "Custody Convention") refers to "persons", and in some national laws persons other than parents may have contact with the child. In fact, in some States, the most recent legislation relating to this matter has tended to broaden the circle of persons who are given or who may apply for contact. In this respect, it is necessary to underline that in certain of these laws grandparents have a right to contact while in other laws they have only a right to apply for contact. The case-law relating to the ECHR has recognised the possibility to apply to maintain contact between a grandmother and her grandchildren and the European Court of Human Rights stated as follows: "the Court noted, firstly, that it was common ground that issues relating to the relations between the second applicant and her grandchildren were covered by Article 8 of the ECHR. It also pointed out in that connection that "family life", within the meaning of Article 8 includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life. "Respect" for a family life so understood implies an obligation for the State to

act in a manner calculated to allow these ties to develop normally" (*Eur.Court HR, Scozzari and Giunta v. Italy judgment of* 13 July 2000, Series A, par.221). Where there has been a certain period of family life together, persons who have lived in the same household as the child may belong to this group (e.g. former foster parents, a spouse or former spouse of a parent, a person who has cohabited with a parent) (see also the comments in paragraph 47 below).

10 By promoting the adoption in States of common principles concerning contact with children, the text also supports the operation of international instruments which deal with the abduction, custody and habitual residence of children, in particular the Custody Convention; the Hague Convention of 25 October 1980 on the civil aspects of international child abduction (entry into force 1 December 1983, henceforth 1980 Hague Convention); the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (entry into force 1 January 2002, henceforth 1996 Hague Convention). It is in this context that the Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses was adopted. The Regulation entered into force on 1 March 2001.

11. Concerning the relationship of this Convention and the existing international legal instruments containing provisions on matters governed by this Convention, it is necessary to stress, first of all, that, apart from certain provisions contained in the Custody Convention concerning access (see Article 19 of the present Convention), this Convention supports, but does not affect, the way in which these international instruments operate (see Article 20 of the present Convention). Secondly, it has been shown that the provisions of the existing international instruments concerning contact are insufficient and additional measures may be necessary to improve their effectiveness, in particular principles, which can be applied in a uniform manner by States in contact cases. The general principles (see Chapter II) to be used when making, amending, suspending or revoking contact orders are the generally accepted principles of good practice applied currently by the majority of States. These principles are to be applied in all types of cases, whether or not there is an international element, and can also form a useful basis for parties when making agreements or can be used in the context of issues concerning contact in family mediation. Therefore, this Convention, by dealing not only with procedural matters but also with substantive principles, provides new elements which can help to prevent or limit conflicts which may appear in cases of contact concerning children.

12. In some cases the authorities of the State where a parent resides and which are not the authorities of the State of the habitual residence of the child, may be better placed to deal with the practical conditions under which contact is to be exercised. Therefore, it is necessary to promote co-operation between the courts of the State of the habitual residence of the child, which will, in most cases, be the ones which make the contact order, and the courts of the State where contact is to take place in order to obtain more reliable and appropriate information concerning the manner to establish and exercise contact in the best interests of the child (see also Article 35 of the 1996 Hague Convention).

13. It is possible for the judicial authorities which have made the contact order to take certain steps to ensure, as far as possible, that the order is carried into effect (e.g. supervision of contact) and that the child is returned after a period of contact or that he or she is not improperly removed. This could be done, for example, by requiring a person, who seeks contact, to surrender the passport, by financial guarantees, by means of undertakings or stipulations to the court, or even, by the obligation of the person seeking contact to present a document, coming from the State where contact is to take place, certifying the recognition and, where appropriate, declaration of enforceability of a custody or a contact order or both, either before a contact order is made or before contact takes place, etc. In this way more children will be returned at

the end of a period of contact.

14. When, in spite of the provisions of this Convention, the child is not returned after a period of contact, which has taken place abroad, the Convention leaves it to the other applicable international instruments to deal with the return of the child to the place where he or she usually lives. By producing a clearer framework for the exercise of contact, this Convention is likely to facilitate the tasks of courts, when so requested, to order the return of the child under the other applicable international instruments.

15. This Convention leaves it to the domestic law of each State to determine:

i. which children are covered by paragraph c. of Article 2. States may therefore exclude the application of the Convention where, as indicated in paragraph c. of this Article, a contact order may not be made or enforced, in particular in:

a. cases where a child under the age of 18 has obtained full legal capacity such as by marriage or emancipation;

b. cases where a child is entitled to decide on his or her own residence before the age of 18;

c. cases where courts may not make or enforce a contact order concerning a child who has reached a certain age or has sufficient understanding and who strongly opposes any contact.

ii. the persons (i.e. the mother or the father) who are to be legally recognised as "parents";

iii. the persons who are to be legally recognised as having family ties with the child (as understood in the framework of this Convention and as further set out in paragraphs 34 and 46 to 51 below);

iv. the best interests of the child;

v. when a child has sufficient understanding;

vi. whether contact is subject to the consent of the child.

## Chapter I – Objects of the Convention and definitions

### Article 1 – Objects of the Convention

16. The Convention is concerned with different situations relating to the right of contact, and lays down specific solutions for them. Therefore, the objects of this Convention are to determine general principles to be applied to contact orders; to fix appropriate safeguards and guarantees to ensure the proper exercise of contact and the immediate return of children at the end of the period of contact, and to establish co-operation between central authorities, judicial authorities and bodies which are concerned by a contact order.

17. The general principles in letter a of Article 1 are those contained in Chapter II, which are to be implemented in the internal law of the States Parties and to be applied by the judicial authority taking the decision (see Articles 2 letter b and 3). Such principles will not only assist judicial authorities, at a national level, to follow certain standards but will also ensure that any foreign decisions to be implemented from other States Parties to this Convention have been based on similar reliable standards.

18. Article 1 letter b deals with the establishment of appropriate safeguards and guarantees to ensure the proper exercise of contact and to ensure the return of the child at the end of the period of contact (see the comments on Article 10 below). These safeguards and guarantees concern not only transfrontier cases, but also national cases. Thus, when the parents live in the same State it may be advisable, if there is any real danger that the child may not be returned at the end of the period of contact, to require, for instance financial guarantees or, as the case may be, even the surrender of passports or identity documents or both, in order to ensure that the child will be returned to the place where he or she usually lives.

19. Article 1 letter c concerns the need for co-operation between the different bodies involved in contact cases. The paragraph aims at promoting co-operation first between similar bodies (for instance direct co-operation between the judicial authorities of different countries) and secondly between bodies of different categories, for instance co-operation between the central authorities and judicial authorities of the same or different countries.

**Article 2 – Definitions**

20. This article defines certain terms used in the Convention.

21. Article 2 letter a defines "contact" and shows that contact may concern not only a child and a parent who do not usually live together, but also other persons with whom the child does not usually live, in particular persons having family ties with the child (see paragraph 34 below). Where, under paragraph 2 of Article 5, States have extended the provision concerning contact (e.g. to persons having close personal links with the child), States may freely decide what aspects of contact, as defined in Article 2 letter a, shall apply (see the comments on Article 5 below).

**a. Contact**

22. Article 2 letter a indicates that the right of the child and certain persons to maintain contact with each other can take different forms. There are three levels of contact:

– The first level covers direct contact: this means "personal" (face-to-face) contact between the child and his or her parents or other persons having family ties with the child (or other persons if States have extended the circle of these persons according to paragraph 2 of Article 5). Direct contact usually implies an absence of the child from the place where he or she usually lives and staying for a limited period of time with or meeting one of the persons mentioned in Article 4 or 5. This direct contact is usually the most appropriate way to maintain contact;

– The second level covers other forms of contact than direct contact: the contact between the child and other persons is established by ways other than "personal" or face-to-face contact, for instance by telephone, letters, faxes, e-mail, etc. This type of contact can be used in addition to direct contact or even instead of direct contact in specific circumstances when direct contact is not possible (e.g. if contrary to the best interests of the child or if the child lives very far away and regular direct contact is difficult).

– The third level of contact covers the provision of information about the child to those persons seeking contact with him or her (e.g. sending recent photographs, school reports, medical reports etc.) or to the child about such persons. This type of contact can be used first of all in addition to the other two levels of contact or even instead of such contact in specific circumstances when one or both of the two levels of contact are contrary to the best interests of the child.

23. The provision of information to the child or concerning the child shall respect the

best interests of the child and the interests of other persons involved as the case may be.

24. As it is such an important human right, obtaining and maintaining regular contact between the child and his or her parents should only be restricted or excluded where necessary in the best interests of the child, in conformity with Article 4 of the Convention. If unsupervised contact is not in the best interests of the child, supervised contact should be available.

**b. Contact order**

25. The Convention ensures that parents, who have a custody or residence order, especially in cases of a joint or shared custody or residence order, are also entitled to make use of the provisions of this Convention when the child is staying with the other parent. However, this will usually apply to cases where the residence period is of considerable length. Otherwise, the right of a parent and the child to have contact with each other must normally be considered to be catered for through the time spent together as a result of the shared residence order.

26. Article 2 letter b defines the term "contact order". According to this definition, a contact order means a decision of a judicial authority or an agreement confirmed by it, irrespective of the type of contact concerned (direct or other forms of contact).

27. In the context of this Convention the term "contact order" also includes agreements between parties, usually between parents, relating to direct or other forms of contact, which were drawn up as authentic instruments and which are enforceable, where provision for such agreements exists under the internal law of the State where the agreement has been made and, in the case of transfrontier contact, of the State where it is to be applied. The inclusion of both court-approved agreements and authentic instruments in the scope of the Convention is due to the fact that in very many cases, contact with a child results from private agreements rather than a judicial decision. However, in order to facilitate the carrying into effect of such agreements, the Convention only applies to agreements which have been confirmed by a competent judicial authority or which have been formally drawn up or registered as authentic instruments and are enforceable under the law of the State where the agreement has been made. Therefore, mere private agreements, which do not fall within these categories, are excluded from the scope of application of this Convention. However, the decision of the judicial authority could take account of the possibility of the parents making private agreements by fixing a general framework for such agreements (e.g. by providing that contact may only take place abroad if both parents have agreed in writing).

28. The Committee of experts on family law (CJ-FA) and its Working Party on custody and access (CJ-FA-GT1), when preparing this Convention, underlined the importance of promoting agreements between parties in particular in matters concerning children. For this purpose, they encouraged States to make greater use of family mediation according to the provisions of Recommendation (98) 1 of the Committee of Ministers to member States on family mediation. Therefore, mediated agreements confirmed by the competent judicial authority are also included in the notion of "contact order".

29. The terms "agreement (...) formally drawn up or registered as an authentic instrument and which is enforceable" refers to a document which is not based on a "decision" of a judicial authority but which has been established or registered under the control of a public authority. Under the Scottish legal system, for instance, such instruments may refer to any aspect of the re-organisation of the spouses' affairs after the divorce such as matters relating to the children, e.g. residence or contact. In order to obtain the force of a court order, these instruments have to be recorded in public registers existing in the Higher Courts in Scotland, known as the Books of Council and

Session and the Books of the Sheriff Court. In other legal systems, it is possible that the parties obtain an authentification of their agreement before a notary or a youth welfare office. This confers a certain degree of "faith and credit" to an otherwise merely private agreement, without the authority issuing the authentification exercising a decisive control as to the content of the agreement. However, since such documents are not known in all legal systems, they only fall under this Convention where provision for these documents exists in the State Party where they are made and, in transfrontier cases, in the State Party where contact is to take place.

30. In the context of this Convention "contact order" also includes an order prohibiting contact as a means to safeguard the best interests of the child ("non-contact orders"). A consequence of this is that, even in the case where the competent authority does decide to prohibit the contact, this authority will, before its decision, have to consider all possible forms of contact (see Article 2 letter a) and will have to apply the principles contained in Chapter II of this Convention (for instance informing the child and allowing the child to express his or her views according to Article 6 of the Convention).

**c. Child**

31. Article 2 letter c defines a child as being a person under the age of 18 in respect of whom a contact order may be made or enforced in a State Party. The age of 18 is the age of full legal capacity in all member States of the Council of Europe (in this respect see the Committee of Ministers' Resolution (72) 29 on the lowering of the age of full legal capacity). In addition, Article 1 of the 1989 United Nations Convention states that "a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier". The Convention recognises that it is in the interests of children to fix the scope of application of the Convention at the age of 18 and not 16 years as, for example, in the Custody Convention (ETS No. 105). This will assist in ensuring the continuation of contact with a child and will ensure a certain continuity, as other instruments would apply after the age of 18, in particular those dealing with protective measures concerning incapable adults. However, it is also necessary to take into account that some legal systems provide that a person under 18 years of age may obtain full legal capacity (e.g. through marriage) or may be entitled to decide on their own residence at an earlier age. Where such cases apply according to the law of the State where the child usually lives or in cases of transfrontier contact, according to the law of the state where the contact is to be exercised, it will not be possible to make or enforce a contact order. In the internal law of some countries it is not possible for courts to make or enforce a contact order where a child is 16 or over, or even for younger children, if the child strongly opposes any contact.

32. As the present Convention also applies to children close to the age of majority, the increasing maturity and autonomy of the child should duly be taken into account, e.g. if a child with sufficient understanding refuses contact, due consideration should be given to his or her wishes not only when making a contact order, but also for any subsequent enforcement. States should be encouraged to include provisions about these matters in their internal laws (see also the comments on Article 6 below).

33. The Convention recognises that it is normally is in the best interests of children to remain in contact with their parents and other persons having family ties with the child. Although contact orders in most cases concern a child who is usually living in a family home with the other parent or with a person having family ties with the child, contact orders may also concern a child who is usually living in foster or residential care or in a public institution. States have the possibility in individual cases to exclude contact for children who are living in foster or residential care. If contact is excluded for such children, member States of the Council of Europe will still have to comply, in particular, with Article 8 of the European Convention on Human Rights and the case-law of its Court (see, in particular, the comments below concerning Article 4 and the case-law of the Court).

**d. Family ties**

34. Article 2 letter d defines the notion of « family ties » as understood in the framework of this Convention (as further set out in paragraphs 46 to 51 below). "Family ties" means a close relationship between the child and certain persons other than parents (for instance grandparents and siblings) based on law or on a *de facto* family relationship. " Family relationship" means the family relations recognised in accordance with the domestic law of the specific State which need not necessarily correspond to the genetic situation – e.g. in the event of adoption or reproductive medicine. Such a close relationship may also arise from a *de facto* family relationship; that is to say that a person has been living in the same household as the child and therefore there has been a certain period of family life (e.g. former foster parents, a parent's spouse or former spouse who is not the child's parent or a person who has cohabited with a parent and the child). As referred to in paragraphs 15 and 49 of this explanatory report, States have some room for discretion concerning the determination of persons who are regarded by national law as having family ties with the child. However, States Parties are bound by the case-law of the European Court of Human Rights relating, in particular to Article 8 of the ECHR. Courts may in particular make specific arrangements in respect of a situation where several persons are applying for contact.

**e. Judicial authority**

35. The definition of "judicial authority" in Article 2 letter e is based on the definition contained in Article 2 of the European Convention on the exercise of children's rights of 1996 (ETS N° 160). In this respect, it is necessary to underline that, in addition to courts, any administrative authority with judicial powers in family proceedings is covered by the definition of the term "judicial authority". Administrative authorities have been included, as the powers which belong to courts are also, in some States, exercised by administrative authorities for certain types of family proceedings. This includes the power to make a contact order or to confirm private agreements on contact.

## Chapter II – General principles to be applied to contact orders

### Article 3 – Application of principles

36. This article provides that States Parties shall adopt all necessary legislative or other measures in order to ensure that judicial authorities apply the principles contained in this Chapter when making, amending, suspending or revoking a contact order concerning children. According to the rules of public international law, each State Party undertakes to ensure the conformity of its law with the principles of this Convention and takes measures for that purpose. These principles correspond to those generally accepted and applied by European courts in cases concerning contact (whether or not there is an international element). These principles should be applicable, as far as possible and where appropriate, to all types of contact mentioned in Article 2 letter a.

37. If a contact order has been made, the order normally ends the dispute and regulates the conditions and the frequency of contact. However where the order is no longer appropriate, in particular, in case of a change of circumstances or new evidence making the order contrary to the interests of the child, it may be necessary to amend or even to suspend or revoke the contact order. In these cases, the judicial authority having jurisdiction, should be able to amend or adapt the contact order, according to the applicable national law and the provisions of any relevant international instruments.

38. Article 15, which deals with the conditions for implementing transfrontier contact orders, allows the judicial authority of the State Party where the transfrontier order is to be carried into effect, to fix or adapt the conditions for its implementation as well as any safeguards or guarantees attaching to it, provided that these changes are intended to facilitate the exercise of contact. However Article 15 only concerns the implementation

of the order and prohibits an examination as to its substance.

**Article 4 – Contact between a child and his or her parents**

39. Article 4 applies to contact between a child and his or her parents (i.e. those who by law are recognised as parents, as mentioned in paragraph 34 above). The first paragraph of Article 4 recognises the importance of the right of a child and of both his or her parents to obtain and to maintain regular contact. This should be the first principle to be applied by judicial authorities to contact orders. The second and the third paragraphs contain derogations and restrictions to the right mentioned in paragraph 1 of Article 4.

40. This fundamental right of the child and his or her parents to obtain and to maintain contact is already provided in the internal laws of the vast majority of member States of the Council of Europe and in international instruments. This right is also protected under the case-law of the European Court of Human Rights with regard to the right for respect of family life under Article 8 of the ECHR. This case-law takes into account the 1989 United Nations Convention and in particular its Article 9 paragraph 3, which provides that "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests".

41. Article 4 paragraph 2 of this Convention provides that contact may be restricted or excluded only where necessary in the best interests of the child. Therefore the only criterion shall be the best interests of the child. However, it must be beyond any doubt that such restriction or exclusion of what essentially is a human right is necessary in the best interests of the child concerned. The appreciation, by judicial authorities, of the necessity of a possible restriction or even exclusion of the right provided in Article 4 paragraph 1 shall therefore take into account the following elements: there shall be no other less restrictive solution available; the possible restriction or exclusion shall be proportional; the necessity of the restriction or the exclusion shall be duly justified. The more the right of contact is to be restricted, the more serious the reasons for justifying such restriction must be. For instance, contact is against the best interests of the child where there is a physical or psychological danger for the child from the part of his or her parent. In cases where a parent has never before shown any interest in the child, contact might deeply disturb the child. In those cases where a child having sufficient understanding is opposed to having contact with one parent, it is possible that such contact might adversely affect the child. States Parties have a margin of appreciation in determining those cases where a restriction or an exclusion of a contact is necessary in the best interests of the child. The relevant domestic law provisions must nevertheless take into account that contact as such is in the best interests of the child and that it may only be restricted or even excluded, in individual cases, when proven not to be in the best interests of the child, for example when a legal regime aimed at protecting the best interests of the child in special circumstances has been established in keeping with the provisions of domestic law.

42. In this respect, the case-law of the European Court of Human Rights provides, according to paragraph 2 of Article 8 of the ECHR, that where the law gives the national court the competence to grant or refuse a right of contact, its refusal must be "in accordance with the law"; and in order to decide whether the refusal of a right of contact is a measure "necessary in a democratic society", the parents' interests are balanced with those of the child, the latter playing a preponderant role. In different cases, most of which concern children taken into public care, the European Court of Human Rights declared a violation of Article 8 of the ECHR due to restrictions imposed on contact between the applicants and their children (*Eur. Court HR, O.,H.,W.,B. and R. v. United Kingdom* judgments of 8 July 1987, Series A n° 120-A, 121-A, 121-B and 121-C; *Eur. Court HR, Olsson v. Sweden (n°1)* judgment of 24 March 1988, Series A n° 130; *Eur. Court HR, Eriksson v. Sweden* judgment of 22 June 1989, Series A n°156; *Eur.*

*Court HR, Margareta and Roger Anderson v. Sweden* judgment of 25 February 1992, Series A n° 226; *Eur. Court HR, Olsson v. Sweden (n°2)* judgment of 27 November 1992, Series A n° 250; *Eur. Court HR, Johansen v. Norway* judgment of 7 August 1996; *Eur. Court HR, Holdry v. Germany* decision of 12 January 1999; *Eur. Court HR, Nuutinen v. Finland* judgment of 27 June 2000*; Eur. Court HR, Gnahore v. France* judgment of 19 September 2000; *Eur. Court HR, K. and T. v. Finland* of 12 July 2001). These restrictions of contact can take different forms: for instance non-regular contact (e.g. a personal contact only during the child's birthday) or a supervised contact can be considered as restrictions to the right of contact.

43. In fact, the case-law of the European Court of Human Rights, as it relates to contact, is founded on the fundamental principle that States have positive obligations inherent in an effective respect for family life (*Eur. Court HR, Marckx v. Belgium* judgment of 13 June 1979, Series A n° 31; *Eur. Court HR, X and Y v. Netherlands* judgment of 26 March 1985, Series A n° 91), which includes the obligation to maintain and develop the family ties (*Eur. Court HR, Kroon and others v. Netherlands* judgment of 27 October 1994, Series A n° 297-C) and that the ECHR applies to children as it does to adults (*Eur. Court HR, Nielsen v. Denmark* judgment 22 November 1988, Series A n° 144). In addition, the European Court of Human Rights recognises that the best interests of the child are of crucial importance (*Eur. Court HR, Johansen v. Norway* judgment of 7 August 1996, Series A) and that the wishes and feelings of children should duly be taken into account in applications concerning them (*Eur. Court HR, Hokkanen v. Finland,* judgment of 23 September 1994 Series A n° 299-A).

44. According to paragraph 3 of Article 4 of this Convention, if unsupervised contact is not in the best interests of the child (e.g. domestic violence, danger of abuse, risk of abduction of the child, parent who has not seen the child for a long time, etc.), the possibility of direct supervised contact or other forms of contact shall be considered especially as the maintenance of regular contact with both parents is normally in the long term in the best interests of the child. Supervised contact requires the existence of the basic conditions for the supervision of the exercise of such contact (persons, places, etc.). In this respect, it should be pointed out that where there is any danger of child abduction, certain security aspects will have to be considered, as not only must a relative or other third person be present or supervise the exercise of contact but also appropriate premises must be provided. It might be possible to provide supervision in all cases where this is needed, if the youth welfare authorities and other social bodies could provide assistance. Supervision of contact should usually be of a temporary nature and will usually take place in a neutral location (for instance it could take place in the home of third persons offering such assistance or on the premises of social bodies or youth welfare authorities). Such temporary supervised contact should be checked periodically, preferably upon request, to ensure that it continues to be in the best interests of the child. The underlying idea is that contact is only supervised for a limited period of time so that in the long term, where this is in the best interests of the child, supervision of contact will no longer be necessary.

45. Direct contact is usually the most appropriate way to maintain contact and the judicial authority should normally consider this form of contact before exploring other ways of maintaining contact. However, in accordance with the definition provided by Article 2 letter a of the Convention, other forms of contact (for instance by telephone, letters, faxes, e-mail, or by the provision of information about the child – or about the person seeking contact with the child - by sending recent photographs, school reports, medical reports, etc.) can be used in addition to direct contact or even instead of direct contact in specific circumstances. Supervised contact normally refers to direct contact.

**Article 5 – Contact between a child and persons other than his or her parents**

46. As already indicated in paragraph 9 above, it is important for children and certain persons, in addition to parents, having family ties with the child to maintain contact

subject to the child's best interests. The expression of "persons having family ties", stated in paragraph 1 of Article 5, has been borrowed from the case-law of the European Court of Human Rights. Although in most of this case-law the expression is used to distinguish "family life" based on relationships outside the marriage from "family life" based on marriage, its usefulness resides in the fact that it shows quite graphically that certain factors other than legal factors may indicate that a relationship has sufficient constancy to create family ties.

47. Concerning the circle of "persons other than his or her parents" who can obtain and maintain contact with the child, there are three different categories of persons:

– The first one concerns persons having a close family relationship with the child by law. It is up to the internal law of States to define who falls into this category. In most States this will include persons such as grandparents and siblings. In this respect, it is necessary to underline that, when this Convention was elaborated some European laws did not grant any particular right to grandparents on contact matters. However, in other European laws the grandparents either had a right to contact or only a right to apply for contact. In the latter sense, as mentioned in paragraph 9 above, the European Court of Human Rights stated in a case concerning children taken into public care: "the Court noted, firstly, that it was common ground that issues relating to the relations between the second applicant and her grandchildren were covered by Article 8 of the ECHR. It also pointed out in that connection that "family life", within the meaning of Article 8 includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life. "Respect" for a family life, so understood, implies an obligation for the State to act in a manner calculated to allow these ties to develop normally" (*Eur.Court HR, Scozzari and Giunta v. Italy judgment of* 13 July 2000, Series A, par.221). States, which already provide for a right of contact and not merely a right to apply for contact, are free to maintain their system.

– The second category concerns persons having a *de facto* family relationship with the child. Here it is the factual connection with the child, independent of any legal family ties, which is decisive. This group covers not only persons having, at present, *de facto* family ties with the child but also persons who have had *de facto* family ties with the child in the recent past (e.g. former foster parents, a spouse or former spouse of a parent, a person with whom the child has been living in the same household for a considerable period of time, a person who has cohabited with a parent and the child, a relative of the child such as an aunt or uncle). In the case of *Boyle against the United Kingdom* concerning a request of an uncle for contact with his nephew, who had been taken into public care, the former European Commission on Human Rights considered that the claim of this uncle was admissible and that there should be a procedural safeguard under Article 8 paragraph 2 of the ECHR, i.e. a forum or a mechanism (and not necessarily a court) for obtaining an objective and meaningful review of the applicant's (a non-parent) requests as to contact and his complaints as to the approach taken by those acting on behalf of a local authority (see the report of the European Commission on Human Rights of 9 February 1993 on the case *Terence Boyle against the United Kingdom*). The Court took formal note of the friendly settlement reached by the Government and Mr Boyle and decided to strike the case out of the list (*Eur. Court HR, Boyle v. The United Kingdom judgment* of 28 February 1994, Series A n° 282-B);

– The third category, which is mentioned in paragraph 2 of Article 5 covers persons other than those having family ties with the child, as freely determined by each State Party; for instance, persons having close personal links with the child (see paragraph 51 below).

48. According to the above-mentioned case-law of the European Court of Human Rights relating to Article 8, it may be said that, at present, certain persons, other than parents, having family ties with the child may, at least in situations where a child is placed in public care, have a right to apply for contact. Moreover, according to the case-law of the European Court of Human Rights, States Parties have a positive obligation to facilitate the exercise of rights ("implies an obligation for the State to act in a manner calculated to allow these ties to develop normally"). However, the parents' right to bring up their children is also protected by Article 8 of the ECHR. In particular, if a right of contact is claimed by third parties, this contact must therefore serve the child's best interests, taking into account the parents' rights.

49. Taking into account the above considerations, it could be said that:

– Persons, other than parents, having family ties with a child may have a right to apply for contact. However, this right is not on an equal footing with the right of a child and his or her parents to contact because there is a presumption of contact for legally recognised parents and their children, and only where it is necessary in the best interests of the child the parents and the child can be deprived of their right of contact (see paragraph 1 and 2 of Article 4 of this Convention). A child and persons, other than parents, having family ties with the child do not have a right to obtain and maintain contact but may only have a right to apply for contact subject to the best interests of the child.

In the implementation of this right, States have some room for discretion concerning the determination of persons who are regarded by national law as having family ties with the child. However, States Parties are bound by the case-law of the European Court of Human Rights relating to Article 8 of the ECHR. Courts may in particular make specific arrangements in respect of a situation where several persons are applying for contact.

As regards the rights of persons having family ties with the child to apply for contact, it should be kept in mind that such contact should normally take account of the views of the child's parents.

– National laws could envisage that contact with a person having family ties is subject to the consent of the child having sufficient understanding (possibility for the child to refuse or veto such contact) (see the comments on Article 2 above and the comments on Article 6 below). It is sufficient if national law provides for the possibility of applying for direct (personal) contact or other forms of contact (e.g. letters, e-mail).

– This right of the child and of certain persons, other than parents, having family ties with a child to apply for contact will always be subject to the condition that this contact is in the best interests of the child. Even where such contact is in itself in the best interests of the child initially, if contact leads to family friction, the court may consider that contact, which causes such family friction, may, after taking account of all the circumstances, be against the best interests of a child.

50. Paragraph 1 of Article 5 is giving to such persons and a child the possibility to establish contact ("contact may be established"), that it is to say, that judicial authorities should not refuse *a limine* an application for contact if *de facto* family ties with the child exist. Some states have established filtering systems whereby certain persons need the leave of the court in order to apply for contact (the United Kingdom) or whereby the task of deciding whether proceedings are to be instituted has been entrusted to a special organ (Sweden).

51. According to paragraph 2 of Article 5, States are free to extend the possibility to obtain and maintain contact with the child to persons other than those mentioned in

paragraph 1. These other persons are those persons having close personal links with the child but not having "family ties "(for instance, a teacher who has a close personal link with the child). States can also provide the possibility for these persons or the child to apply for contact. In these cases, States may freely decide what aspects of contact, as defined in Article 2 letter a, shall apply. Thus, a person, who is not the parent of the child and who does not have family ties with him or her, may have, for instance, direct contact or other forms of contact such as by mail or may simply be given information about the child.

**Article 6 – The right of a child to be informed and to express his or her views**

52. Article 6 which sets out some of the procedural rights of the child is based on the European Convention on the exercise of children's rights (ETS No. 160): the rights to be informed, to be consulted and to express his or her views (see Articles 3 and 6 of the above mentioned Convention). Providing this would not be manifestly contrary to his or her best interests, the child entitled to these rights is the child considered by internal law as having sufficient understanding.

53. According to the explanatory report of the European Convention on the exercise of children's rights (ETS No. 160) it is left to States to define the criteria enabling them to evaluate whether or not children are capable of forming and expressing their own views, and States are naturally free to make the age of children one of those criteria. Where the internal law has not fixed a specific age at which children are considered to have sufficient understanding, the judicial authority will, according to the nature of the case, determine the level of understanding necessary for children to be considered as being capable of forming and expressing their own views.

54. In cases where the child is considered, by internal law, as having sufficient understanding, the judicial authority shall, before taking a decision concerning contact, ensure that the child receives all relevant information. This may be particularly important when the child does not have a special representative and the judicial authority has reason to believe that the holders of parental responsibilities have not given this information to the child. Not all information necessarily has to be divulged to children, since some information might be harmful to their welfare independently of their age and their capacity of understanding. In addition, once it has been decided to transmit information to children, that information must be adapted, in both form and content, to their age and understanding.

55. The judicial authority is also under a duty to ensure that the child is consulted in a manner appropriate to his or her understanding and has the opportunity to express his or her views. The judicial authority may consult the child in person or decide to request a child welfare officer or appropriate bodies to ascertain the views of the child and to communicate these views to the judicial authority (see Article 6 letter b of the European Convention on the Exercise of Children’s Rights, ETS No. 160).

56. Paragraph 2 of Article 6 provides that due weight shall be given to the views and the ascertainable wishes and feelings of the child (in this respect see also Article 6 letter c of the Convention ETS No. 160 which requires the judicial authority to give due weight to the views expressed by the child). However, this second paragraph of Article 6 does not grant the child an absolute right to consent or to veto a planned decision concerning contact, because it is not always in the best interests of the child to grant him or her such a right. It is for the judicial authority to make the final decision taking into account the wishes and feelings of the child as well as all other circumstances.

**Article 7 – Resolving disputes concerning contact**

57. Article 7 sets out the duties of judicial authorities ("take all appropriate measures")

when resolving disputes concerning contact.

58. Letter a. of Article 7 enounces the duty of judicial authorities to ensure that both parents are informed of the importance for their child and for both of them of establishing and maintaining regular contact with their child. It aims at making parents realise that Article 4 of the present Convention contains a fundamental right (of the child and his or her parents) to obtain and develop regular contact between their child and themselves. This implies a duty for each parent to act in the best interests of the child and not to prevent or create obstacles to the exercise of this right of contact of their child with both parents. This paragraph reflects the main contents of Article 9 of the 1989 United Nations Convention, which establishes the right of the child, who is separated from one or both parents, to maintain personal relations and direct contact with both parents on a regular basis. It is also reflected in Article 8 of the ECHR, which guarantees the right of each mother and father to maintain contact with his or her children, according to the interpretation given to this Article by the European Court of Human Rights.

59. This information, which is to be given to both parents, should in particular stress that "both parents have common responsibilities for the upbringing and development of the child" (Article 18, paragraph 1 of the 1989 United Nations Convention) and these responsibilities imply that the parent with whom the child usually lives should ensure that the other parent has regular contact with the child. It is incumbent also on a parent who does not usually live with the child to ensure that regular contact is actually brought about.

60. This information should be provided, in particular but not exclusively, by judicial authorities. For instance mediators, social workers, etc…who are also dealing with the case can provide this information.

61. Letter b. of Article 7 is intended to encourage parents and other persons having family ties (where States have, under paragraph 2 of Article 5, enlarged the categories of persons who may apply for contact, the provisions of Article 7 letter b. could also apply to such persons) with the child to reach amicable agreements concerning contact, in particular through family mediation and other processes for resolving family disputes. In this respect, it should be recalled that Recommendation No. R (98) 1 on family mediation recommends the governments of member States to introduce or promote the process of mediation in order to resolve family disputes and aiming at avoiding litigation in court. Furthermore, this Recommendation also recommends the use of process other than mediation to resolve family disputes. Paragraph 11 of the explanatory memorandum of Recommendation N° R (98) 1 on family mediation provides: "(…) the increasing number of marriages ending in divorce have led States to introduce and support a variety of means of resolving family disputes amicably. Not all of these are referred to specifically as "family mediation", although their aims and objectives may be similar. These methods may include, for instance, conciliation, conciliation counselling (mediation which includes some counselling), family counselling, and so on.". In addition Article 13 of the European Convention on the exercise of children's rights (ETS N° 160) refers to the need to encourage the provision of mediation or other processes to resolve disputes affecting children and the use of such processes to reach agreements and thus avoiding proceedings before a judicial authority. However, family mediation rarely offers a feasible solution in transfrontier cases. Practical problems, such as: geographical distance; organisational difficulties; the dynamics of the relationship between the parents and lack of communication between them, can make the use of mediation difficult in particular cases. In these cases it may be necessary for some preparatory work to be done with each parent in their respective country of residence, with a view to facilitating the voluntary participation of both parents in mediation. In cases involving transfrontier contact, it is important to recognise that unless all the agencies and bodies involved in facilitating mediation give the parents all appropriate information and sufficiently motivate them, mediation is unlikely to take place, and if it does it is unlikely to succeed. In order to ensure the best possible chance of success, it is also important

that the agencies and bodies complete all necessary co-ordination and organisational arrangements before mediation is attempted. It will also be important for agencies and bodies to develop criteria relating to the use of language and techniques appropriate to mediation in cases with a foreign element. Generally, it would be useful to provide the judicial authorities in States Parties with a sufficient understanding of mediation, whether by training or the provision of information or otherwise, so as to enable them to facilitate and encourage the use of mediation.

62. Letter c. of Article 7 provides that, when resolving disputes concerning contact, the judicial authority, before making a decision, shall ensure that it has sufficient information at its disposal in order to take a decision in the best interests of the child and, when necessary, obtain further information from other relevant bodies or persons, in particular from the holders of parental responsibilities. In this respect, it is particularly important to recognise that the judge of the habitual residence of the child has normally more reliable information about all circumstances of the child and his or her family; the most recent international legal instruments also reflect this position. According to Article 6 of the present Convention it would be possible for judicial authorities also to obtain, where appropriate, further information from the child having sufficient understanding. This paragraph is in accordance with the content of Article 6 letter a. of the European Convention on the exercise of children's rights (ETS N° 160) relating to the role of judicial authorities during the decision making process in order to implement the rights of children.

**Article 8 – Contact agreements**

63. As indicated above, parents and other persons having family ties (where States have, under paragraph 2 of Article 5, enlarged the categories of persons who may apply for contact, the provisions of Article 8 could also apply to such persons) with the child should be encouraged to reach amicable agreements concerning contact. It is normally in the best interests of the child and parents and these other persons to decide by themselves how to implement the contact between them and the child. Another supplementary reason to encourage agreements is that a contact order made by the judicial authority will not usually contain all details for contact with the child during future years, having regard to the need to take account of changing circumstances. Therefore the persons concerned will have, at a later stage, to agree on the necessary detailed arrangements to give effect to this order. Thus, Article 8 paragraph 1 states that States Parties shall encourage parents and other persons concerned to comply with principles laid down in Articles 4 to 7 when making or modifying agreements concerning contact with the child.

64. Given the basic and essential nature of the principles set out in Articles 4 to 7, parties are encouraged to comply with these principles even when making private agreements concerning contact.

65. In order to avoid doubt about such agreements, in particular arrangements where a child is to stay with a person for a limited period of time or is to be taken out of the jurisdiction, these agreements should preferably be made in writing by the persons concerned. This could, for example, be by means of a document signed by these persons and indicating the name of the child, the place where he or she usually lives, the dates and place of contact and the name of the person who is to have contact with the child. Such documents should contain all essential details concerning contact. The importance of a common understanding between the parties is recognised by giving them great autonomy to make agreements concerning contact, which they may decide subsequently to submit to the judicial authorities for confirmation.

66. Although a written document, which has not been confirmed by a judicial authority, would not be binding on a judicial authority, it would, in case of difficulties arising out of the exercise of contact, provide this authority with useful indications concerning the

intention of the persons. Such indications could help to facilitate the return of the child at an appropriate moment to the place where he or she usually lives.

67. In order to give such agreements the same legal force as a court order and therefore facilitate their implementation, paragraph 2 of Article 8 provides that, upon request, judicial authorities shall confirm agreements concerning contact with a child. Apart from cases where internal law does not provide for confirmation of such agreements, confirmation shall only be refused if the agreement is contrary to the best interests of the child. The judicial authority may take account of the principles set out in Articles 4 to 7 of this Convention in order to check that the agreement complies with the best interests of the child.

**Article 9 – The carrying into effect of contact orders**

68. This article provides that States Parties shall by appropriate means ensure that contact orders are carried into effect. When the Convention was being drafted the national legislation of some States lacked means to ensure an effective implementation of contact orders. Granting contact to a parent without the possibility of properly implementing such contact does not comply with the case-law of the European Court of Human Rights. States Parties are free to choose the implementation measures necessary in order to give effect to contact orders.

69. Indeed, the European Court of Human Rights has held that the non-enforcement of judicial decisions concerning parental rights and responsibilities, including contact orders, may constitute a violation of the right to respect for family life as provided by Article 8 of the ECHR. Since the States enjoy a margin of appreciation in this area, the Court checks whether the measures taken by the judicial authorities or the administration were *adequate* and *sufficient* to ensure enforcement of the applicant's right to respect for family life (see, for instance, *Eur. Court HR, Ignaccolo-Zenide v. Romania* judgment of 25 January 2000– what was important for the Court in this case was not whether national law provided for sufficient measures and whether they had been properly applied, but whether they were successful in bringing about the re-unification of the applicant and her children; see also *Eur. Court HR, Nuutinen v. Finland,* judgment of 27 June 2000 and *Hokkanen v. Finland,* judgment of 23 September 1994 Series A n° 299-A).

70. In a number of earlier cases regarding the length of proceedings (Article 6 paragraph 1 of the ECHR), the Court had already held that judicial proceedings concerning the relations between the children and their parents, including enforcement proceedings (forming integral part of the trial within the meaning of Article 6 according to a well-established case-law of the Court), must be conducted with "*exceptional diligence"* (see, for instance, *Eur. Court HR, H. v. the United Kingdom* judgment of 8 July 1987, Series A, No. 120; *Eur. Court HR Johansen v. Norway* judgment of 7 August 1996, Reports 1996-III, para. 88; *Eur. Court HR, Paulsen-Medalen and Svensson v. Sweden* of 15 February 1998).

71. Finally, it is recalled that Article 7 of the European Convention on the exercise of children's rights (ETS N° 160) states that: "In proceedings affecting a child the judicial authority shall act speedily to avoid any unnecessary delay and procedures shall be available to ensure that its decisions are rapidly enforced. In urgent cases, the judicial authority shall have the power, where appropriate, to take decisions which are immediately enforceable."

72. Therefore, States are required to provide appropriate remedies, which may include the enforcement of any safeguards and guarantees to ensure that a contact order is carried into effect as soon as possible.

**Article 10 – Safeguards and guarantees to be taken concerning contact**

73. This article contains examples of practical solutions which may, where appropriate, be used to promote and secure the proper implementation of national or transfrontier contact with children, before, during and after the contact has taken place. Safeguards and guarantees are amongst the most important steps to be taken in order to facilitate the proper exercise of the right of contact as defined in letter a of Article 2. By virtue of Article 10 paragraph 1, each State Party shall provide for and promote the use of safeguards and guarantees. The safeguards and guarantees, indicated in paragraph 2 of Article 10, do not constitute an exhaustive list and, in addition to the requirements of paragraph 3 of Article 4 and paragraph 1 letter b of Article 14, States are free to choose three or more categories of safeguards and guarantees available under their law. Therefore, States may provide any other safeguards and guarantees that they consider necessary in order to ensure the proper implementation of contact with children.

74. States are requested to communicate, through their central authorities, to the Secretary General of the Council of Europe, within three months after the entry into force of this Convention for that State, at least three categories of safeguards and guarantees available in their internal law. As indicated in paragraph 73, in addition to these safeguards and guarantees, States must provide for supervised personal contact (Article 4 paragraph 3) and recognition of custody /contact orders in advance (Article 14 paragraph 1 letter b). Changes of available safeguards and guarantees are required to be communicated in the same way as soon as possible. In addition to information concerning safeguards and guarantees provided according to paragraph 1 of Article 10, central authorities are required, under Article 12 letter b, to provide each other, on request, with any additional detailed information concerning safeguards and guarantees.

75. By virtue of Article 10 paragraph 2, where the circumstances of the case so require, the judicial authority, which will normally be in the State of the habitual residence of the child, may, at any time, make a contact order subject to any safeguards and guarantees both for the purpose of ensuring that the order is carried into effect in a proper way and that either the child is returned at the end of the period of contact to the place where the child usually lives or that he or she is not improperly removed. In the case of transfrontier contact, the necessary safeguards and guarantees to be required may depend upon the extent to which the foreign States can be relied upon to ensure that the child is returned at the end of a period of contact. Therefore, although safeguards and guarantees will not automatically be established, they will be established where, according to the specific circumstances of the case, they are needed. These safeguards and guarantees are divided in two groups. One group concerns safeguards and guarantees, which are designed to ensure that the contact order is carried into effect. Another group concerns safeguards and guarantees, which are designed to ensure that the child is returned at the end of a period of contact or to prevent improper removal. As indicated above these safeguards and guarantees can be included at any time before or during the exercise of contact or after contact has taken place, for instance when making the contact order or when amending it at a later stage, due to a change of circumstances.

76. Letter a. of paragraph 2 of Article 10 concerns those safeguards and guarantees, which can ensure a proper implementation of the contact order. For instance the exercise of contact can be subject to supervision when, according to paragraph 3 of Article 4, unsupervised contact is not in the best interests of the child (e.g. domestic violence, danger of abuse, risk of abduction of the child, contact between a child and a parent who has not seen the child for a long time, etc.). In these cases, the parent with whom the child is usually living will be more reassured where the contact between the child and the other parent takes place under supervision. Paragraph 3 of Article 4 requires States Parties to provide for the possibility of supervised personal contact. Therefore, these States cannot exclude the supervision of contact among the safeguards and guarantees available.

77. Letter a. of paragraph 2 of Article 10 mentions another safeguard and guarantee for ensuring that the order is carried into effect: the obligation of a person (e.g. the person

seeking contact, the person with whom the child lives or both) to provide for travelling and accommodation expenses for the child and, where appropriate, for any other person accompanying the child, where the child cannot travel alone because he or she is too young.

78. Letter a also provides for a security to be deposited by the person with whom the child is usually living, to ensure that the person seeking contact is not prevented from having contact. This can ensure that persons given contact do not find, when they have arrived at their destination, that the person looking after the child refuses to allow them to have contact with the child. The forfeited security could cover the travel expenses of the person entitled to contact the child, depending on the internal law of the State concerned.

79. Finally, Article 10 paragraph 2 letter a mentions the possibility to impose a fine (civil, criminal or administrative depending on the judicial system) on the person with whom the child is usually living, should this person refuse to comply with the contact order. This fine might be a particularly effective measure in cases where it is feared that the negative attitude of the person is likely to continue in the future.

80. Letter b. of paragraph 2 of Article 10 mentions, as examples, some safeguards and guarantees that can be taken in order to ensure that the child is not improperly removed when contact occurs at the place where the child is usually living (or in another place) and in order to ensure that the child is returned at the end of the period of contact to the place where he or she usually lives.

81. In relation to the surrender of passports or identity documents of the person with whom the child is not usually living, and possibly also the surrender of passports or identity documents of the child, the person seeking contact could be required to present a document indicating that he or she has notified the competent consular authority about such a surrender during the period of contact. In addition States may wish to set up a mechanism to allow courts to inform directly the consular services about a decision to surrender a passport. In this respect, it could be useful to establish simple and direct communication between the court, which takes the decision concerning contact and the consular services. The central authority could act, where appropriate, as an intermediary and directly inform the central authority of the other State concerned. Both measures could prevent the issue of another passport. The surrender of passports might however be less effective as a preventive measure within the territories of the groups of States which have abolished or diminished border controls among themselves such as those countries which have ratified the Schengen Agreement.

82. The provision of financial guarantees before the exercise of contact, by the parent with whom the child does not usually live, can be used to discourage an improper removal or retention of the child after a period of contact. In fact, although financial guarantees are, in practice, not often used, they can be one of the most effective safeguards. The deposit of these financial guarantees could be made in the State where the child usually lives or in the State where contact will take place. However, it is necessary to take into account the financial situation of the person concerned and the cost of living in the State of his or her habitual residence when making the decision about the provision of financial guarantees. The decision about how to deal with any financial guarantee when there has been an improper removal or retention depends on the different legal systems. For instance, the court could order the forfeiture of the financial guarantee and decide on how to deal with it (e.g. for the benefit of the child, to finance return proceedings etc.).

83. Another safeguard and guarantee directly linked to the financial guarantees are charges on property of the person seeking contact with the child. A mortgage or a deposit of stocks and shares are some examples of charges on property. These charges on property may be made in advance in order to avoid an improper removal or

retention. If the improper removal or retention has taken place after the period of contact, the sequestration of the properties could take place in order to ensure the return of the child to the place where he or she usually lives, according to the internal law of the State concerned.

84. An important type of safeguard or guarantee, which may be used for contact orders, is an undertaking:

– In some legal systems, in particular common law systems, undertakings (also known in some legislations as "stipulations" or "conditions") are promises or assurances given to a court by a litigant and which can be adapted to the needs of each specific case. An undertaking, which is an agreement with the court and not with the other party, does not therefore give the other party any personal rights. Although undertakings may be given at the request of the court, in the majority of cases undertakings are given voluntarily by the litigant in order to show good faith. Undertakings are part of the order of the court, and are enforceable as such. It is a matter of public policy that undertakings should be honoured and enforced. A breach of an undertaking, which is equivalent to breach of any other injunction, is regarded as being a contempt of court, which may result in a committal to prison, a fine or sequestration of assets.

– Although undertakings are also used very often in matters outside family law, they are regarded in certain States as being particularly important in the field of family law. As litigants are encouraged to settle their disputes, undertakings are useful as litigants are more likely to comply with something that they have agreed to and this also may reduce the cost of litigation. One important aspect of undertakings is that they may be given concerning matters, which extend beyond the court's powers to make orders.

– The content of undertakings can include specific details relating to the exercise of contact such as a promise not to allow the child to contact certain persons or a promise to allow the child to have telephone contact with the parent having custody on specific days or can include promises of a preventive nature, for instance a promise to surrender a passport or to provide financial guarantees.

– In some countries, notably England and Wales, the courts, particularly at an appellate level, have made it clear that some restrictions must be imposed on the use of undertakings in international cases, where undertakings are being given to a court in a State other than the State whose courts have jurisdiction on the merits of the case. In particular, they must be limited in scope and duration to what is necessary to achieve the objects of the international instruments and should only last until such time as the courts of the habitual residence of the child can resume their normal role as a forum for decision-making in relation to the child, so as not to impinge on the jurisdiction of those courts. They must not be so elaborate as to either cause the proceedings to become frustrated by protracted investigations into their scope or feasibility or to open up grounds for an appeal. Courts should also be careful not to seek or accept undertakings, which give abductors an unfair financial or tactical advantage.

– According to paragraph 3 of Article 10, any safeguard and guarantees (including undertakings given in proceedings concerning contact) form part of the contact order. They may be enforced in the same way as other orders by instituting the appropriate recognition and enforcement procedures in the state in which the order (including the undertakings) is to be enforced. For example, the judges attending the Common Law Judicial Conference on International Child Custody in Washington in September 2000, were of the opinion that undertakings are a useful tool in international children’s cases and, designed as they are to protect children, judges are entitled and bound to assume that the foreign courts and welfare

services will take the same serious view as they would of a failure to honour undertakings regarded as being essential for the welfare of a child. It is in the mutual public interest that the courts of each jurisdiction should support this policy, which leads to the speedy resolution of cases and consequently to a reduction in the use of court time and costs to the litigants and public funds.

85. To ensure that there will be neither abduction nor wrongful retention of the child, it can be useful to require the person having contact to present himself or herself and the child regularly before a competent body. This safeguard can be appropriate especially in cases where the child is to stay, for a limited period of time, with the person having contact rights. If this person having contact does not appear on the fixed date, the police can react very quickly and start to search for the child. The choice of the competent body is left to States. This competent body could be a youth welfare authority or a police station in the town where contact is to take place. Other competent bodies could be the public prosecutor's office or the office of a judge. However, when making their choice, States should bear in mind the need to ensure that the presentation before a competent authority does not have an adverse effect on the child: for instance the presentation to a police station, where there is no appropriate place for that purpose might deeply disturb the child.

86. An effective way of ensuring that the child will return after contact has been exercised abroad can be to require the person seeking a contact order to present, before a contact order is made or before contact takes place, a document coming from the State where contact is to take place, certifying the recognition and declaration of enforceability of the custody or residence order in favour of the other parent with whom the child usually lives. This would avoid any doubt about the allocation of custody in the State where contact is to take place.

87. Where there is no doubt about custody, another safeguard could be to make a contact order allowing contact to take place outside the State of habitual residence of the child but to require, before the child may actually travel to that country, the presentation of a certificate concerning recognition and declaration of enforceability in advance of the contact order in that other State (Article 14 paragraph 1 letter b). This could speed up the enforcement of any duty to return the child at the end of the period of contact referred to in the order.

88. Another safeguard and guarantee could be the imposition of conditions in relation to the place where contact is to be exercised. For instance, if there are valid grounds to fear the abduction of a child, the court could restrain a person from removing a child from a specified place or could prohibit the child from leaving the country. The prohibition could be registered under a national or transfrontier information system in order to prevent the departure of the child from the territory of the State concerned.

89. Paragraph 3 of Article 10 requires these safeguards and guarantees to be in writing or evidenced in writing. These safeguards and guarantees could be set out in the same document containing the contact order or in an appended document. In any event, the document fixing these safeguards and guarantees forms part of the contact order and is therefore an enforceable obligation.

90. Article 10 paragraph 4 states that if safeguards or guarantees are to be implemented in another State Party, the judicial authority shall preferably order such safeguards or guarantees as are capable of implementation in that State Party. As the list of safeguards and guarantees provided in Article 10 paragraph 2 is merely indicative (in addition to the safeguards and guarantees referred to in paragraph 3 of Article 4 and paragraph 1 letter b of Article 14), it is clear that these measures and other measures will not be identical in all countries. For more information, see the comments to Article 12 letter b. In any event, the judge in the other State Party may apply Article 15 and adjust the safeguards or guarantees contained in the contact order in order to facilitate

the exercise of contact.

### Chapter III – Measures to promote and improve transfrontier contact

#### Article 11 – Central authorities

91. Article 11 provides for co-operation among the States by means of central authorities appointed for that purpose by each State Party. This has become a well-established structure for co-operation between States in child protection matters, under the Custody Convention (ETS No. 105) as well as under the 1980 Hague Convention. As the present Convention is intended to complement those two international instruments as well as the recent 1996 Hague Convention, it seems advisable to designate the same central authorities to deal with applications under all these conventions.

92. Paragraph 2 of Article 11 takes into account the situation in Federal States and in States with more than one legal system. However, experience with other international instruments has shown that, where several central authorities are appointed within one State Party, in order to avoid unnecessary delay it is preferable to designate one of them as being responsible to receive incoming communications from abroad and transmit them to the central authority which is competent under the internal law of that State in the respective case.

93. According to paragraph 3 of Article 11, the Secretary General of the Council of Europe, as depositary of the Convention, shall be notified of any appointment concerning central authorities. The Secretary General shall, after receiving such appointment, make the notification as indicated in Article 27.

#### Article 12 – Duties of central authorities

94. Article 12 letter a, like Article 3 of the Custody Convention (ETS No. 105), provides for co-operation both between the central authorities themselves and co-operation between competent national authorities, including judicial authorities. The objective is to ensure that these authorities consider both the national aspects of the international cases submitted to them and the international elements. Such co-operation should lead to the speeding up of procedures.

95. This co-operation should be as active as possible and include information about national legislation concerning parental responsibilities (including contact) in general (Article 12 letter b), any more detailed information concerning safeguards and guarantees in addition to that already provided according to paragraph 1 of Article 10 and available services (including legal services, publicly funded or otherwise) as well as any changes in the law and services (Article 12 letter b). Information should also concern developments in specific cases (Article 12 letter d) as well as information relating to difficulties in the application of this Convention, which may be of a general nature or linked to a specific case (Article 12 letter e).

96. By virtue of Article 12 letter c, an important duty of central authorities is to take or cause to be taken all appropriate steps in order to discover the whereabouts of the child in the State concerned or in another State Party. In a transfrontier situation a holder of parental responsibilities may try to prevent contact by concealing the whereabouts of a child. Therefore central authorities may receive frequent requests from parents who are entitled to have contact to take steps to find the child. For these cases where the address of the child or of the parent of the child cannot be given to the parent who is entitled to contact (refusal by parent etc.) it would be very helpful if State authorities could provide this information to the central authorities without disclosing it to the applicant.

#### Article 13 – International co-operation

97. This article recognises the need to establish close co-operation between the judicial authorities, the central authorities and social and other bodies of the States Parties concerned.

98. As this Convention does not deal with jurisdiction (this question is dealt with by several other international instruments), in cases of transfrontier contact, the States Parties concerned will be, in the majority of cases, the State where the child has his or her habitual residence and the State where the contact will take place. This co-operation covers all the different steps to be taken from the beginning until the end of the period of contact.

99. The need for closer co-operation includes in particular the need to establish mechanisms to improve co-operation between judicial authorities in different countries, especially in relation to proceedings regarding transfrontier contact (the duty to co-operate covers the situation before, during and after the institution of proceedings). This co-operation should be voluntary and without necessarily involving central authorities. However, it is necessary to underline the importance of the assistance that central authorities can provide, under paragraph 2 of Article 13, to judicial authorities.

100. As Judges have an important role and a difficult task to carry out when dealing with transfrontier cases relating to custody and contact, in some countries, steps have been taken to ensure that such cases are dealt with by judges who have received special training and are experienced in these matters. However, in other countries different rules relating to jurisdiction apply and cases may not be allocated to a specific judge or a specific court. In addition some cases, which begin as national cases, can, in the course of the proceedings, become complex transfrontier cases.

101. Judges have an essential role to play in transfrontier cases and should, as indicated in letter b of Article 7, encourage the parents themselves to make suitable agreements concerning the custody of and contact with their children and, where appropriate, by means of mediation. Recommendation N° R (98) 1 on family mediation and its explanatory memorandum contain useful information for this purpose.

102. Judges of course have to take account of the best interests of the child and the views of the child and for this purpose reference can be made to the relevant provisions of this Convention (see in particular Article 6), to the case-law of the European Court of Human Rights (Eur. Court HR *Sahin v. Germany*, judgment of 11 October 2001) as well as to the different international instruments in this field, in particular the European Convention on the exercise of children's rights (ETS N° 160) and the 1989 United Nations Convention.

103. Even though in some States the extent to which courts may co-operate could be uncertain (e.g. owing to constitutional reasons), it is clear that co-operation between courts, both at a national and an international level, is permitted in all States where this co-operation does not concern the decision to be taken on the merits of a case. This co-operation may be direct or carried out through the Central Authorities (see paragraph 2 of Article 13).

104. In some cases the authorities of the State where contact is to take place, and which are not the authorities of the State of the habitual residence of the child, could have more suitable information in order to decide about the practical conditions under which contact is to be exercised. Therefore, it is necessary to promote direct contacts between the court of the habitual residence of the child and the court where contact is to take place in order to obtain more reliable and appropriate information concerning the appropriate manner to establish and exercise contact in the best interests of the child (see Article 35 of the 1996 Hague Convention). Moreover, such contacts could provide the court of the State of the habitual residence of the child with better information about which safeguards and guarantees are available in the State where the non-custodial

parent is living if he or she applies for a contact order in the State of the child's habitual residence.

105. Concerning co-operation between the social bodies, it is necessary to stress the important role that these bodies can play in cases of contact, in particular in cases of transfrontier contact. The local social bodies can collect information, so avoiding any linguistic or cultural problems, and facilitate communication in order to find a solution, in the best interests of the child, in co-operation with central authorities. In this respect, the competent authorities should be conscious that the exercise of contact in an international situation can pose particularly acute practical and emotional difficulties for the parties, and that assistance might be provided by facilitating easy access to social bodies and mediation services and the use of "neutral venues" such as contact centres. It is necessary to stress the importance of transnational co-operation between local authorities and courts to reduce conflicts and to avoid contradictory decisions. In this respect, the relevant provisions contained in Chapter V of the 1996 Hague Convention are of particular importance.

106. Paragraph 2 of Article 13 provides that central authorities shall assist judicial authorities in order to facilitate the communication and the exchange of information and assistance between them. This paragraph aims at facilitating the co-operation between the courts concerned. The court, before deciding about a request for granting contact, should have the possibility to contact the court of the country where the person requesting contact lives - through the channels of Central Authorities or directly under paragraph 1 of Article 13 – to obtain necessary information. This is a lex specialis to multilateral or bilateral instruments in the field of general judicial assistance.

107. In cases concerning transfrontier contact, the assistance of central authorities to institute proceedings is essential and more vital than in national cases, because normally two different legal systems are implicated and quite often the applicant does not know even the language of the State where he or she wishes to lodge an application. This assistance under paragraph 3 of Article 13 would not only imply the provision of a list of lawyers but also the provision of assistance in order to obtain, for instance, legal aid. Central authorities should bear in mind and encourage parties to reach a friendly settlement before instituting legal proceedings. Paragraph 3 provides that central authorities shall assist children, parents and other persons having family ties with the child, in particular, to institute proceedings regarding transfrontier contact. Where States have, under paragraph 2 of Article 5, enlarged the categories of persons who may apply for contact, the central authorities should also, where possible, assist these other persons having close personal links with the child to institute proceedings.

**Article 14 – Recognition and enforcement of transfrontier contact orders**

108. Although this Convention neither establishes rules of jurisdiction nor deals directly with issues concerning recognition and enforcement, Article 14 underlines the obligation of States Parties to establish, where applicable, in accordance with relevant international instruments, means to facilitate the exercise of contact and custody rights in the case of transfrontier contact orders.

109. However, this Convention does not require a State to enforce those parts of a transfrontier contact order, which would conflict with domestic law (e.g. a contact order concerning a child who, according to domestic law has already obtained full legal capacity – see also letter c. of Article 2, which defines a child as being a person under 18 years of age in respect of whom " a contact order may be made or enforced in a State Party").

110. Article 14 paragraph 1 letter a requires States Parties to provide a system for the recognition and enforcement of transfrontier orders concerning contact and rights of custody. In this respect, it is necessary to underline that one of the major problems

identified during the drafting of the Convention in this matter, is the inexistence or the inadequacy of national procedures or systems for the recognition of foreign contact orders. The establishment of such procedures or systems would facilitate the proper exercise of contact and rights of custody. These questions have been to some extent considered in the 1996 Hague Convention and Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

111. Article 14 paragraph 1 letter b deals with the most important guarantee to be taken in order to facilitate the normal exercise of the right of transfrontier contact. In the case of transfrontier contact the recognition and the declaration of enforceability (exequatur) in advance – (by the State of the place where the contact is to take place) of the contact order and/or the custody order made by the judicial authorities of another State (usually the habitual residence of the child) – would encourage a parent with whom the child usually lives not to hamper the exercise of transfrontier contact with the other parent. The main advantage of recognition in advance of a custody and/or contact order would be that the prompt return of the child after a period of contact would be facilitated in case of any removal or retention of the child and therefore the parent not having custody of the child would be less likely to try to retain the child after a period of contact. For all these reasons a procedure for the recognition and the declaration of enforceability in advance of custody or contact orders made abroad is compulsory for the Parties to this Convention.

112. Article 14 paragraph 2 aims at guaranteeing reciprocity (formal and factual, as the case may be) for the purposes of recognition and enforcement of contact orders for States, which require such a condition in their laws for the recognition and enforcement of foreign orders. This provision is particularly helpful in situations where there is no *other*"treaty" basis between the State of origin and the State of enforcement.

**Article 15 – Conditions for implementing transfrontier contact orders**

113. According to Article 15, the judicial authority of the State Party in which a transfrontier contact order is to be implemented may, when recognising or declaring enforceable such contact order or at any time afterwards, fix or adapt the conditions of implementation established in the contact order made in another State Party if this is necessary for facilitating the exercise of this contact and in order to adapt the decision to the factual situation where it has to be applied. In this respect it is necessary to underline that conditions for the exercise of a right of contact may vary considerably from one State to another and that in some cases the judicial authorities of the State where contact is to be implemented could have more suitable information in order to decide about the practical conditions under which contact is to be exercised. The amendments permitted by this Article are a matter of enforcement law only, and may therefore, if necessary, be made by the courts of any State where the order is to be carried into effect. Of course, this does not rule out the possibility for the courts of a State Party to refuse the enforcement of a contact order, invoking a ground of refusal available in accordance with the relevant international instruments or with the internal law of the State.

114. When judicial authorities of the State addressed fix, adapt or supplement the conditions for the exercise of contact, they cannot change the essential elements of the contact order. The respect for the essential elements of the contact order is of great importance because otherwise two contradictory orders concerning contact could be made in two different States. In any case the possibility for the judicial authorities of the State Party in which the transfrontier order is to be implemented to fix or modify conditions for the implementation and exercise of the right of contact should be understood not as a possibility for the court to limit or extend the right of contact but a way to facilitate the implementation of this right. A review of the substance is prohibited, unless a court has jurisdiction on the merits to modify the order.

115. When the judicial authorities of the State addressed fix, adapt or supplement the conditions for the exercise of contact, they should take into account the changes of circumstances and the arrangements of the persons concerned. A change in the circumstances will normally be constituted by a new factor which requires a practical adjustment without amounting to a change of the order in substance (for example the parent entitled to have contact with the child has moved from one city to another city of the State addressed, the person entitled to contact on her day off has this weekly day off now on Monday and no longer on Sunday, as mentioned in the order, the requirement for the child to prepare important examinations or undergo medical treatment). Concerning the arrangements made by the persons concerned (for example, the agreement relating to the persons that the child may not visit because they could cause an emotional disruption to the child) it is necessary to recall, first of all, that these persons should be encouraged to settle their disputes, and, secondly, where they have agreed, they are more likely to comply with their agreement.

116. In order to avoid problems that may occur in implementing safeguards and guarantees because of differences in the legal systems of the States Parties, the court of the State in which the safeguard or guarantee must be implemented is entitled to adapt the safeguard or guarantee to its own law if the order is declared enforceable. It would then however be obliged to adapt the safeguard or guarantee ordered abroad into its own law to the greatest degree possible. Such an amendment shall not be an examination of the order on the merits. Furthermore, it must not be an amendment of an "essential element" of the order. The adjustment of safeguards may be one of the elements subject to amendments, provided that they are not lifted completely.

117. Article 15 of this Convention reproduces the main content of paragraph 2 of Article 11 of the Custody Convention (ETS No. 105) but resolves the current problems of its interpretation (see the comments below concerning Article 19).

**Article 16 – Return of a child**

118. Article 16 refers to those situations in which in accordance with a contact order (this notion includes a confirmed agreement according to Article 2 letter b.) a child has been taken abroad for the implementation of the right of contact and at the end of this period of contact the child is not returned to the place where he or she usually lives. Although this Convention does not deal with recognition and enforcement of contact orders, Article 16 is an important additional guarantee for the proper exercise of the transfrontier contact and will stimulate the willingness of the custodial parent to allow such a transfrontier contact.

119. The competent authorities (central authorities, judicial authorities, police forces, social bodies, etc…) are obliged, under Article 16, to take all the necessary steps and, if necessary, use all the means available to them under their national law to discover the whereabouts of the child and to return the child to the place where he or she usually lives.

120. Article 16 is based on the idea that in order to ensure the return of the child it is necessary, first of all, where applicable, to apply the relevant international instruments which are dealing with the recognition and enforcement of decisions concerning custody and contact and the restoration of custody (paragraph 1 of Article 16) and, where appropriate, to enforce the safeguards and guarantees of the contact order. Recognition in advance (see Article 14 paragraph 1 letter b) will improve and facilitate the prompt return of the child.

121. The competent authorities are required to act upon request. It should be recalled that Article 14 of the Custody Convention (ETS No. 105) provides that requests for enforcement may be lodged by simple application (see also the Hague Conventions of 1980 and 1996).

122. Paragraph 2 of Article 16 also provides that the decision on the return of the child shall be made, whenever possible, within a period of six weeks from the date of the application. In this respect, it should be noted that according to Recommendation No. R (91) 9 of the Committee of Ministers to member States on emergency measures in family matters in cases involving the return of a child, courts and other competent authorities should make use of appropriate measures in order to trace the child and should give an enforceable decision within six weeks of the receipt of the complete application by the person or authority concerned. Furthermore, the Recommendation No. R (99) 7 of the Committee of Ministers to member States on the application of the European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children (ETS No. 105) recommends that governments of member States "make the decision concerning recognition and enforcement within a period of six weeks from the date of commencement of the proceedings before the judicial authority" (paragraph c. of the Recommendation). Finally, it should be also noted that States will have to take into account the provision of the ECHR, which requires cases to be determined within a reasonable time (Article 6), and therefore any delay in an urgent case concerning a child might be considered not to be reasonable.

**Article 17 – Costs**

123. Under Article 17, if applicants apply to a central authority they will not be required to defray any expenses for the services of this central authority even if their application is rejected. Unlike under the Custody Convention (ETS No. 105), this article only refers to central authorities of the States Parties, and not to the courts. Thus, the costs of court proceedings and also of lawyers are not covered by this article. Whether and to which extent they may be imposed on parties depends on the internal law and the legal aid system of the respective State. Member States of the Council of Europe will however have to comply with the provisions of Article 6 of the ECHR concerning a fair trial and consequently may have to provide legal aid or assistance if the nature of the case necessitates such legal aid or assistance.

**Article 18 – Language requirement**

124. This article follows Article 6 of the Custody Convention (ETS No. 105) and provides for communications between central authorities which should preferably be in the official language or one of the official languages of the State addressed. This system will tend to accelerate the enforcement in the State addressed of decisions coming from the applicant State. However, paragraph 3 of Article 18 introduces the possibility for States Parties to object to the use of either French or English but not both official languages of the Council of Europe in applications, communications or other documents that will be sent to their central authorities in the application of this Convention. States are free to agree to use another language on a bilateral basis or to accept communications in other languages.

**Chapter IV – Relationship with other instruments**

**Article 19 – Relationship with the Custody Convention**

125. Article 19 provides that in those cases where the two States concerned are States Parties to the present Convention and to the Custody Convention (ETS No. 105), the access provisions of the Custody Convention (ETS No. 105) shall not be applied. For reasons of consistency the present Convention reflects the main contents of paragraphs 2 and 3 of Article 11 of the Custody Convention (ETS No. 105). In this respect see in particular Articles 15 and 16 of Chapter III of the present Convention "on measures to promote and improve transfrontier contact". Paragraph 3 of Article 13 makes it clear that there is an obligation for Central Authorities to assist children, parents and other persons to institute proceedings regarding transfrontier contact. Paragraph 2 and

paragraph 3 of Article 11 of the Custody Convention (ETS No. 105), which are interpreted in a different way by some States Parties, will no longer be applied between States Parties of the present Convention and the Custody Convention (ETS No. 105).

**Article 20 – Relationships with other instruments**

126. This Convention, by promoting the adoption in States of similar principles concerning contact with children, maintains and strengthens the operation of existing or future international instruments or Community rules which deal with or will deal with the improper removal, custody, habitual residence or contact with children. The Convention makes it quite clear that it does not affect existing or future international instruments which contain provisions on matters governed by this Convention.

127. Instruments closely interrelated with the present Convention have been listed explicitly in order to facilitate the work of practitioners. It is clear that this Convention not only does not prejudice the application of these instruments but also promotes their application and provides assistance in their implementation.

128. The Convention contains a specific reference in paragraph 3 of Article 20 to Community rules and provides that States Parties, which are members of the European Community, shall not in their mutual relations apply the Convention unless there is no Community rule governing the particular subject concerned. Of particular importance in this context is the Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matter of parental responsibility for children of both spouses.

**Chapter V – Amendments to the Convention**

**Article 21 – Amendments**

129. Amendments to the provisions of this Convention may be proposed by the Parties. They shall be communicated to all member States of the Council of Europe, to any signatory, to any Party as well as any State or the European Community invited to sign or to accede to the Convention.

130. The European Committee on Legal Co-operation (CDCJ) will prepare an opinion taking into account in particular the views of all Parties on the proposed amendment and submit this opinion to the Committee of Ministers. After considering the proposed amendment and the opinion of the CDCJ and following consultation of the Parties to the Convention, which are not members of the Council of Europe, the Committee of Ministers may adopt the amendment. These amendments adopted by the Committee of Ministers shall be forwarded to the Parties for acceptance.

**Chapter VI – Final clauses**

**Article 22 – Signature and entry into force**

131. This Convention is open for signature not only by the member States of the Council of Europe but also the European Community and the non-member State of the Council of Europe (Holy See), which has participated in its elaboration.

132. Should the Community become a Party, the terms "State Party" or "State Parties" should be read throughout the Convention also to refer, where appropriate, to the European Community.

133. The other paragraphs of Article 22 concerning the ways in which States can express their consent to be bound by the Convention as well as those concerning the

entry into force of the Convention, are similar to the final clauses inserted, with the necessary modifications, in other conventions and agreements concluded within the framework of the Council of Europe.

**Article 23 – Accession to the Convention**

134. The Committee of Ministers may, after consultation of the Parties, invite any non-member state of the Council of Europe, which has not participated in the elaboration of the Convention, to accede to the Convention.

**Article 24 – Territorial application**

135. Paragraph 1 of Article 24 deals with the specification of the territories to which this Convention shall apply. In this respect, it is necessary to underline that it would be incompatible with the object and the purpose of this Convention to exclude parts of a territory from the application of this instrument without valid reasons (e.g. the existence of different systems of law which are applicable in relation to matters dealt with in the Convention).

136. Paragraph 2 of Article 24 concerns the extension of the application of the Convention to territories for whose international relations the Parties are responsible or on whose behalf they are authorised to give undertakings.

**Article 25 – Reservations**

137. Article 25 implies that the Parties to the Convention are bound by all the provisions of the text and may not exclude the application of certain provisions. In particular, the substantive general principles to be applied to contact orders (Chapter II of the Convention) are essential in order to facilitate the proper exercise of the right of contact and any restriction established by a reservation would be incompatible with the object and the purpose of this Convention. Moreover, these principles are the generally accepted principles of good practice applied currently by the majority of States: they form the minimum standards, which should be applied in a uniform manner by States in contact cases. For these reasons, this Article on reservations is included in order to avoid any *a contrario* interpretation from the silence of the Convention on this point, in particular taking into account the mandatory character of the rules of the Convention.

**Article 26 – Denunciation**

138. According to the United Nations Vienna Convention on the Law of Treaties, Article 26 provides for the possibility for a Party to denounce the Convention.

**Article 27 – Notifications**

139. Article 27 lists the notifications that the Secretary General of the Council of Europe, as the depositary of the Convention, is required to make as well as it determines the entities (States or the European Community) to be notified.