



Explanatory Report to the European Convention on the Repatriation of Minors

The Hague, 28.V.1970

I. The European Convention on the Repatriation of Minors, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee for Crime Problems (ECCP), was opened to signature by the member States of the Council on 28 May 1970, at The Hague, on the occasion of the VIth Conference of European Ministers of justice.

II. The text of the explanatory report prepared by the committee of experts and submitted to the Committee of Ministers of the Council of Europe, as amended and completed by the CCJ, does not constitute an instrument providing an authoritative interpretation of the Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein.

Background notes

1 . At its XIVth Plenary Session, held in October 19,65, the European Committee for Crime Problems (ECCP) suggested to the Committee of Ministers of the Council of Europe to proceed to the drawing up of a European Convention on the Repatriation of Minors and that a sub-committee of the ECCP should be given the mandate to prepare the draft of such a Convention.

2. The Committee of Ministers approved this proposal at its 151st meeting at Deputy level in April 1966.

3. The sub-committee, which was accordingly created, held three meetings in 1966 and 1967. Subsequently, on the recommendation of the European Committee on Legal Co-operation (CCJ) which had considered that the text prepared by the subcommittee of the ECCP should be revised and-, possibly, amended to take account of a number of criteria based on civil and administrative law, work was continued at two meetings, in 1967 and 1968, of an enlarged committee of experts, composed of specialists in civil law and criminal law. Both the enlarged committee of experts and the sub-committee of the ECCP were presided over by Mr. L. Hulsman (Netherlands).

4. The texts which resulted from the work of these committees, and which were approved by the ECCP, namely, the draft European Convention on the Repatriation of Minors and the draft explanatory report, were transmitted to the Committee of Ministers of the Council of Europe in October 1968. At a number of meetings held at Deputy level, the Committee of Ministers adopted a certain number of amendments to the text of the draft Convention as submitted by the ECCP. The text was adopted in its final form in January 1970.

5. The European Convention on the Repatriation of Minors was opened to signature by member States of the Council of Europe on 28 May 1970 at The Hague, on the occasion of the holding of the VIth Conference of European Ministers of justice.

6. The present explanatory report has been drawn up on the basis of the draft submitted by the ECCP; it incorporates certain developments necessitated by the amendments which the Committee of Ministers made to the text of the Convention. This text is reproduced as an appendix.

General observations

Introduction

7. Mutual assistance between member States in the legal sphere is developing from several points of view.

8. Such assistance is indeed necessary if the legal systems adopted by different sovereign States are to function satisfactorily in an area in which frontiers are constantly becoming less of an obstacle to the free movement of persons and goods. The development of mutual assistance and a reallocation of functions among States are in fact becoming manifest in the spheres of civil, administrative and criminal law simultaneously. The treaties and conventions drawn up by international institutions such as the Council of Europe, the United Nations Organisation, the European Economic Community and the Hague Conference on Private International Law are essential instruments for the achievement of the object laid down.

9. However, all these activities need to be co-ordinated so as to create a complete and coherent system of mutual assistance.

10. Such a system requires that it should be possible, in certain circumstances, for a person on the territory of one State to be transferred to another State where his presence is considered to be necessary under that State's law.

11. With adults, who as a general rule have complete freedom of movement, the need for officially imposed transfer hardly arises outside the sphere of criminal law. In that particular field mutual assistance is provided for in conventions, in particular the European Convention on Extradition. But this system rightly necessitates somewhat cumbersome proceedings, since the measures in question may constitute a serious threat to individual liberty.

12. In respect of minors who have not yet the right to determine their own place of residence, the question of officially imposed transfer is to be viewed in quite a different light. Minors do not enjoy complete freedom of movement, being subject to the authority of a parent or guardian. Moreover, minors can be subjected to protective or re-educative measures which also limit their freedom of movement and which may be the result of an administrative, civil or penal procedure.

13. In addition to these legal restrictions, there are restrictions of fact resulting from the minor's inexperience. Thus an adult deported by virtue of legislation on aliens can generally leave the country of his own accord and choose his destination. This is not always so in the case of a minor; it may prove necessary to accompany him, to repatriate him to his home.

14. The foregoing shows that the need for mutual assistance with a view to officially imposed transfer is more extended in the case of minors. It should be stressed that the need is not confined to delinquent minors. Indeed, this question is all the *more* important simply because it concerns minors. It is in their interest that an officially imposed transfer may take place, a transfer which should be made under the best possible conditions.

15. Even before the second world war, some States had concluded bilateral arrangements which in certain cases made possible the officially imposed transfer of a minor who had removed himself from the authority of parents or guardian. In this connection we may mention the Arrangements concluded between Belgium and the Netherlands (2,1 July 1913), between Belgium and France (17 July 1925), between Belgium and Luxembourg (3,1 May 1933) and

between Belgium and Italy (7 February 1934). These relatively few agreements, of limited scope, by no means meet present-day requirements. The need for effective mutual assistance in this particular sphere is all the more evident since young people are travelling more and more, either as tourists or in connection with their work, and arrangements for their protection have developed greatly. It is mainly for these reasons that a multilateral European convention is required making possible the officially imposed transfer of minors from the territory of one Contracting Party to that of another.

16. In this context reference should also be made to the Hague Convention of 26 October 1960 on the powers of authorities and the law applicable in respect of the protection of infants. The aims of the Hague Convention and the present Convention are not identical, so there is no conflict possible between the two instruments. The Hague Convention deals with measures which create a situation of a certain duration such as the appointment of a guardian, the placement in family care etc. The present Convention, on the other hand, deals with a specific event: repatriation. The text of the Hague Convention and the explanatory report presented by Professor W. de Steiger confirm the interpretation that repatriation as such is not a measure covered by the Hague Convention.

17. Article 7 of that Convention provides for the conclusion of international conventions on the recognition and the enforcement of measures involving acts of enforcement in a State other than that in which they have been taken. The present Convention may be considered as an example of the conventions referred to in that Article which facilitate the Application of the Hague Convention.

Composition of the text

Persons covered by the Convention

(sphere of application *ratione personae*)

18. The Convention applies as is indicated in Article 1 (a) thereof, to persons who are designated as "minors", who fulfil the following conditions: they are all persons who have not yet attained the age of majority, on the one hand, and who have not the right themselves to determine their own place of residence, on the other. It is, moreover, this incapacity which justifies for minors the special procedure of officially imposed transfer. It was necessary to mention this expressly as a condition for the application of the Convention, since under the law of certain member States of the Council of Europe the notion exists that minors have the right themselves to determine their own place of residence when they have reached a certain age.

19. With regard to the first condition, it should be made clear that the term "majority" must also include majority acquired before the age normally fixed by the law for the acquisition of majority, by reason of the accomplishment of certain legal acts, for example, marriage or a declaration of majority. On the other hand, minority under penal law is of no importance in this respect.

20. Account has been taken, in the Convention, of the fact that both majority and the right of the minor to determine his own place of residence must be assessed in certain cases by reference to the law applicable in accordance with the rules of private international law. In order to avoid conflicts which might arise between the rules of private international law of two or more interested States, the Convention provides that the law applicable must be determined by the application of the rules of private international law of the requesting State, that is to say the Contracting State which presents to another Contracting State a request for the repatriation of a minor by virtue of the provisions of the Convention.

**Cases in which a request for repatriation may be made
(sphere of application *ratione materiae*)**

21. Article 2 of the Convention states the reasons for which a request for repatriation may be made, and draws a distinction between cases where the request emanates from a Contracting State other than the State of sojourn of the minor to be repatriated (paragraph 1) or from this latter State (paragraph 2). In the first case, a minor is on the territory of a Contracting State, whereas he should rightly be on that of another Contracting State. The requesting State is, therefore, the one that asks for the minor to be transferred to its territory; the requested State is the State on whose territory he is. In the second case, the Contracting State on whose territory the minor is considers his presence to be incompatible either with its own interests or with those of the minor, and wishes, for these reasons, to bring about his repatriation to his home. In this case, the requesting State is the State on whose territory the minor is, the requested State being that to which he is to be transferred.

22. In the former case which is the subject of Section 11 (Articles 4-13 of the Convention), various hypotheses may be considered:

(a) The minor may have been removed from those who, in respect of the minor, are legally invested with parental authority; in such a case it matters little whether he removed himself or was removed against his will. The State where the person with parental authority is may, at that person's request, act as requesting State.

The following examples may be given

– a child of Italian parents who are living in Germany is in the Netherlands; the Federal Republic of Germany, as requesting State, requests repatriation;

– a child of Netherlands parents who are living in the Netherlands is in Belgium; the Netherlands, as requesting State, requests repatriation;

– a child of French parents who are living in Italy is in France; Italy, as requesting State, requests repatriation.

In the Convention a special meaning has been given to the concept of parental authority (Article 1 b)). It relates to the right of the minor to determine his place of residence. This right usually is attached to the persons invested with parental authority or guardianship; it may, however, also be attached to other natural or legal persons.

(b) The minor in question is outside the reach of some protective or re-educative measure (not parental authority), either through his own action or because of the intervention of some other person; in this case a State cannot act as requesting State unless it has competence to take protective or re-educative measures. It may be pointed out that, for the purposes of the Convention, only the nature and purpose of the measures are relevant, not the branch of law (civil, criminal or administrative) under which the measure is taken.

(c) Proceedings with a view to a protective or re-educative measure in respect of a minor are being taken in one State and necessitate his presence on its territory: in this case, as in the previous one, only a State competent to take protective or re-educative measures may act as requesting State.

23. In the second case mentioned, under paragraph 21 above – in Section III (Articles 14 and 15) of the Convention – different hypotheses are again possible:

(a) A State may apply for the removal of a minor whose presence it considers contrary to its interest when the minor has, for instance, committed an offence, acted against the public interest or is unable to support himself;

(b) A State may also consider a minor's presence on its territory to be contrary to his interests, for instance, if he is in an environment that may expose him to moral danger.

These two grounds may, in fact, both be present, for example, where the minor has committed an offence of some gravity on the territory of the requesting State. In that case it will usually be in his interests to be prosecuted not in the requesting State but in his State of residence. For this reason Article 15, paragraph 2, of the Convention provides that a request for repatriation may be accompanied by a demand that appropriate measures be taken to deal with the conduct or situation of the minor in the requesting State.

24. However, if a request for repatriation is to be presented in this second category of cases, it is not enough for the requesting State to consider the minor's presence to be contrary to his or its own interests. It is also necessary:

- that the requesting State is able, under its own legislation, to remove the minor from its territory;

- that there is a certain link – as defined in Article 14 of the Convention – between the requested State and the minor in question.

If all these conditions are met, the requesting State may request the co-operation of the other Contracting State.

Organisation of mutual assistance

25. If the system of mutual assistance is to function satisfactorily, it will be necessary to have rapid and effective means of communication between the authorities requesting repatriation and those responsible for acting on the request. The importance of this aspect must on no account be underestimated. Even the best thought-out rules cannot ensure that the desired objectives are reached if the departments that are to apply them are found wanting.

26. Furthermore, the persons and authorities that may cause the requesting State to request repatriation are many, as are the branches of law from which their powers are derived.

27. The authorities responsible for relations between Contracting States in this particular sphere must meet the following requirements:

– their existence must be known to those entitled to resort to them;

– their experience of the subject must be adequate to requirements, both nationally and internationally;

– they must, so far as possible, have the most modern technical aids (e.g. telex) available for the performance of their duties.

28. Only a central authority can meet all these requirements. For this reason Article 3 of the Convention requires Contracting States to designate a central authority responsible for issuing and receiving requests for repatriation in accordance with the provisions of the Convention, which on this point follows the Convention of the United Nations Organisation on the recovery abroad of maintenance (20 June 1956).

29. Furthermore, the fact that a central authority is an organ of communication does not imply that it is necessarily an organ of decision. Each Contracting State is free to settle this point in accordance with its own law.

30. In many States with common frontiers, the local authorities are accustomed to settle the cases which occur in particular in frontier regions by direct contact. Obviously such States may maintain or establish this contact, which is often considered desirable on account of the speedy and practical solutions arrived at, on condition that each central authority is informed of the terms of the settlement which must be in conformity with the substantive provisions of the Convention.

The obligation to act on a request for assistance

31. In what circumstances is a State that receives an application for assistance obliged to act on it ? A fairly strict system has the advantage of giving the requesting State greater legal security and of ensuring that decisions on minors taken or confirmed by it are more widely effective. However, such a system also has inconveniences. Strict international execution of certain decisions would presuppose the harmonisation of legislation governing such decisions. However much progress may have been made, this object is at present far from being achieved. Moreover, the repatriation of minors may raise problems whose implications are difficult to assess without being on the spot.

32. These arguments militate in favour of a more flexible system which also is capable of making it possible for a larger number of States to accede to the Convention without at the same time jeopardising the object sought. It should be noted that the differences between a flexible and a rigid system would be mainly apparent in marginal cases, of which there would be few.

33. The flexible system adopted in the Convention is as follows:

In the cases covered by Section III (repatriation on the request of the State of sojourn) there is no strict obligation on the requested State to act on the request. Acceptance of a request is optional. Furthermore, refusal by the requested State to co-operate does not prevent the requesting State from removing a minor from its territory, for Article 14, paragraph 2, specifically provides that the Convention does not affect the powers which Contracting States enjoy under their own legislation in respect of foreign nationals.

34. In the cases covered by Section II (repatriation on the request of a State other than the minor's State of sojourn) the system is different. Here an obligation to act constitutes the rule when the request complies with the conditions laid down in the Convention. It is obvious that repatriation cannot take place in pursuance of the Convention if these conditions are not fulfilled. This follows from Article 6, which refers expressly to Article 2, paragraph 1. It goes without saying that the requested State shall decide according to its own law (including the provisions of its private international law) whether the request for repatriation complies with the conditions laid down in Article 2, paragraph 1. When deciding on this question the requested State shall, if appropriate, take into consideration judicial and other decisions which have settled the question of parental authority and are enforceable on its territory. An example would be the case of a minor who, according to the law of the requesting State, has the right himself to determine his place of residence.

35. The rule laid down in Article 6 contains two categories of exceptions in which the requested State is given the right to refuse the request. The first is based on the legal situations referred to in Article 7. Six possibilities exist:

(a) the minor has either the right himself to determine his place of residence according to the law applicable under the rules of private international law of the requested State or according to the national law of this State;

(b) the request is intended to repatriate the minor to the persons having parental authority in respect of him, but according to the law applicable under the rules of private international law of the requested State or according to the national law of this State, parental authority does not devolve upon the person in whom it is vested under the law of the requesting State;

(c) the requested State considers that the authorities of the requesting State are not competent to take protective or reeducative measures in respect of the minor in question;

(d) the requested State considers that the repatriation of the minor would be contrary to its *ordre public*;

(e) the minor is a national of the requested State;

(f) the minor is a national of a State which is not a Party to the Convention, and his repatriation would not be compatible with the Obligations existing between that State and the requested State.

36. As regards the two reasons for refusal mentioned under (a) and (b) above, it should be noted that the reference to the private international law as well as to the national law of the requested State has been introduced in order to avoid any doubt as to the possibility of the requested State's basing its refusal on the provisions of its national law; thus, the Convention eliminates any risk of conflict over the concept of public policy on which the requested State should base the application of its national law in the absence of any express provision to this end.

37. As regards the grounds for refusal mentioned under (e) above, it should be observed that its unconditional mention in the text of Article 7 of the Convention was based, in part, on Article 3 of the Fourth Protocol of 16 September 1963 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the right of residence on an entry into the territory of the State, the nationality of which the person in question possesses. This mention gives to every Contracting State the unconditional right to refuse a request for repatriation of a minor who has its nationality and grants it the possibility of providing in its national law for the refusal of any request for repatriation of such a minor.

38. The second category is based on situations of fact mentioned in Article 8 of the Convention. In view of the potential variety of factual situations the exact scope of which is not easily ascertainable, it has seemed desirable to give a rather wide discretion in the matter to the requesting State. Article 8 confirms two hypotheses in which the requested State may, after examining all aspects of the case, exercise the option of refusing a request for repatriation. The first concerns the case where those who have a link with the minor object to repatriation (Article 8 (a)); the second relates to relationships of minors and the requested State (Article 8 (b)).

39. With a view to limiting the number of grounds for refusal, a separate reference to opposition by the parents was considered superfluous and capable of raising serious difficulties. In fact, the opposition of parents who have parental authority is covered by Article 8 (a). In case of doubt, the courts of the requested State may always pronounce upon the recognition of parental authority of the person who opposes repatriation. If these courts

refuse to recognise this parental authority, it would seem difficult to conceive the refusal of repatriation for the sole reason that it is opposed by parents who do not have parental authority.

40. Article 8 (b) provides for the possibility of refusal if the requested State considers repatriation to be contrary to the interests of the minor. This ground for refusal may be based on quite a wide variety of factual situations. One might quote as examples the case of a minor who objects to his repatriation and has reached a degree of maturity which, possibly even under the law of the requested State, calls for his own will to be taken into consideration, or the case of a repatriation which would risk causing not negligible damage to the physical or mental health of the minor. The expression "contrary to the interests of the minor" is a rather vague notion. Any profitable international collaboration means that the requested State must not be too ready to push its point of view regarding the interests of the minor in preference to that of the requesting State. The requested State's point of view in this matter has more weight if the minor has established effective ties in that State or if that State has taken any measures of protection in respect of him. However, these examples mentioned under (b) do not in themselves create a situation from which it may be deduced that it would be contrary to the interests of the minor to be repatriated; they are rather an indication that such a possibility may exist.

41. As regards the measures of protection referred to under (b), it may be observed that Contracting States that have also ratified the Hague Convention for the Protection of Minors must take into account the principles laid down in Article 4 (4) of this Convention. If a requesting State which is also the State of origin of the minor has taken a measure of protection, that measure is, according to this article, given preference over any protective measure taken by the requested State. Consequently, the requested State could not in such a case refuse repatriation by claiming that it would be contrary to the interests of the minor to terminate the measures of protection taken by that State in respect of him.

42. A requested State might have serious reason to believe that a request for repatriation was inspired, *inter alia*, by political motives. In such a case the requested State is not obliged to grant it. It may base its refusal either on Article 8 (b) or on Article 7 (d).

43. Finally, the requested State may postpone taking a decision on a request in two cases (Article 9 of the Convention), namely:

(a) if the request aims at subjecting the minor to a parental authority which is disputed for serious reasons;

(b) if it considers it necessary to prosecute the minor for an offence or to subject him to a penal sanction involving deprivation of liberty. It is desirable for States to avail themselves of this right only in quite exceptional cases. In most cases it seems preferable to grant the request and in return to present a request (similar to that provided for by Article 15, paragraph 2) that all appropriate measures may be taken in the requesting State as a result of the conduct or the situation of the minor in the territory of the requested State.

Procedure

44. Repatriation procedure presents various aspects. One of these, that of inter-State procedure, has been dealt with in part in connection with Article 3 of the Convention, on the designation of central authorities.

45. Inter-State procedure is also dealt with in Articles 16-18 and 20-22 of the Convention which follow the principles adopted in other European conventions, such as the European Convention on the Punishment of Road Traffic Offences.

46. As the requested State is required to comply with a request for repatriation, except for the cases provided for in Articles 7 and 8, it follows that the grounds for a refusal to grant repatriation must be stated (Article 20). The requested State must state the reasons of fact or of law which in its opinion entail the application of any one of the exception clauses contained in Articles 7 and 8. There is nothing to prevent the requesting State, once it has examined the reasons for refusal, from renewing its request for repatriation, on the basis notably of points which had not been taken into consideration by the requested State.

47. With regard to internal procedure, the following solution was adopted. In the case of procedure in the requesting State, any requests for repatriation under Section II of the Convention -whether emanating from private persons who are parents or guardians or from authorities responsible for carrying out a protective measure or who consider the minor's presence necessary at proceedings with a view to measures for his protection must be addressed to the central authority of that State (Article 4). These applications are named "applications" in the Convention. The national legislation of the requesting State specifies the authorities competent to decide whether the application is well-founded and reasonable. It lays down which criteria and which procedure shall be followed and which channels of appeal may be available in respect of decisions taken. If the application is considered well-founded and reasonable, the central authority shall issue a request for repatriation to the State on whose territory the minor is.

48. Proceedings in the requested State are opened by the central authority after it has received a request for repatriation. It is left to the discretion of that State to lay down details of the procedure and designate any authorities whose intervention may also be necessary.

49. The requested State is therefore required to ensure that its domestic law provides the necessary safeguards in such proceedings for the rights of the minor and of persons responsible for him. The Convention contains only one provision in this respect, namely Article 5, which stipulates that the requested State shall:

- hear the minor in person, if his capacity for discernment allows;
- endeavour to obtain the views of the persons having an interest in the decision. It is obvious that it is not necessary to hear again persons whose views are already known. This is particularly so if the application has been made by those having parental authority.

50. Articles 11 and 12 of the Convention are concerned with provisional measures that the requested State may take between the time of receipt of the request - or in urgent cases, even before a request has been formally made-and the time of repatriation.

51. It is clear that the course of proceedings should be such that repatriation can be effected as quickly as possible, at least in cases that raise no particular difficulties.

52. A request for repatriation made in pursuance of either Section II or Section III must, under Article 16, paragraph 1, be submitted in writing. Telegraph messages, or any other form of message which leaves a written record, are regarded as valid.

Repatriation of minors and mutual assistance in extradition matters

53. The relation between the repatriation of minors, as provided for in the Convention, and extradition law is a very delicate one. Repatriation is in fact very similar to extradition in that both involve the officially: imposed delivery of a person by one State to another. Their objects differ however.

54. The purpose of extradition is to hand over a convicted or accused person to the justice of another State for imprisonment or prosecution. As it is primarily in the interest of society rather than of the person convicted or accused, it is hedged around by a number of safeguards, including the condition of dual criminal liability, the rule of speciality and also, in general, the principle that nationals cannot be extradited. Such safeguards areas important to minors as to adults, and to withhold them would place minors in a less favourable position. In so far as they are prosecuted under ordinary criminal law, and this generally applies to minors above a certain age, their cases are incontrovertibly covered by extradition law. The question is more complex when it comes to applying criminal law designed specially for juveniles because this Jaw provides for sanctions serving in particular the interests of the convicted person and being identical with the protective measures known in civil and administrative law. Apart from these sanctions it provides, however, also for sanctions similar to those provided for in the ordinary penal law. Since there can be no question of prejudging what decision will be taken, extradition safeguards must also be applied in the case of a repatriation requested for the purposes of taking criminal proceedings against a minor in the requesting State.

55. The object of repatriation is different from that of extradition. In the last analysis, and contrary to extradition, repatriation is always in the minor's interest. This is obvious as regards repatriation under Section II of the Convention. Even if it is not the only interest at stake –for that of the parents must also be taken into consideration – it enjoys some degree of priority in that it cannot be sacrificed to other interests. It is in the minor's interest to receive education and be placed in the care of the persons responsible for him. It is also in his interest to ensure that protective measures taken or planned for him can be applied.

56. The question is more complex in the case of repatriation under Section III of the Convention. This Section provides that a minor may be removed from the requesting State either in his own or in the State's interest. However, the fact that expulsion takes the form of repatriation as envisaged in the Convention is always in the interest of the minor. We may therefore consider that repatriation serves the interests of minors in one way or another.

57. What are the implications for this Convention of the difference in purpose between repatriation and extradition ? This question needs to be considered separately for repatriation under Section III and for repatriation under Section II of the Convention.

58. In the cases covered by Section III there can, as a rule, be no confusion between repatriation and extradition, for the initiative for removal lies with the State on whose territory the person concerned is. It is for this reason that Section III contains no guarantees relating to prosecution, in particular guarantees analogous to those contained in Article 13 of Section II. However it was considered desirable to make provision in Article 15, paragraph 2, for an option making it possible for the requesting State to attach to its request any conditions it considers advisable and to which repatriation of the minor may be made subject. These might concern guarantees in respect of criminal proceedings brought against the minor in the State to which repatriation is requested, as set out in Article 13. Moreover, the same paragraph makes it possible for the requesting State to ask the requested State to take appropriate measures to deal with the minor's conduct in its (the requesting State's) territory. Such a measure may entail prosecution by the requested State for an offence committed in the requesting State. From the point of view of rehabilitation the requested State will generally be in a better position to prosecute than the requesting State. In this way repatriation under Section III may present a form of mutual assistance facilitating the transfer of prosecution in the case of minors.

59. The situation is different for cases under Section 11, where repatriation, like extradition, means the officially imposed delivery of a person into the hands of another State, at the latter's request. It would be possible in theory to use repatriation for the purpose of extradition, thus depriving the individual of extradition safeguards which, as has been said above, should apply also to minors. This possibility can and must be ruled out by laying down in the repatriation regulations a "speciality principle" similar to that in the rules on extradition.

60. Article 13 therefore provides that there shall be no prosecution in the requesting State for acts committed before repatriation unless the requested State expressly authorises prosecution. The same applies for the enforcement of a sentence to a sanction involving deprivation of liberty or to a more severe sentence, pronounced in the requesting State before repatriation.

61. An initial question may arise here as to the interpretation of the terms "prosecution" and "sanction involving deprivation of liberty". Owing to the special nature of legislation applicable to minors, it is often quite difficult to establish whether a given sanction or procedure is penal. It is obvious that its "penal" nature, in the sense of this Convention, does not depend exclusively on the appellation given to a sanction or procedure in domestic law. The meaning of "penal" in the Convention is to some extent independent of usage in the domestic law of States, and its interpretation calls for study on a comparative basis. There is no doubt that all proceedings in which a possible penalty depends on the proved existence of all the components of an offence are to be considered as penal. The same applies to all penalties pronounced in such proceedings in so far as they are not peculiar to the law applicable to juveniles but exist also in ordinary criminal law.

62. On the other hand, it is clear that a measure arising from non-penal proceedings cannot be regarded as a sanction under criminal law. The distinction to be made between a sanction under criminal law and other sanctions becomes more complicated when the measure in question results from penal proceedings but does not exist in ordinary criminal law. In such cases, it must first be established whether the measure could also result from non penal proceedings; if so, it cannot be regarded as penal in nature. If not, then the measure should be considered as penal to the extent that its effect is analogous to that of sanctions under criminal law.

63. It follows that Article 13 constitutes no hindrance to the execution of a protective measure resulting from prosecution prior to repatriation. Such a measure may even be the initial reason for a request for repatriation under Article 2, paragraphs 1 (b) and 2 of the Convention. It is also clear that Article 13 does not impede the execution of a measure resulting from non-penal proceedings (civil or administrative).

64. Even for the remaining categories – sanctions under criminal law pronounced before repatriation and prosecution for offences committed before repatriation – Article 13 constitutes no absolute hindrance to the enforcement of the sanction or to the institution of criminal proceedings. These are always possible if the requested State agrees. That State is in fact bound to give its authorisation in so far as it would be obliged to extradite were extradition requested (Article 13, paragraph 3). Thus the Contracting States are obliged, under the Convention, to give their authorisation in certain circumstances. However, the wording of this provision reflects the desire of not imposing on Contracting States obligations which might exceed the limits defined by their national law and by international agreements by which they are bound on the subject of extradition. It follows that the guarantees to be given to minors as well as the procedure to be observations governed by the rules which apply to authorisation in the law on extradition in force in the requested State, in so far as such law does not provide for special rules.

65. Authorisation may be given for individual cases, but also for certain categories of cases. It may be the subject of bilateral agreements, as provided in Article 27, paragraph 3, of the Convention. Such agreements make it possible to adapt the system of authorisation to the legislation of the requesting State and to arrive at flexible and practical solutions which take account of the fact that the sole purpose of Article 13 is first, to prevent this Convention having the effect of reducing the guarantees now enjoyed by minors under extradition:law, and, second, to ensure that this Convention is genuinely Applied in the interests of minors.

Relations between the present Convention and other international treaties or the national law of the Contracting States

66. One of the principal characteristics of the Convention is that it is optional and non-exclusive: that is to say that once it enters into force it will exist alongside other treaties, conventions and bilateral agreements between Contracting States, which contain provisions governing the repatriation of minors; these provisions are only superseded to the extent that their effect is to prevent the Contracting States availing themselves of the present Convention and thereby prejudicing its application. This is the principle set out in paragraphs 1 and 2 of Article 27 of the Convention. Moreover, this principle is also valid with regard to the national law of the Contracting States.

67. It follows that since the Convention does not seek to create a single and exclusive system for the repatriation of minors, it in no way limits the power of those persons who wish to repatriate minors by availing themselves, according to the circumstances and the needs, of other means based on international instruments or national law. As regards the rules of national law, it should be made clear that the expression "national law" includes the decisions of courts. The freedom of the Contracting States to use all procedures offered by their national law in connection with repatriation and extradition is, therefore, in no way affected; in particular, there is no prejudice to the consequences which might follow, according to the national law of each Contracting State, from the recognition of foreign judgments.

68. Moreover, the Convention, and in particular Article 8, does not have the effect of changing the national law of the Contracting States in respect of matters outside its field of application. Thus the guardian of a minor who finds his ward in a foreign country and wishes to bring him back home, may find it expedient to invoke the collaboration of the local authorities. Given the present legal situation, several States would not hesitate to assist the guardian once they had ascertained that they recognise his authority. This is not a case of repatriation under the terms of the present Convention, and this possibility is not, therefore, covered by its provisions.

69. On the other hand, the provisions of the Convention do not affect the obligations which might arise for Contracting States from other international treaties or under national law concerning the treatment of minors under their jurisdiction. For example, a number of international agreements, particularly in the field of social assistance, contain provisions to the effect that the Contracting Parties undertake not to expel nationals of another Contracting Party for the purpose of avoiding having to grant them social or medical assistance, provided that the person in question has been living legally on the territory of the State concerned for a certain period of time, for example five years. A similar provision is also to be found in Article 6 (a) of the European Convention on Social and Medical Assistance, signed on 11 December 1953, under the terms of which a Contracting Party in whose territory a national of another Contracting Party is lawfully resident shall not repatriate that national on the sole ground that he is in need of assistance". None of these provisions is invalidated by the application of the present Convention. In fact, as regards the repatriation of minors at the request of the State of sojourn, the rules embodied in this Convention do not primarily relate to the grounds for which a person might be repatriated but rather invoke the grounds which are already recognised by the law in force for the Contracting States. Thus Article 2, paragraph 2, expressly provides that the Convention applies to the repatriation of minors requested by the State of sojourn "provided that its legislation authorises removal of the minor from its territory". Consequently, minors to whom the Convention applies are not deprived of the protection to which they might be entitled by virtue of other international agreements such as those mentioned above, since such protection must be assumed to be guaranteed by the legislation of the Contracting State in question.

70. Finally, paragraph 3 of Article 27 of the Convention makes provision for the conclusion of supplementary bilateral or multilateral agreements. The fields which may be covered by such supplementary agreements are, for example, those dealt with under points 30 and 65 of this Explanatory Report. This possibility also extends to the Administrative Arrangements which are often concluded between neighbouring States in order to establish practical and simple mutual aid in this matter.

Commentary on certain articles of the Convention

Article 1

71. Article 1 defines the key terms in the Convention: "minor", "Parental authority" and "repatriation".

72. The term "minor" is explained in points 18-20 of this explanatory report.

73. The term "parental authority" designates the natural or legal persons entitled to determine the minor's place of residence. These persons may be:

- the parents or any other natural persons taking their place permanently or temporarily;
- or any legal person appointed by the law (such as in France the *Service de l'aide sociale à l'enfance* when the parents are dead), or by a court or administrative decision.

74. The term "repatriation" is not to be understood literally. Usually, it is true, the minor will be repatriated to the State of which he is a national (the country of birth), but it is perfectly conceivable, say, for a child of Italian parents resident in the Federal Republic of Germany, who is in France or even Italy, to be sent back to the Federal Republic pursuant to the present Convention. The Convention could thus actually give rise to a repatriation from the home country to the country of residence, should the latter not be the minor's home country. It is obvious that only transfers made in pursuance of this Convention are covered by this term.

Article 2

75. This article defines the scope of application *ratione materiae* of the Convention. It is dealt with in points 21-24 and 69 of this explanatory report.

Article 3

76. This article, whereby the Contracting States are to set up the machinery to ensure that the Convention functions properly, is referred to in points 25-30 above.

Article 4

77. Article 4 lays down the procedure to be followed in the requesting State: reference of the request to the central authority, which in turn must forward it to the central authority in the requested State. It is dealt with in points 47 and 48 above.

Article 5

78. Article 5 deals with the procedure to be followed in the requested State before it pronounces on the request, and in particular the obligation to give a hearing to the minor in person, his capacity of discernment permitting. The details regarding this article are set out in point 49. It was not considered desirable to state in the Convention the age at which such a hearing should be compulsory. Such a system was regarded as being excessively rigid. Intellectual and psychological maturity, which varied extensively between children even of the same age, was a key consideration when deciding on the measures to be adopted and consequently when assessing how much importance should be attached to the child's own views on the matter. For instance, it might be reasonable to hear a four-year-old child, but not a seven-year-old child who was mentally deficient or psychologically retarded. For these reasons the relevant authorities in the requested State will be empowered to assess each individual case.

79. A hearing should also be given to the person or persons with a special interest in the minor, such as his parents, guardians or those exercising parental authority. These terms also cover persons temporarily in charge of the minor. It should be stressed that the repatriation procedure should not be held up unduly by hearings of this kind.

Article 6

80. Article 6 establishes, subject to Articles 7 and 8, the principle whereby the requested State must grant a request made by the requesting State. All the provisions contained in Articles 6-8 are dealt with in points 34-42 of this explanatory report.

Article 9

81. Article 9 lists the grounds on which a decision on a request may be postponed. It is dealt with in point 43 above.

82. It should be pointed out that the term "parental authority which is contested" (sub-paragraph (a)) is not concerned with situations in which there is a legal doubt as to the minority of the person in respect of whom the application is made, or those in which the minority is based on a law whose application is not recognised in this connection. This provision does not apply when the parental authority is disputed between the two States concerned. It is concerned rather with parental authority disputed by a person claiming it himself, such as for example the case of disputes between parents seeking divorce, or of parents and a body or authority of the requesting State.

83. Special problems might arise regarding the legal position of persons acting as de facto guardians. It frequently happens that the authorities responsible for child welfare place children who, for various reasons, have been taken away from their natural parents, in the care of specially suitable foster parents for fairly long periods. However it was considered that the terms of Article 9 covered this case adequately, and that no special provisions were called for.

Article 11

84. With respect to this article which is concerned with provisional measures allowed for the purpose of repatriation, it should be remembered that the requested State is at liberty to adopt measures of protection in respect of the minor even after the 30 days' period has lapsed, if it thinks fit. Article 9 of the Hague Convention concerning the powers of authorities and the law applicable in respect of the protection of infants expressly recognises this possibility.

85. In view of the need to ensure that the conditions in which minors are held do not adversely affect their psychological and moral development, and comply with modern principles regarding the treatment of juvenile offenders and young persons in need of protection, it is recommended to governments to do everything in their power to prevent minors from being exposed, while the subject of provisional measures adopted in pursuance of Article 11, to harmful influences.

Article 13

86. This article concerns the possibility of prosecuting the minor in the requesting State and enforcing a sentence incurred before repatriation. It is dealt with in points 60-65 of this explanatory report.

87. It should be stressed that this Convention must not in any way diminish the protection already given to minors under conventional provisions contained in extradition treaties, such as the European Convention on Extradition. Clearly, however, in order to ensure that the minor is transferred rapidly to the State where he is to undergo social rehabilitation, extradition procedure needs to be as brief as possible.

Articles 14 and 15

88. These articles govern the repatriation of a minor on the request of the country of residence. They are dealt with in points 23, 24, 33 and 58 of this explanatory report.

89. It should be pointed out in this context that the Convention did not prohibit refusal of entry by frontier authorities; such refusal was always possible where allowed by the law of the State in question. Repatriation could be used, under the present Convention, as a means of refusing entry, but while this procedure might be desirable it was never compulsory.

Section IV (Articles 16-22)

90. Section IV contains the common provisions, concerning the formalities governing communications between the States concerned, and calls for no special comment. The articles in this Section are based on corresponding rules in the European Conventions on the Punishment of Road Traffic Offences and on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.

Section V (Articles 23-30)

91. The final provisions contained in this Section have been drafted according to the standard final clauses for European conventions and agreements approved by the Committee of Ministers in 1963. As regards Article 27, which is concerned with relations between the present Convention and other international treaties, reference should be made to points 66-70 of this explanatory report.