THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION IN CASES INVOLVING BATTERED RESPONDENTS

How to Adapt the Model Bench Guide for Your State

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How to Adapt the Model Bench Guide for Your State

Introduction: A Note from the Hague DV Project

The Hague Domestic Violence Project has developed several bench guides for jurisdictions across the United States in partnership with committees of local experts, including state and federal court judges, public interest and private practice attorneys, administrative court staff, and academic scholars. There are no dedicated Hague Convention courts in the United States and these cases may be filed in either state or federal court, thus these bench guides have been essential to ensuring that judges across the United States have access to basic information about the intersection of the Convention and domestic violence. With our leadership and guidance, bench guide committees have worked to create a resource specifically for their jurisdiction's state and federal court judges.

*This **Model** Bench Guide is a tool to allow further adaptation of bench guides across the country. The purpose of this Model Guide is to serve as a template covering a broad range of topics relevant to the intersection of Hague Convention jurisprudence and domestic violence in cases in which the respondent (the taking parent) alleges abuse by the petitioner (the left-behind parent). A jurisdiction can use this resource as a starting point to create its own state-specific Bench Guide. It is our hope that eventually every state across the United States will have its own Hague Convention Bench Guide.*

Sincerely,
The Hague DV Project

The How-To

Below is a list of suggested actions to assist in adapting the model bench guide for your jurisdiction. These steps are meant to provide guidance, not as strict rules. This is your bench guide now and the process should be adjusted to accommodate you and your committee.

Convene Consulting Committee

- ⇒ Identify a committee "host"—this may be your state administrative court office, a law firm, or public interest organization. The "host" will work with you on the administrative end of this project and will commit to providing meeting space and a call-in line for committee meetings.
- ⇒ Work with your host to identify potential committee members, including at least one state and one federal court judge, one public interest attorney, one private practice attorney, one to two state court administrators (state and federal), and an expert in the field of children exposed to domestic violence. Ideally, committee members will have experience in domestic violence, the Hague Convention, or both—it is okay if not all committee members are experts in both areas.

⇒ Inviting committee members: we suggest first confirming two judges, ideally one from state court and one from federal court. Invite your judges to co-chair the committee. Work with your judges to determine the best strategy for inviting the remaining committee members. Invitations may come from the judges, the host, or you.

⇒ We have included some sample invitations letters here in an appendix.

Adapting the Model Bench Guide for Your Jurisdiction

⇒ **Research Local Case Law**: the Model Bench Guide includes citations to and discussion of the most important and commonly cited Hague Convention cases from federal appellate courts and some district courts. Few state cases are discussed in detail; however, there are some state cases are cited to in the footnotes. It is essential that your committee begin the adaptation process with a search of local case law—at both the state and federal levels.

⇒ **Review Model Guide Sections and Topics:** the Model Bench Guide is meant to be a starting point offering a suggested framework for your Guide. As you work with the committee on various drafts of the guide the committee may decide to add to or delete sections or topics as it sees fit for the jurisdiction. If, for example, your review of local case law raises an issue not covered in the Model, that issue can be added to the guide.

⇒ Some areas of the guide are particularly state or jurisdiction specific, these areas will require the most research and revision. Alternatively, some sections of the guide will require few changes from the Model.

Circulate the Model Bench Guide and Plan First Committee Meeting

⇒ Work with the host and co-chairs to generate a list of potential dates and times for the first meeting. We recommend holding the first meeting in person if possible. Circulate a doodle poll with time and date options to the full committee in order to select a date and time for the first meeting that works for the most people. It is a good idea to send the doodle poll within a welcome email, since this will be your first correspondence with the full committee.

⇒ Set a deadline for the committee to submit their first round of feedback. We recommend allowing enough time to receive and review committee feedback before first meeting.

⇒ Scheduling the first meeting early will give you a clear sense of your timeline to review and revise the first draft. You may choose to circulate a revised draft prior to the first meeting, implementing the committee's first round of feedback before the committee gets together. Alternatively, you may decide to wait and implement revisions after the committee's first discussion which will allow you to incorporate any feedback that came up during the meeting.

⇒ Once the committee is confirmed and a time frame has been established, send an email to the full committee confirming dates/deadlines and circulating the Model Bench Guide, representing the ***first draft*** of the [State] Guide.

Feedback, Revisions, Follow-up, and Additional Committee Meetings

⇒ Between you and the host, there should be one person designated to collect committee feedback and organize revision strategy.

⇒ During review of committee feedback, follow-up with specific committee members as needed.

⇒ Revise based on feedback and circulate a second draft of the guide.

⇒ It is up to the committee to determine how many rounds of feedback and revisions are necessary and how many additional meetings the committee will require to finalize the guide. It may be easiest to hold subsequent committee meetings by phone, although in-person is always ideal when practical and possible.

The Appendix

⇒ We have included appendix A-E in the Model Bench Guide. This includes: (A) Hague Convention Text; (B) International Child Abduction Remedies Act; (C) Sample Language and Federal Search Database Instructions; (D) The Pérez-Vera, Explanatory Report; and (E) The State Department Text and Legal Analysis.

⇒ The appendix is provided as a separate word document, including title pages and appendix A-C. The PDFs for appendix D and E are available at haguedv.org and will have to be inserted into the document after your Guide is finalized and saved as a PDF.

⇒ The committee should review Appendix C closely, and revise as necessary. The remaining appendices do not require editing, but the committee can decide whether to include them or not in your [State] Guide.

Final Steps

⇒ **Proofread**: Remember, the Model Bench Guide is a draft and multiple revisions may impact footnotes and sentence structure. This will be your committee's final product, therefore it is up to your committee to thoroughly proofread the entire document and check all citations.

⇒ **Finalize Formatting**: Check all formatting—spacing, font, page layout, page numbers, etc.

⇒ **Adapt Cover and Inside Cover Pages**: we have included our standard bench guide cover. You may choose to add additional logos or the committee may opt to design its own cover. We have also included a template for the inside cover and acknowledgements pages.

⇒ **Create or update table of contents**.

⇒ **Create or update table of authorities**.

Support

⇒ If you have any questions about the Model Bench Guide or would like technical support in adapting your state's guide from our Model Bench Guide please visit our website at haguedv.org or contact us at haguedv@berkeley.edu.

Appendix

Sample Letter A: Invitation to Potential Host

[Date]
[Address]

Dear _____,

I am writing to invite [Administrative Office/Law Firm/Organization] to develop a [State] Bench Guide on Hague Convention Child Abduction cases involving allegations of domestic violence. This project is being modeled after several successful bench guides created by the Hague Domestic Violence Project, a technical assistance grant funded through the Office on Violence Against Women and housed at the University of California Berkeley's Goldman School of Public Policy, in conjunction with local consulting committees in each state.

The Hague Domestic Violence Project created a model bench guide on the intersection of domestic violence and the Hague Convention. Our Committee will adapt their model guide for state and federal court judges in [State].

The [State] Committee will consist of at least one state court judge, one federal court judge, and attorneys from both the private and public interest sector with experience in either Hague Convention work or domestic violence. We expect to hold three meetings with the Committee over the period of a few months. Each meeting may be in person or call-in and is expected to last approximately one to two hours. We will also rely on the Committee to review drafts of the guide and provide feedback between meetings. The model bench guide will be circulated as a ***draft*** prior to the first meeting, where the Committee will discuss developing [State]'s guide. We will work with your organization to staff the Committee and provide administrative support—convening and facilitating the meetings, implementing the suggestions and edits that come out of Committee meetings, and circulating drafts of the Bench Guide as the work progresses.

Please let us know if you have any questions about the model bench guide or our intentions for this Committee. If you are interested in serving as the host for this project, please contact me at _____.

Thank you and we look forward to hearing from you.

Sincerely,

_____

Sample Letter B: Invitation to Potential Committee Members from Hosts

[Date]
[Address]

Dear _____,

[Host Liaison], the [title] of [host organization], and I would like to invite you to join the [State] Hague Convention and Domestic Violence Bench Guide Consulting Committee to develop a [State] Bench Guide on Hague Convention Child Abduction cases involving allegations of domestic violence.

The goal of this Committee is to develop a bench guide on the Hague Convention on the Civil Aspects of International Child Abduction for both state and federal court judges in [State]. The guide will specifically focus on cases in which a taking parent alleges domestic violence by the left-behind parent. The Committee will work closely with [host organization(s)] to develop this Guide.

This project is being modeled after several successful bench guides developed by the Hague Domestic Violence Project, a technical assistance grant funded by the Office on Violence Against Women and housed at UC Berkley's Goldman School of Public Policy.

The [State] Committee will consist of at least one state court judge, one federal court judge, and attorneys from both the private and public interest sector with experience in either Hague Convention work or domestic violence. We expect to hold three meetings with the Committee over the period of a few months. Each meeting may be in person or call-in and is expected to last approximately one to two hours. We will also rely on the Committee to review drafts of the guide and provide feedback between meetings. A ***draft*** Bench Guide based on the prior state guides will be circulated prior to the first meeting, where the Committee will discuss developing [State]'s guide.

Please let us know if you have any questions about this project or our intentions for this Committee. In addition, we would greatly appreciate if you could let us know whether you accept this invitation to join the [State] Hague Convention and Domestic Violence Bench Guide Consulting Committee no later than **[date]**, so that we may provide you with the draft guide.

If you have any questions, please feel free to contact me at _____.

Thank you and we look forward to working with you.

Sincerely,

_____

Sample Letter C: Invitation to Potential Committee Members from Judges/Co-Chairs

[Date]
[Address]

Dear _____,

Judge _____ and I are writing to invite you to join the [State] Hague Convention and Domestic Violence Bench Guide Consulting Committee to develop a [State] Bench Guide on Hague Convention Child Abduction cases involving allegations of domestic violence.

The goal of this Committee is to develop a bench guide on the Hague Convention on the Civil Aspects of International Child Abduction for both state and federal court judges in [State]. The guide will be specifically focused on cases in which a taking parent alleges domestic violence by the left-behind parent. The Committee will work closely with [host organization(s)] to develop this Guide.

This project is being modeled after several successful bench guides developed by the Hague Domestic Violence Project, a technical assistance grant funded by the Office on Violence Against Women and housed at UC Berkley's Goldman School of Public Policy.

The [State] Committee will consist of at least one state court judge, one federal court judge, and attorneys from both the private and public interest sector with experience in either Hague Convention work or domestic violence. We expect to hold three meetings with the Committee over the period of a few months. Each meeting may be in person or call-in and is expected to last approximately one to two hours. We will also rely on the Committee to review drafts of the guide and provide feedback between meetings. A ***draft*** Bench Guide based on the prior state guides will be circulated prior to the first meeting, where the Committee will discuss developing [State]'s guide.

Please let us know if you have any questions about this project or our intentions for this Committee. In addition, we would greatly appreciate if you could let us know whether you accept this invitation to join the [State] Hague Convention and Domestic Violence Bench Guide Consulting Committee no later than **[date]**, so that we may provide you with the draft guide.

If you have any questions, please feel free to contact me at _____. You may also direct any and all questions to [designated host contact] ([email address]), who will take the lead on organizing future meetings and circulating bench guide drafts as we work toward a final [State] Bench Guide.

Thank you and we look forward to working with you.

Sincerely,

_____ _____

Judge _____ Judge _____

Berkeley

GOLDMAN SCHOOL OF PUBLIC POLICY

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION IN CASES INVOLVING BATTERED RESPONDENTS

A [State] Bench Guide for Federal and State Court Judges

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION IN CASES INVOLVING BATTERED RESPONDENTS

A [State] Bench Guide for Federal and State Court Judges

The [State] Hague Convention and Domestic Violence Bench Guide Consulting Committee has developed this Bench Guide, *The Hague Convention on the Civil Aspects of International Child Abduction in Cases Involving Battered Respondents*, for both federal and state court judges in [State] who are confronted with a petition for return pursuant to the Hague Convention in cases involving domestic violence. This Bench Guide was created from a Model Bench Guide, developed by the Hague Domestic Violence Project, a technical assistance grant funded through the Office on Violence Against Women and housed at the University of California Berkeley's Goldman School of Public Policy.

Please visit www.haguedv.org for more information about the Hague Domestic Violence Project and for more resources on the Hague Convention and domestic violence.

[Date of Publication]

BENCH GUIDE CONSULTING COMMITTEE

[Name]
[Title]
[Organization]
Committee Co-Chair

[Name]
[Title]
[Organization]
Committee Co-Chair

[Name]
[Title]
[Organization]

[Name]
[Title]
[Organization]

[Name]
[Title]
[Organization]

[Name]
[Title]
[Organization]

[Name]
[Title]
[Organization]

[HOST ORGANIZATION] LIAISON

[Name]
[Title]
[Organization]

HAGUE DOMESTIC VIOLENCE PROJECT
(Model Bench Guide)

Jessica S. Goldberg, Esq.
Project Attorney
Goldman School of Public Policy, UC Berkeley

Sudha Shetty, Esq.
Assistant Dean, Project Director
Goldman School of Public Policy, UC Berkeley

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Appendices

THE CONVENTION: *AT-A-GLANCE*

The Guide's central focus is the relationship between domestic violence and the Hague Convention in cases where the taking parent is alleged to have been physically or psychologically abused by the left-behind parent.

This Guide refers to *parental* abduction and *parental* custody rights, but either or both the parties may be someone other than a parent.

This Guide is applicable to:

- Petitions filed pursuant to the Hague Convention;
- Petitions filed in U.S. courts (state or federal); and
- Petitions seeking return of a child to his or her habitual residence.

This Guide is *not* applicable to:

- Cases involving rights of access (also referred to as access cases);
- Cases in which the child has been removed from or retained outside of the United States; or
- Cases in which the left-behind parent is a victim of domestic violence.

A. SOURCES

The Hague Convention, Appendix A, is an international treaty intended to protect children by providing a civil legal framework for return to their habitual residence when they are wrongfully removed or retained across international borders.

International Child Abduction Remedies Act (ICARA), Appendix B, is the federal legislation implementing the Convention in the United States.

Central Authority: Article 6 of the Convention directs each Contracting State to designate a Central Authority to facilitate the Convention's implementation. In the United States, the U.S. State Department's Office of Children's Issues (OCI) serves as the Central Authority. OCI's website has a resource page for judges that includes links to primary resources, links to related criminal and civil laws, and information about the International Hague Network of Judges.

Further Guidance:

1. **Elisa Pérez-Vera, Explanatory Report**, Appendix D, is recognized as the official history and commentary to the Hague Convention. Courts often look to this report for guidance in interpreting the Convention, although it was never adopted as part of the Convention.
2. **U.S. State Department's Text and Legal Analysis**, Appendix E, is the State Department's legal analysis of the Convention. Like the Explanatory Report, courts have looked to the Text and Legal Analysis for support in treaty interpretation.

B. ELEMENTS OF A HAGUE CONVENTION CASE

3 STEPS:
1. DOES THE COURT HAVE **JURISDICTION?**
2. WAS THE TAKING **WRONGFUL?**
3. DO ONE OR MORE OF THE **5 EXCEPTIONS** TO MANDATORY RETURN APPLY?

Courts should articulate their findings and the standards applied in their rulings.

(1) JURISDICTION

The court has **jurisdiction** if**:**

- The child was removed from or retained outside of a country that is a Contracting State to the Convention *and* a Treaty Partner with the United States;
- The child is under the age of 16;
- The child is located in the state and county or federal district of the court; AND
- The child is not the subject of any other Hague Child Abduction proceeding.

Removal—Both state and federal district courts have original and concurrent jurisdiction in cases arising under the Convention. If the petitioner files a Hague Convention petition in state court, the respondent has the right, pursuant to the federal removal statute, to file a notice of removal in federal district court.

Abstention—If the Hague Convention case has already been raised and litigated in state court, abstention by the federal court would be appropriate. If the Hague Convention case has not been raised or has been raised but not litigated in state court, courts have largely found abstention doctrines do not apply. An ongoing state court custody proceeding does not require abstention by the federal court.

(2) WRONGFUL

The taking is **wrongful** if the petitioner proves the following by a *preponderance of the evidence*:

- Habitual Residence—that the child was removed or retained from his or her country of *habitual residence* ["Habitual residence" has not been defined in the Convention or ICARA but should be given its "ordinary meaning."]; AND
- Custody Rights—that the removal or retention was in breach of the petitioner's *custody rights* [The petitioner's rights under the law of the child's habitual residence—through law, judicial or administrative decision, or legal agreement—must amount to "custody rights" within the meaning of the Convention]; AND
- Custody Rights Actually Exercised—that those custody rights were *actually exercised* at the time of removal or retention or *would have been exercised* but for the removal or retention [Interpreted liberally, generally established when petitioner keeps or seeks to keep any sort of regular contact with the child.].

If the petitioner fails to establish this* prima facie *case, the remedy of return is <u>not</u> available.
If the petitioner is successful, the burden shifts to the respondent to prove one or more of the exceptions (defenses) to return.

(3) EXCEPTIONS

The court **may deny return** if the respondent proves one or more of the following by a ***preponderance of the evidence***:

- One Year and Well-Settled—that *one year has passed* from removal or retention to filing AND the child is now *well-settled* in the new environment [The court can consider many factors, including: child's age; duration of stay and stability in the new residence; consistent schooling or daycare; friends and relatives; stability of housing; and respondent's employment.]; **OR**

- Consent or Acquiescence—that the petitioner *consented or subsequently acquiesced* to the removal or retention [Two separate defenses with analytical difference. Acquiescence requires a level of formality whereas consent can be inferred from informal actions or behavior.]; **OR**

- Mature Child Objection—that the child *objects* to return AND is *mature enough* to have his or her objection considered [Child's objection must be more than mere preference and the child must be mature enough to have his or her objection considered. It is for the court to determine how much weight to give to the child's objections.]; **OR**

The court **may deny return** if the respondent proves one or more of the following by ***clear and convincing evidence***:

- Grave Risk or Intolerable Situation—that return poses a *grave risk* that the child will be exposed to physical or psychological harm or an otherwise *intolerable situation* [Intended to prevent future harm. It can apply if the child will be returned to a zone of war, famine, or disease, or in cases of serious abuse or neglect. History of spousal abuse is also relevant to a grave risk determination. It is **not**, however, a vehicle to litigate custody.]; **OR**

- Human Rights and Fundamental Freedoms—that return would not be permitted by the fundamental principles of human rights and fundamental freedoms [This has been restrictively interpreted and applies to cases where it "shocks the conscience."].

C. JUDGMENT: THE COURT'S OPTIONS

1. **MANDATORY RETURN**—required if removal or retention is proved to be "wrongful" (within the meaning of the Convention) **AND** no exceptions (Respondent's Defenses) apply.
2. **DENIAL OF RETURN—**required if petitioner fails to prove *prima facie* case; permitted if one or more exceptions (Respondent's Defenses) are proved.
3. **DISCRETIONARY RETURN**—an option regardless of whether any exceptions are proved.

INTRODUCTION

This Bench Guide, developed by the [State] Hague Convention and Domestic Violence Bench Guide Consulting Committee, provides guidance to federal and state court judges confronted with a petition for return of a child pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention") in cases involving allegations of domestic violence.

The information in this Guide is applicable to cases filed in the United States seeking return of a child taken to or retained in the United States ("incoming cases") and in which the respondent ("taking parent") alleges physical or psychological abuse by the petitioner ("left-behind parent"). The Guide focuses on the intersection of domestic violence and the Convention, discussing the dynamics of domestic violence and the applicability of domestic violence issues to the court's analysis in a Hague Convention case.

The Convention was designed to protect children from the harms of abduction, and it established procedures to ensure the prompt return of children "wrongfully removed or retained" from their countries of habitual residence. The exceptions to mandatory return of an abducted child, often referred to as affirmative defenses, outline the limited circumstances under which a child would be better served by remaining in the removed-to country rather than being returned to his or her country of habitual residence. If an exception is established, return is discretionary.

The attention of this Guide to cases involving domestic violence is critical because, unlike federal legislation to prevent child abduction, neither the Convention nor ICARA provides an explicit defense for parents fleeing domestic violence. However, domestic violence is relevant within the broader context of the exceptions to return and the consideration of settled intent with regard to habitual residence.

Parents who flee across international borders due to domestic violence often do so for their own safety and the safety of their children. Still, they frequently find themselves in court facing a petition under the Hague Convention where they may be viewed as an "abductor" or "wrongdoer." Thus, it is critical that courts understand the dynamics of domestic violence and the ways in which domestic violence is relevant to the consideration of whether a petition for return should be granted.

GLOSSARY & ACRONYMS

This section briefly defines important terminology used in the Convention and this Guide. For an in-depth definition of specific terms, please refer to the substantive sections within.

access case: Pursuant to Article 21 of the Convention, a petitioner may file a petition to secure "the effective exercise of rights of access" to a child. When a petitioner files for access, rather than return, the case is referred to as an access case. Alternatively, a petitioner may file a petition for return but fail to prove that he or she enjoyed rights of custody (an element of the *prima facie* case for return). Petitioner may then move to amend his or her petition to seek rights of access. This Guide does not address rights of access in depth. (For more on rights of access compared to rights of custody *see* Part [__], § [__]; *see also* "access rights" and "custody rights," *infra*.)

access rights: Under Article 5 of the Convention, rights of access "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Where rights of access are at issue, the remedy of return is not available. (This Guide does not address cases involving rights of access in depth. For more on rights of access compared to rights of custody *see* Part [__], § [__])

Central Authority: Article 6 of the Convention directs each Contracting State to designate a Central Authority to facilitate the Convention's implementation. Central Authorities coordinate and cooperate with various agencies from both countries involved to secure the prompt, voluntary return of a child or to facilitate access to a child. The Central Authority's role is that of a facilitator, not a fact finder, and it has no power to order a child's return. The procedure of each Central Authority varies, and each is responsible for managing its own caseload and priorities. In the United States, the U.S. State Department's Office of Children's Issues (OCI) serves as the Central Authority.

Office of Children's Issues: International Parental Child Abduction Division	
United States Department of State	Phone: 888-407-4747; 202-501-4444
Bureau of Consular Affairs	Fax: 202-485-6221
Office of Children's Issues	Email: AskCI@state.gov
SA-17 9th Floor	Web address: childabduction.state.gov
Washington, DC 20522-1709	

clear and convincing evidence: "The phrasing within most jurisdictions has not become as standardized as is the 'preponderance' formula . . . . It has been persuasively suggested that [the standard] could be more simply and intelligibly translated to the [trier of fact] if [the trier of fact] were instructed that they must be persuaded that the truth of the contention is "highly probable." 2 McCormick On Evid. § 340 (7th ed.).

Contracting State(s): A country that is party to the Convention is a Contracting State, meaning the Convention is in force in that country. The Convention only applies to Contracting States. A

country may become a Contracting State by ratifying or acceding to the Convention. As of [date], there were [#] Contracting States and this number continues to expand. The Hague Conference on Private International Law maintains a Status Table of Contracting States, available on their website at http://www.hcch.net. (For more on Contracting States *see* Part [__], § [__]; *see also* "Treaty Partner.")

rights of custody: Under Article 5 of the Convention, rights of custody "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. . . ." Proving rights of custody is an element of the petitioner's *prima facie* case for return. (For more on Rights of Custody *see* Part [__], § [__].)

Explanatory Report by Eliza Pérez-Vera (*Appendix D*)**:** Recognized as the official history and commentary to the Hague Convention. Courts often look to this report for guidance in interpreting the Convention, although it was never adopted as part of the Convention. (Note Justice Stevens' comment on this in a footnote in his *Abbott v. Abbott* dissent: "As the Court recognizes . . . the Executive Branch considers the Pérez-Vera Report 'the "official history"' for the Convention and 'a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it.'" 560 U.S. 1, 24 n.1, (2010) (citing Text & Legal Analysis).)

habitual residence: Proving habitual residence is an element of the petitioner's *prima facie* case. To establish that the child's removal or retention was wrongful, the petitioner must prove that the left-behind country ("Requesting State") was the child's habitual residence. Habitual residence is not defined by either the Convention or the International Child Abduction Remedies Act (ICARA), and is interpreted by courts according to its "ordinary meaning." (For more on Habitual Residence *see* Part [__], § [__].)

incoming cases: Incoming cases are those in which the child has been removed to or retained in the United States.

International Child Abduction Remedies Act (ICARA), 22 U.S.C.A. §§ 9001-9010**:** This federal legislation implements the Hague Convention in the United States and establishes procedures for bringing Convention cases in U.S. courts. ICARA is to be applied in conjunction with, and not in lieu of, the Convention. (ICARA should not be confused with the International Child Abduction Prevention and Return Act (ICAPRA), 22 U.S.C.A. §§ 9101-9141, which came into effect in 2014 and requires annual reporting on international child abduction and the success or failure of subsequent procedures for return, including compliance with the Hague Convention in Treaty Partner countries.)

outgoing cases: Outgoing cases are those in which the child has been removed from or retained outside of the United States and is located in another country at the time the petition is filed. This Guide does not address outgoing cases.

petition: The application filed by a party in either state or federal court seeking access to or return of a child who has been brought to the United States from a foreign country. The Convention refers only to "applications," making no reference to "petitions." ICARA makes a distinction between "application" and "petition," using *application* for that which is filed with a Central Authority and *petition* for that which is filed with a court. This Guide follows ICARA usage.

petitioner ("left-behind parent"): The petitioner is the person, institution, or any other body seeking return of or access to a child under the Convention. The petitioner may contact the U.S. Central Authority, either directly or through the Central Authority in the country where he or she is located, or may file a petition pursuant to the Hague Convention in either state or federal court. For purposes of this Guide, the petitioner will be located outside the United States. (A petitioner may also file a petition to establish or enforce rights of access, but such proceedings are beyond the scope of this Guide. *See* "Rights of Access," *infra*, and "Access Case," *supra*.)

preponderance of the evidence: "The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its nonexistence." 2 McCormick On Evid. § 339 (7th ed.) (citing Model Code of Evidence Rule 1(3)).

removal: The physical taking of a child, by a parent, relative, or other person, without the permission of a party with custodial rights.

Requested State ("removed-to country"): The country where the child is located and where the petition is filed. For the purpose of this Guide, the Requested State will always be the United States.

Requesting State ("left-behind country"): The country the child was removed from or retained outside of.

respondent ("taking parent" or "abducting parent"): The respondent is the person who removed or retained the child and must respond to the petition. For purposes of this Guide, this person will be located in the United States at the time the petition is filed and has alleged domestic violence by the petitioner.

retention: The keeping of a child, by a parent, relative, or other person, outside of a country beyond a previously agreed-upon time period. In such cases, initial removal of the child from the habitual residence was not wrongful.

return case: Cases in which a petition has been filed seeking return of a child to his or her habitual residence. Return is available under the Convention only in cases in which the petitioner had rights of custody at the time of removal or retention.

Text and Legal Analysis (*Appendix E*)**:** The Hague International Child Abduction Convention; Text and Legal Analysis was drafted by the U.S. State Department before the Convention was in force in the United States, and like the Pérez-Vera Explanatory Report, courts often rely on it for support in treaty interpretation. (In *Abbott v. Abbott*, for example, the U.S. Supreme Court clearly stated the decision was both supported and informed by the Text and Legal Analysis. 560 U.S. 1, 3 (2010).)

Treaty Partners: The Convention must be in force not only *in* each country involved in the case, but also *between* the countries. As of [date], the United States was a Treaty Partner with [#] Contracting States (including countries and territories). The U.S. State Department maintains a current list of U.S. treaty partners on their website at travel.state.gov.

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA): Is a Uniform Act drafted by the National Conference of Commissioners on Uniform State Laws addressing jurisdiction in custody matters. The UCCJEA sets forth standards for when courts may make an initial custody determination or modify orders from other states. It has been enacted in all states except Massachusetts. It also has been enacted in the District of Columbia and in the Virgin Islands.

CHECKLISTS

The following are checklists for wrongful removal cases brought in U.S. courts under the Hague Convention on the Civil Aspects of International Child Abduction.

JURISDICTION

For the court to have jurisdiction over a case, all four of these conditions must apply:

[ ] The child must be located in the same county (state) or district (federal) as the court where the petition is filed.

[ ] The child must be under age 16.

(Note: If at any point during the proceedings the child turns 16, the Convention ceases to apply and the case must be dismissed.)

[ ] The country from which the child was removed or retained must at the time have been a Contracting State to the Hague Convention, AND when the petition was filed country must have been a treaty partner with the United States.

[ ] The child cannot be the subject of another proceeding under the Hague Convention in state or federal court.

(Note: Any U.S. court custody proceedings involving the child must be stayed until the Convention case is resolved.)

PRIMA FACIE CASE FOR RETURN

[ ] The child was removed/retained from his or her country of habitual residence.

[ ] The petitioner has custody rights to the child (not rights of access) under the law of the child's habitual residence.

(Note: These custody rights may arise by operation of law, by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the child's habitual residence.)

[ ] The petitioner was actually exercising those custody rights at the time of the removal or retention—or would have exercised them but for the removal or retention.

If all three conditions are proved by a preponderance of the evidence, the petitioner has established that removal was wrongful under the meaning of the Convention. The court must next consider whether an exception to mandatory return applies.

EXCEPTIONS TO RETURN

The court has discretion to deny return of the child if any of five Convention exceptions is proved:

[ ] The petition was filed more than one year after the date of removal or retention AND the child is well-settled in the new environment.

(preponderance of the evidence)

[ ] The petitioner consented to the removal or retention OR the petitioner later acquiesced to the removal or retention.

(preponderance of the evidence)

[ ] Return would expose the child to a grave risk of physical harm OR return would expose the child to a grave risk of psychological harm (including exposure to domestic violence) OR return would expose the child to an otherwise intolerable situation.

(clear and convincing evidence)

[ ] The child objects to being returned AND the child is sufficiently mature, in age and degree, that his or her views should be taken into account.

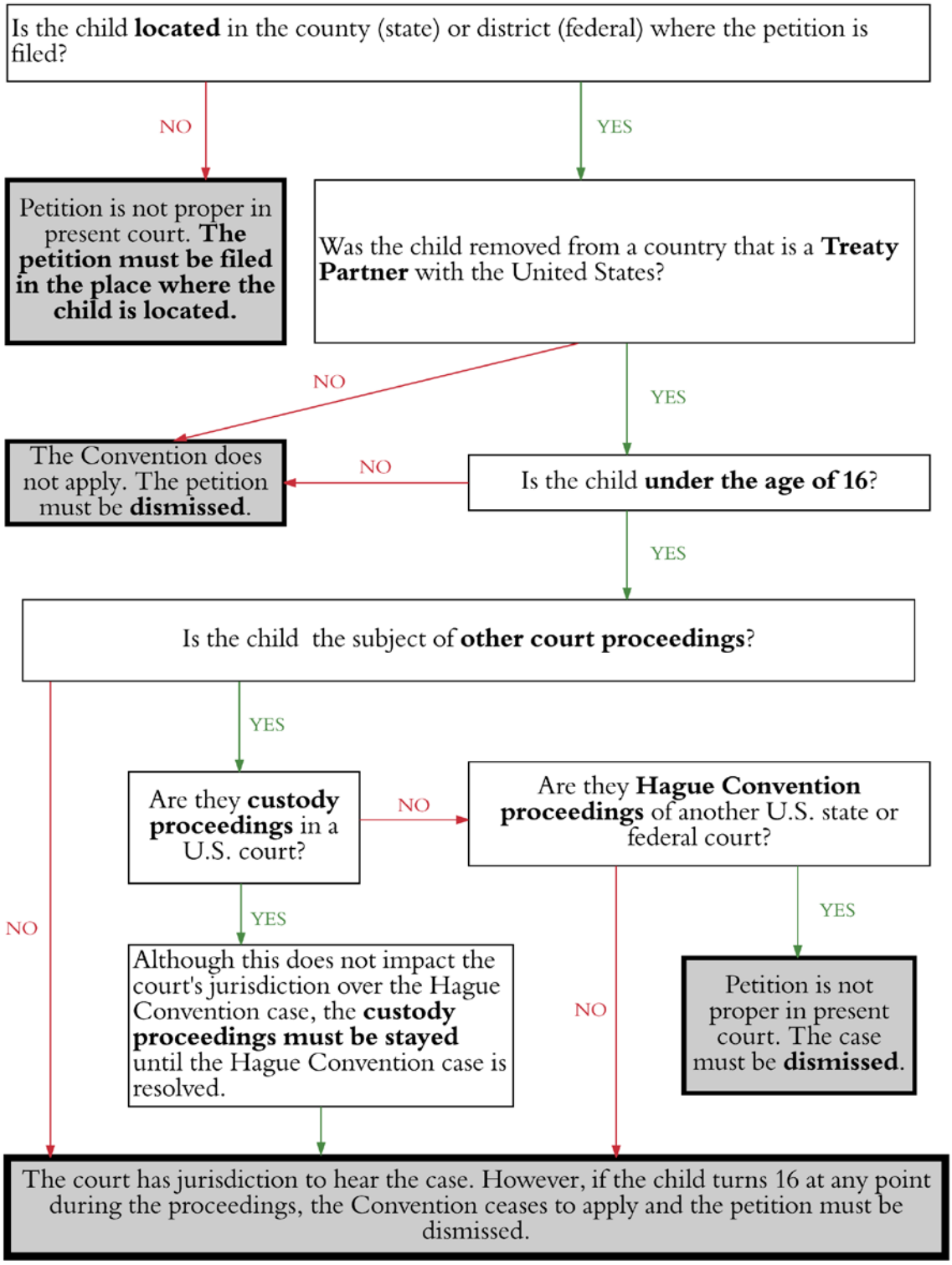
(preponderance of the evidence)

[ ] Return of the child would violate principles of human rights or fundamental freedoms.

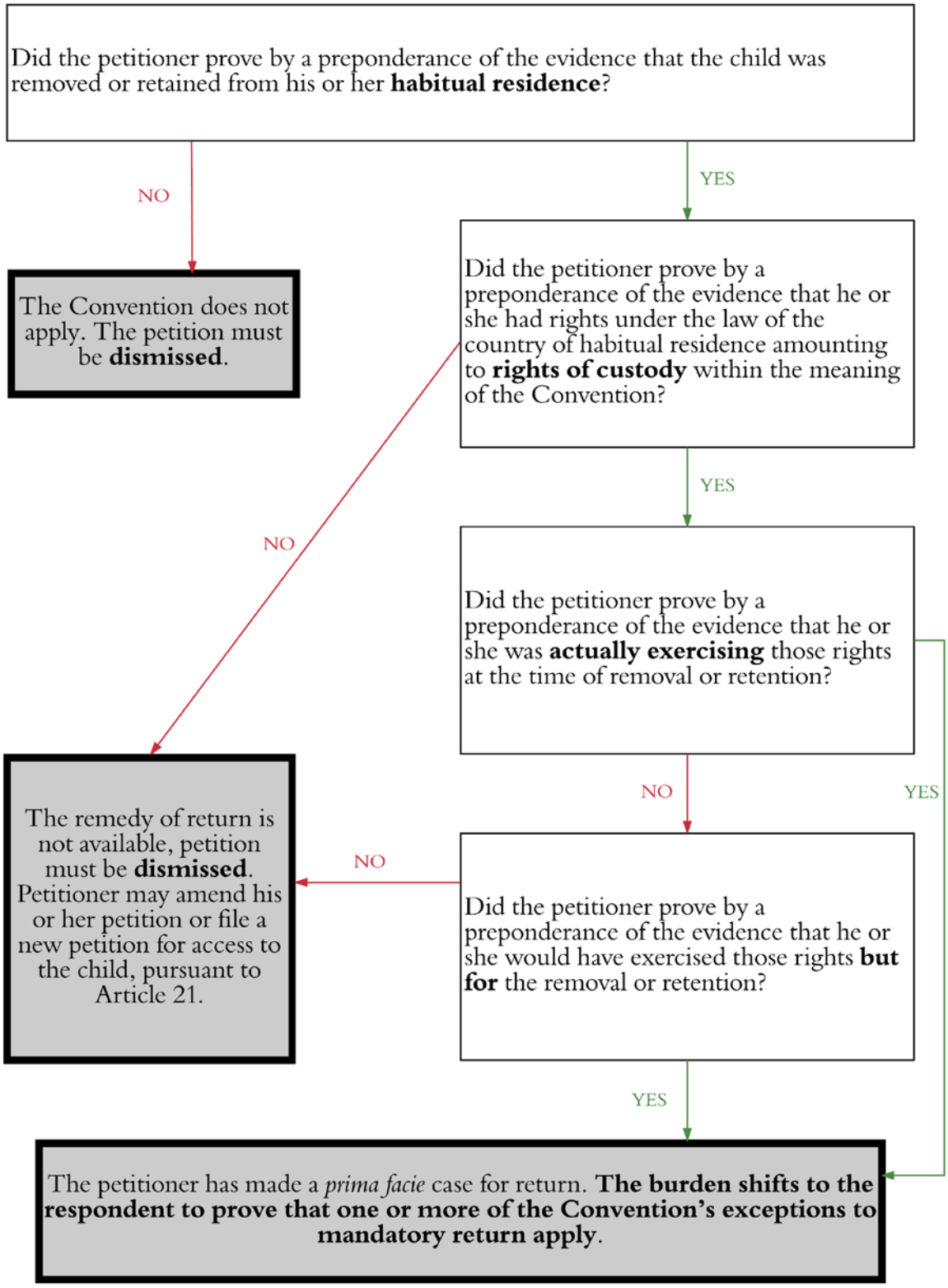
(clear and convincing evidence)

FLOWCHARTS

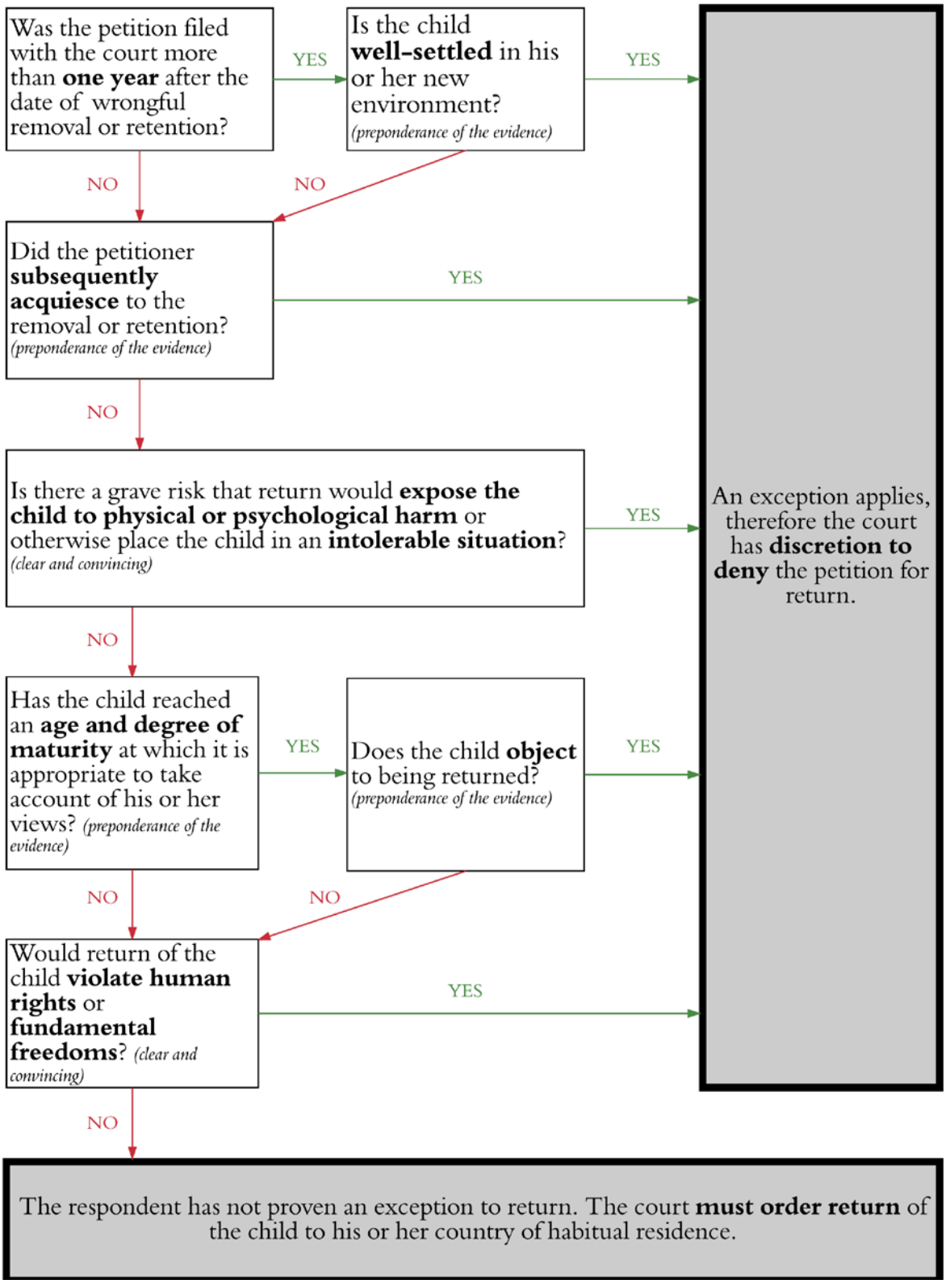
Jurisdiction



Petitioner's *Prima Facie* Case



Respondent's Defenses



PART I. OVERVIEW, JURISDICTION, AND PROCEDURE

§ 1.00. The Hague Convention and the Federal Implementing Legislation

The Hague Convention on the Civil Aspects of International Child Abduction[1]

- An international treaty.
- A mechanism for returning a wrongfully removed or retained child to his or her country of habitual residence.
- A mechanism to establish or enforce rights of access (such proceedings, however, are beyond the scope of this Guide).

The International Child Abduction Remedies Act (ICARA)[2]

- Federal legislation implementing the Hague Convention in the United States.
- Intended to be read in conjunction with, and not in lieu of, the Convention.
- Establishes burdens of proof for Convention elements and defenses.

The Convention's Limited Purpose

→ To **protect the *status quo ante*** under the law of a child's habitual residence.[3]

→ To **prevent forum shopping**: according to the Pérez-Vera Explanatory Report, a central purpose of the Convention is to prevent one parent from gaining an unfair advantage in a custody dispute by taking a child to another country in order to invoke that other country's jurisdiction.[4]

→ To provide a ***procedural*** mechanism for prompt return of a wrongfully removed or retained child to his or her habitual residence.

Cases brought under the Convention do not involve a *substantive* determination of custody.

§ 2.00. Jurisdiction Over a Hague Convention Case

[1] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501 (1981) [hereinafter Convention]. Full text attached hereto as Appendix A.

[2] 22 U.S.C.A. §§ 9001-9010. Full text attached hereto as Appendix B. ICARA establishes procedures for bringing child abduction cases in U.S. courts and should not be confused with the International Child Abduction Prevention and Return Act (ICAPRA), 22 U.S.C.A. §§ 9101-9141, which came into effect in 2014, and requires annual reporting on international child abduction and the success or failure of subsequent procedures for return, including compliance with the Hague Convention in Treaty Partner countries.

[3] *See Abbott v. Abbott*, 560 U.S. 1, 9 (2010) ("A return remedy does not alter the pre-abduction allocation of custody rights but leaves custodial decisions to the courts of the country of habitual residence."); *Karkkainen v. Kovalchuk*, 445 F.3d 280, 287 (3rd Cir. 2006).

[4] Elisa Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, ¶ 11 (1982) [hereinafter Pérez-Vera, Explanatory Report] ("[T]he situations envisaged are those which derive from the use of force to establish artificial jurisdictional links . . . with a view to obtaining custody of a child."), full text attached hereto as Appendix D. *See also* International Child Abduction Remedies Act, 22 U.S.C.A. § 9001(a)(2) ("Persons should not be permitted

When one parent removes or retains a child across international borders in violation of another's rights of custody, a petition for the child's return may be filed if:

- The child was removed or retained from a country that is a **Contracting State** to the Convention and a **Treaty Partner with the United States**.[5]
- The child is **under the age of 16**.[6]
- The child is located in the state and county or the federal district of the court.[7] (Petitioner may choose to file in either qualifying forum.[8])
- The child is not the subject of any other Hague Convention proceeding.

Bright-Line Rule

The Hague Convention ceases to apply and the case must be dismissed if the child turns 16 at any time during the proceeding.[9] However, other remedies may be available under domestic law.[10]

Best Practices

State the jurisdictional elements on the record before proceeding with adjudication:

(1) Is the Requesting State a Contracting State and a Treaty Partner with the United States?
(2) Is the child under age 16?
(3) Is the child located in the state and county or the federal district of the court?
(4) Is the child the subject of any other Hague Convention proceedings?

Contracting States and Treaty Partners

The Hague Convention applies if both countries involved are Contracting States ***and*** Treaty Partners.

- If either country involved is **not a Contracting State** *when the petition is filed*, the Convention does not apply, and the petition must be dismissed.[11]

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to obtain custody of children by virtue of their wrongful removal or retention."); Department of State Public Notice 957, Hague International Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,495 (1986) [hereinafter Text and Legal Analysis] ("The international abductor is denied legal advantage from the abduction . . ."), full text attached hereto as Appendix E.

[5] Convention, *supra* note 1, arts. 35, 38.

[6] *Id.* at art. 4.

[7] 22 U.S.C.A. § 9003(a). If the child is removed from the country or district where the petition is filed, the court loses jurisdiction to hear the case. For best practices to avoid removal of a child from the court's jurisdiction after the petition has been filed *see* Part [__], § [__], *infra*.

[8] 22 U.S.C.A. § 9003(b).

[9] Convention, *supra* note 1, art. 4. The court cannot proceed with a case once the child at issue turns 16—this is a bright-line rule regardless of the circumstances or the stage of a pending case. *See* Text and Legal Analysis, *supra* note 4, at 10,504 (the Convention itself is unavailable as the legal vehicle for securing return of a child 16 or older).

[10] Nothing in the Convention prohibits courts from applying domestic law that may provide remedies for children over the age of 16 when the Convention does not apply.

[11] Convention, *supra* note 1, art. 35.

- If the countries involved are **not Treaty Partners** *when the petition is filed*, the Convention does not apply, and the petition must be dismissed.[12]
- If either country was **not a Contracting State** *when the removal or retention occurred*, the Convention does not apply, and the petition must be dismissed.[13]
- If the countries involved were **not Treaty Partners** *when the removal or retention occurred*, the Convention might still apply.[14] If the court finds that the Convention does not apply, the petition must be dismissed.

Timing of Removal or Retention

The Convention applies only to wrongful removals or retentions occurring *after* the Convention has come into effect in each State;[15] however, it is not settled law whether removal or retention must *also* have occurred *after* the countries became Treaty Partners.

Role of the Central Authority

Each Contracting State designates a Central Authority that is charged with specific obligations delineated by the Convention. Central Authorities are directed to "co-operate with each other and promote co-operation amongst the competent authorities in their respective [countries] to secure the prompt return of children and to achieve the other objects of the Convention."[16]

In the United States, the U.S. State Department's Office of Children's Issues (OCI) serves as the Central Authority. OCI's website has a resource page for judges that includes links to primary resources, related criminal and civil laws, and information about the International Hague Network of Judges.

The petitioner can elect whether to file an application through the OCI ("Administrative Return") or to file directly with the court ("Judicial Return"). If the petitioner seeks assistance from the Requesting State's Central Authority, that Central Authority will forward an application to the

[12] *Id.* at art. 38 ("The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession.").
[13] *Id.* ("This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States."); *see also Viteri v. Pflucker*, 550 F. Supp. 2d 829, 835-36 (N.D. Ill. 2008) (citing *In re H.* and *In re S.*, [(1991)] 2 A.C. 476 (H.L.), consolidated appeals before the English House of Lords which went through an extensive analysis before holding that a removal/retention is "a single event" and "cannot be a continuing event"); *cf.* Text and Legal Analysis, *supra* note 4, at 10,504 (acknowledging both a strict and liberal interpretation of Article 35).
[14] *See Viteri*, 550 F. Supp. 2d at 837-39 (finding Convention applies when retention occurred **after** the United States and Peru **each** became a Contracting State but **before** they became Treaty Partners and the petition for return was filed **after** they became **Treaty Partners**). *Viteri*, a district court case, is the only case addressing retentions occurring after each country became a Contracting State but before those countries were Treaty Partners.
[15] Referred to as "entry into force." Note that a Contracting State's date of accession or ratification will **not** be the same date that the Convention enters into force in that State.
[16] Convention, *supra* note 1, art. 7.

OCI. The OCI has no power to order the child to be retuned, but it can help facilitate voluntary return of the child. If the petitioner proceeds via the OCI, the OCI will generally prescreen the application for jurisdictional issues before a petition is filed. If the petitioner files directly with the court, the petition will not be prescreened for jurisdiction defects. In either case, the best practice is to state the jurisdictional elements on the record before proceeding with adjudication.

While a case is pending, the court may request a report about the child's social background;[17] OCI can explain to a party what is required for the report, but the party is responsible for submitting the report directly to the court. OCI can also work with the Central Authority of the Requesting State to obtain "information of a general character as to the law of their [country]."[18]

When a court grants a petition for return, local competent authorities generally facilitate the return. However, OCI may become involved in facilitating return depending on the terms of the return order, or at the request of the local competent authority or foreign Central Authority.

OCI's Obligations

OCI has the same obligations under the Convention regardless of whether the petitioner files through OCI or directly with the court.

Stay of Custody Proceedings

Any proceeding addressing the merits of custody in the Requesting State *must be stayed* pending the outcome of the Hague Convention case:

> After **receiving notice** of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which [the child] has been retained **shall not decide on the merits of rights of custody** until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.[19]

[17] *Id.* at arts. 7(d); 13.

[18] *Id.* at art. 7(e).

[19] *Id.* at art. 16 (emphasis added). The impact this Article would have on child dependency proceedings in U.S. courts has not been addressed; however, domestic courts have power under ICARA to protect the well-being of the child involved. 22 U.S.C.A. § 9004(a).

Under the Convention, "notice" for purposes of Article 16 does not specifically require that an application for return already be filed with the court; rather, proceedings must be stayed on notice that a wrongful removal or retention *has been alleged*.[20]

After the Hague Convention proceeding has concluded or if a petition for return is not filed within a reasonable time,[21] any actions regarding dissolution, parentage, or other custody issues may resume or be filed and litigated. If there are questions regarding jurisdiction over custody, the court presiding over the custody case must apply the relevant domestic law to determine jurisdiction.

Determining Custody Jurisdiction

→ The Hague Convention case does not determine jurisdiction for, nor does it impact the substantive issues of, a custody proceeding.

→ If a child is returned to his or her habitual residence outside of the United States, the U.S. court presiding over the custody case will likely find that it does not have jurisdiction to determine or modify custody.

→ If the petition for return is denied, a domestic court presiding over the custody case should refer to the UCCJEA, [state law codifying UCCJEA], to determine whether it has jurisdiction to adjudicate custody. (See §2.00, Role of the Uniform Child Custody and Enforcement Act *infra*.)

Removal and Abstention

Removal of civil actions from state court to federal court is governed by 28 U.S.C.A. § 1441:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States

[20] *See* Convention, *supra* note 1, art. 16; s*ee also* Text and Legal Analysis, *supra* note 4 at 10,509 ("A court may get notice of a wrongful removal or retention in some manner other than the filing of a petition for return, for instance by communication from a Central Authority, from the aggrieved party (either directly or through counsel), or from a court in a Contracting State which has stayed or dismissed return proceedings upon removal of the child from that State.").

[21] There is little guidance as to what would constitute a "reasonable time" for a petition to be filed following notice. *See* Pérez-Vera, Explanatory Report, *supra* note 4, at ¶ 121. In some cases, notice may occur simultaneously with filing the petition. But if a respondent receives notice before the petition is filed and any time has passed since notice was effected, the court will need to determine based on the circumstances of a particular case whether the delay in filing was reasonable or constitutes inaction by a potential petitioner. If delay in filing is due to the parties' attempt at alternative dispute resolution of Hague Convention issues or administrative delays, a court may find such delay reasonable. *See* Text and Legal Analysis, *supra* note 4 at 10,509.

> for the district and division embracing the place where such action is pending.[22]

In the United States, both state and federal district courts have original and concurrent jurisdiction in cases arising under the Convention.[23]

If the petitioner files in state court, the respondent has the right, pursuant to the federal removal statute, to file a notice of removal in federal district court.[24]

Procedure for the removal of a civil action is governed by 28 U.S.C.A. § 1446, which requires a respondent to file a notice of removal within 30 days after the receipt of the petition.[25]

Abstention may be appropriate for a federal court in some circumstances.

- If the Hague Convention case has **already been raised and litigated** in state court, abstention by the federal court would be appropriate.[26]
- If the Hague Convention case **has not been raised** or has been **raised but not litigated** in state court, courts have largely found abstention doctrines do not apply.[27]

Key Points

→ Abstention doctrines are triggered for a federal court if the Hague Convention petition is in the process of being **litigated in state court**.

→ However, an ongoing state court **custody proceeding** does *not* necessitate abstention by the federal court.

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[22] 28 U.S.C.A. § 1441.

[23] 22 U.S.C.A. § 9003(a).

[24] ICARA does not prohibit removal of state court Convention proceedings to federal court. *See In the Matter of Mahmoud*, CV 96 4165 (RJD), 1997 WL 43524, at *1 (E.D.N.Y. Jan. 24, 1997) ("The federal removal statute [] authorizes removal by the defendant to federal court if original jurisdiction exists in the district court, except 'as otherwise expressly provided.' Neither the Hague Convention nor ICARA prohibits removal.").

[25] 28 U.S.C.A. § 1446(b). Although the federal removal statute gives a defendant (or respondent in the case of the Convention) 30 days to file a notice of removal, to avoid triggering federal-court abstention, a respondent will likely have to file a notice sooner due to the expedited nature of Convention proceedings.

[26] *Yang v. Tsui*, 416 F.3d 199, 202 (3d Cir. 2005) (citing *Copeland v. Copeland*, 97-1665, 1998 WL 45445, at *1 (4th Cir. Feb. 6, 1998), *Cerit v. Cerit*, 188 F. Supp. 2d 1239, 1244 (D. Haw. 2002)); *see generally Younger v. Harris*, 401 U.S. 37 (1971) (establishing the Younger Abstention Doctrine); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (establishing the Colorado River Abstention Doctrine).

[27] *Yang*, 416 F.3d at 202; *see also Barzilay v. Barzilay*, 536 F.3d 844, 850 (8th Cir. 2008) ("The pendency of state custody proceedings therefore does not support *Younger* abstention in the Hague Convention context."); *Gaudin v. Remis*, 415 F.3d 1028, 1034 (9th Cir. 2005) ("[A]bstention under [*Younger* and *Colorado River*] doctrines is equally inappropriate in the case of an ICARA petition."); *Silverman v. Silverman*, 338 F.3d 886, 891 (8th Cir. 2003) ("[A]bstention does not apply in Hague Convention cases").

Full Faith and Credit, *Res Judicata*, and Collateral Estoppel

Courts must accord full faith and credit to the judgment of any other U.S. court with jurisdiction that orders or denies return of a child pursuant to the Convention.[28]

As with abstention, discussed above, this requirement does not apply to decisions made during custody proceedings in state court related to the child at issue in the Hague Convention petition.[29] Although ICARA requires full faith and credit deference only to judgments of U.S. courts,[30] neither ICARA nor its legislative history indicates Congress intended to bar U.S. courts from giving foreign judgments deference under principles of international comity.[31] Moreover, ICARA specifically recognizes the need for uniform international interpretation of the Convention.[32]

A final custody determination in state court does not eliminate a party's right to a determination pursuant to his or her claim under the Hague Convention,[33] but the court presiding over a Hague Convention case has discretion to consider a court's findings made during custody proceedings.[34]

Federal courts have the power to vacate state custody determinations and other state court orders that contravene or frustrate the Hague Convention's purposes.[35]

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[28] 22 U.S.C.A. § 9003(g).

[29] *See Silverman*, 338 F.3d at 893 (holding that when the state-court custody determination addressed only matters of state custody law and did not address issues arising under the Hague Convention, the federal appellate court was not required to uphold the state-court ruling because that ruling was not entitled to full faith and credit, did not invoke protection pursuant to issue or claim preclusion, and was not subject to the *Rooker-Feldman* Doctrine).

[30] *See* 22 U.S.C.A. § 9002(8) (defining "State" to mean "the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States").

[31] *Diorinous v. Mezitis*, 237 F.3d 133, 143 (2d Cir. 2001) ("Even if the limited scope of [ICARA] implies a legislative preference not to extend formal full faith and credit recognition to foreign judgments, we see nothing in ICARA or its legislative history to indicate that Congress wanted to bar the courts of this country from giving foreign judgments the more flexible deference normally comprehended by the concept of international comity."); *see also Velez v. Mitsak*, 89 S.W.3d 73, 82 (Tex. App.—El Paso 2002), *opinion clarified*, 89 S.W.3d 84 (Tex. App.—El Paso 2002, no pet.) ("The exercise of comity is at the heart of the Convention.").

[32] 22 U.S.C.A. § 9001(b)(3)(B).

[33] *Holder v. Holder*, 305 F.3d 854, 865 (9th Cir. 2004) ("It would also undermine the very scheme created by the Hague Convention and ICARA to hold that a Hague Convention claim is barred by a state court *custody* determination, simply because a petitioner did not raise his *Hague Convention* claim in the initial custody proceeding.") (emphasis in the original).

[34] Convention, *supra* note 1, art. 17 (". . . but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying the Convention."); *see also Miller v. Miller*, 240 F.3d 392, 399 (4th Cir. 2000) ("[I]t would be an appropriate—albeit discretionary—judicial exercise to 'take account of the reasons' for that decree in appraising the merits of this abduction claim"); *Rivera Rivas v. Segovia*, 2:10-CV-02098, 2010 WL 5394778, at *2 (W.D. Ark. Dec. 28, 2010) ("While this Court, in its discretion, may take into consideration the reasoning behind the Arkansas State Court's findings . . . this Court is not bound by those findings and limits itself to consideration of only the narrow question presented by Rivas's Petition under the Convention.").

[35] *See Castro v. Martinez*, 872 F. Supp. 2d 546, 552-53 (W.D. Tex. 2012) ("Children who otherwise fall within the scope of the Convention are not automatically removed from its protections by virtue of a judicial decision awarding custody to the wrongdoer. This is true whether the decision as to custody was made, or is entitled to recognition, in the State to which the child has been taken. Under Article 17 that State cannot refuse to return a child solely on the

Role of the Uniform Child Custody and Enforcement Act

The Hague Convention **does not address jurisdiction over custody issues**. Rather, the Convention is concerned only with providing an expedited remedy—prompt return of children to their habitual residences when appropriate.

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[36] was developed to promote uniformity in U.S. state courts regarding jurisdiction and enforcement of custody orders. It sets forth standards for when courts may make an initial custody determination or modify orders from other U.S. states, and requires an analysis independent from Hague Convention proceedings. The UCCJEA is not relevant to the resolution of a case arising under the Convention. However, ancillary custody aspects of a Convention case may be subject to the UCCJEA.[37]

Under the UCCJEA, foreign countries are treated like U.S. states. In certain circumstances the UCCJEA may therefore apply in a case involving foreign custody orders—for example, when enforcement of a foreign custody order is sought.

International Treaties and the Supremacy Clause

The U.S. Constitution provides that international treaties, along with the Constitution and federal statutes, are the supreme law of the land.[38] If conflict exists between an international treaty and a federal statute, the most recent provision applies.[39]

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basis of a court order awarding custody to the alleged wrongdoer made by one of its own courts or by the courts of another country. This provision is intended to ensure, inter alia, that the Convention takes precedence over decrees made in favor of abductors before the court had notice of the wrongful removal or retention.") (quoting Text and Legal Analysis, *supra* note 4 at 10,503-10,506).

[36] The UCCJEA (replacing the Uniform Child Custody Jurisdiction Act) is a Uniform Act drafted by the National Conference of Commissioners on Uniform State Laws. It has been enacted by every state except Massachusetts and by the District of Columbia and the Virgin Islands.

[37] *See In re T.L.B.*, 272 P.3d 1148, 1155 (Colo. App. 2012) (holding that the UCCJEA can be applied to determine jurisdiction between countries after return is denied under the Convention).

[38] U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land.").

[39] *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889).

§ 3.00. When the Convention Does Not Apply

If the Convention is not applicable—either because the court does not have jurisdiction under the Convention or the petitioner fails to prove the *prima facie* case—all issues regarding custody, jurisdiction over the child, or whether any foreign order or agreement is enforceable can be addressed in state court and will be subject to domestic law.

The Convention does not apply to cases in which a child is abducted from one state to another within the United States, regardless of the parents' immigration statuses.[40] The UCCJEA may be implicated in intrastate cases and can be addressed in state court proceedings.

§ 4.00. Procedure

Authority

Adjudication of a case under the Hague Convention will necessarily require analysis of the **treaty text**.[41] The court may also consider other authorities:

- Drafting history[42] and signatories' intent[43] (the Pérez-Vera Explanatory Report)
- Executive branch interpretation[44] (the U.S. State Department Report)
- Interpretations of sister signatories[45] (other Contracting States)
- Federal circuit court precedent (not binding in state court)[46]
- The case law of sister circuits[47]

A court's inquiry in a Hague Convention case will be shaped, in part, by decisions of courts in other Contracting States.[48] The U.S. Supreme Court has made clear that the opinions of "sister signatories" are entitled to "considerable weight" when interpreting any treaty.[49]

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[40] Text and Legal Analysis, *supra* note 4 at 10,504.
[41] *Medellin v. Texas*, 552 U.S. 491, 506 (2008).
[42] *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989).
[43] *Yaman v. Yaman*, 730 F.3d 1, 10 (1st Cir. 2013) (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982)).
[44] *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (citing *Sumitomo Shoji Am., Inc.*, 457 U.S. at 185).
[45] *Id.* at 16 (citing *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999)).
[46] *Yee v. City of Escondido*, 274 Cal. Rptr. 551, 552 (Ct. App. 1990) ("While federal circuit court precedent on issues of federal law is certainly entitled to substantial deference, it is not binding.").
[47] *Berezowsky v. Ojeda*, 765 F.3d 456, 474 (5th Cir. 2014) (considering how sister circuits have interpreted the habitual residence argument).
[48] *See Abbott*, 560 U.S. at 9-10 ("This Court's inquiry is shaped by the text of the Convention; the views of the United States Department of State; *decisions addressing the meaning of "rights of custody" in courts of other contracting states*; and the purposes of the Convention.") (emphasis added).
[49] *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) ("The opinions of our sister signatories, we have observed, are entitled to considerable weight.) (internal quotations omitted); *Air France v. Saks*, 470 U.S. 392,

In both *Abbott v. Abbott* and *Lozano v Montoya Alvarez*, the Supreme Court reiterated the importance of sister signatories' decisions specifically in Hague Convention cases, where Congress emphasized the importance of "uniform international interpretation."[50] In discussing the considerable weight given to the opinions of sister signatories, the *Abbott* Court stated: "The principle applies with special force here, for Congress has directed that uniform international interpretation of the Convention is part of the Convention's framework."[51] Similarly, the Supreme Court in *Lozano* said that it was "inappropriate to deploy background principles of American law automatically when interpreting a treaty," and noted that "Congress explicitly recognized the need for uniform international interpretation."[52]

The Convention should be interpreted in a manner consistent with the shared expectations of other treaty partners. Although the interpretation of the State Department should be given great weight, so should the interpretations of treaty partner signatories. In both *Abbott* and *Lozano* the U.S. Supreme Court relied heavily on the case law from other treaty countries when deciding the cases before it.

Petitioner Commences the Action

Note: A Return Action does not actually commence within the meaning of the Convention until the petition is filed with the court.[53]

The petitioner may submit an application for return through the Requesting State's Central Authority or through the U.S. Central Authority (the OCI).

Alternatively, a petitioner may file a petition for return directly with the court, bypassing both countries' Central Authorities.

The content of an application for return of a child is governed by Article 8 of the Convention.

> **The application shall contain** –
> a) information concerning the identity of the applicant, of the child, and of the person alleged to have removed or retained the child;
> b) where available, the date of birth of the child;

404 (1985) ("In determining precisely what causes can be considered accidents, we find the opinions of our sister signatories to be entitled to considerable weight.") (internal quotations omitted).
[50] *See Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1238-39 (2014); *Abbott*, 560 U.S. at 16. *See also* 22 U.S.C.A. § 9001(b)(3)(B) (recognizing the need for uniform international interpretation).
[51] *Abbott*, 560 U.S. at 16 (internal quotations omitted).
[52] *Lozano*, 134 S. Ct. at 1233–34 (internal quotations omitted).
[53] 22 U.S.C.A. § 9003(f)(3); *see also Wojcik v. Wojcik*, 959 F. Supp. 413, 418 (E.D. Mich. 1997) (finding contact with the Central Authority does not commence the proceedings).

c) the grounds on which the applicant's claim for return of the child is based;
d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated[54] copy of any relevant decision or agreement;
f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
g) any other relevant document.[55]

Timing of Respondent's Answer

→ There is no prescribed time within the Convention or ICARA for a respondent to file an answer to a petition for return.
→ Courts commonly defer to local court rules to govern the time for filing a response.

Expedited Nature of Proceedings

The Convention directs Contracting States to "use the most expeditious procedures available"[56] and courts to "act expeditiously in proceedings for the return of children."[57]

The Convention permits the petitioner or the Central Authority of the Requesting State to seek an explanation of "reasons for the delay" if the judicial or administrative authority in the Requested State has not reached a **decision within six weeks** from the date proceedings commenced.[58]

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[54] The Convention does not define "authenticate." Rule 901 of the Federal Rules of Evidence governs authenticating or identifying evidence in federal courts and provides: "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901. [Cite to corresponding state rule]. Importantly, Article 8 of the Convention permits inclusion of "an authenticated copy of any relevant decision or agreement," but under Article 30, any application in accordance with the terms of the Convention and any documents or other information attached to the application are admissible with no reference to authentication. *See also* 22 U.S.C.A. § 9005 ("[N]o authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court."). For more on Authentication, *see* Part [__], § [__] *infra*.

[55] Convention, *supra* note 1, art. 8. (emphasis added).

[56] *Id.* at art. 2.

[57] *Id.* at art. 11. *See also Chafin v. Chafin*, 133 S. Ct. 1017, 1027 (2013) ("[W]hether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible . . .").

[58] Convention, *supra* note 1, art. 11.

This has been interpreted to imply a six-week time frame from commencement to completion.[59] Generally, courts have broad discretion to expedite Convention cases,[60] but expediency should not take priority over a party's due process rights.[61] The Convention's expediency requirement has not been construed as a license to conduct full hearings *ex parte*.[62]

Frequently, return cases involve two hearings:

- ***First Hearing***: typically the respondent's first appearance before the court, after the petition has been served.
    - In some cases, the respondent may be served with the petition and ordered to appear in court the same day or shortly thereafter.
    - The respondent may request time to secure an attorney or legal advice and prepare for any impending evidentiary hearing. To assure a fair hearing, requests for more time are frequently granted.
    - The court may also choose to set a timeline for the case at this time.
    - The court will determine where the child will remain while the matter is pending. (*See* Part [__], § [__]).
- ***Second Hearing***: often the evidentiary hearing or trial on the merits.
    - Due to the expedited nature of these proceedings, many courts try to conduct a full evidentiary hearing in one day. However, the length of the case will vary with the complexity of the issues.
    - If more time is necessary for each party to present their evidence, the court may conduct the evidentiary hearing over multiple days.
    - Courts are encouraged to give priority to Hague Convention cases and adjust their calendars accordingly.

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[59] The Convention does not specifically require proceedings to be completed within six weeks.

[60] *See West v. Dobrev*, 735 F.3d 921, 929 (10th Cir. 2013) (interpreting Articles 11 and 18 to mean that the court has a "substantial degree of discretion in determining the procedures necessary" to resolve a Hague Convention case); *Dionysopoulou v. Papadoulis*, 8:10-CV-2805-T-27MAP, 2010 WL 5439758, at *2 n.1 (M.D. Fla. Dec. 28, 2010) ("In keeping with the mandate to expedite ICARA petitions, the Court, in its discretion, denied Respondent's request for discovery.").

[61] *See Velez v. Mitsak*, 89 S.W.3d 73, 84 (Tex. App.—El Paso 2002, no pet.), *opinion clarified*, 89 S.W.3d 84 (Tex. App.—El Paso 2002, no pet.) ("It was surely not contemplated by the drafters of the Convention that the provision requiring contracting states to use the most expeditious procedures available to implement the objectives of the Convention would override a party's right to present evidence on possible defenses.").

[62] *See Livanos v.* Livanos, 333 S.W.3d 868, 880 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (rejecting the argument that neither the Convention nor ICARA's emphasis on prompt return abdicate the notice requirement); *Morgan v. Morgan*, 289 F. Supp. 2d 1067, 1069, 1071 (N.D. Iowa 2003) (issuing an *ex parte* temporary restraining order under state law that prevented the respondent mother and her significant other from removing the child named in the petition from the state and ordering the respondent to "provide for the appearance and the physical presence of the minor child" at the show-cause hearing);*Wanninger v. Wanninger*, 850 F. Supp. 78, 79 (D. Mass 1994) (denying a request to issue an *ex parte* order in place of a writ of habeas corpus, instead issuing an order compelling attendance).

Best Practices
Scheduling a case management conferences and creating a timetable for discovery and/or motions can help ensure the matter moves quickly.

Immediate Physical Custody: Provisional Remedies

Before a hearing on the merits of the case, a petitioner may file an *ex parte* motion or application seeking immediate physical custody of the child. The motion may be filed at the same time the petition is filed or immediately preceding the petition and may request that the child be picked up by the U.S. Marshal or local law enforcement before or at the time the respondent is served with the petition.

ICARA empowers the court to "take or cause to be taken measures . . . to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition."[63] However, ICARA **limits the court's authority to remove a child from the person with physical control over that child** by requiring that "the applicable requirements of State law [be] satisfied" before ordering removal.[64]

For cases in which the court is concerned that the respondent is a flight risk, the court may employ several tools to ameliorate the risk that the parent will abscond with the child. The Court may order respondents to surrender passports for themselves and their children. Additionally, the court may restrain or prohibit removal of the children from the forum county while the case is pending or require respondents to post an appropriate bond.[65]

If the child's safety in the respondent's care is an issue, the court must consider alternate placement for the child while the case is pending. The child can be placed with the petitioner if the petitioner is in the United States and the child is not at risk in the petitioner's care. If the court chooses to place the child with the petitioning parent, measures should be taken to ensure the petitioning parent does not simply flee with the child before the petition is resolved.

If the child cannot be placed with the petitioner, the parties may be able to identify a safe, local, willing, and able alternative placement option pending the case's resolution. Before placing the child, the court should confirm that any person under consideration would be an appropriate placement option. If no safe placement options exist, the court may have to involve the [State's Office of Child Welfare].

[63] 22 U.S.C.A. § 9004(a).
[64] 22 U.S.C.A. § 9004(b).
[65] *See* [relevant state law if any].

Transferring Custody of Child

→ As noted above, the child should not be removed from the respondent's custody while the Hague Convention case is pending unless removal would be required under state law.[66] (*For example*: removal pursuant to a court order under [state statute] upon a finding of [statute requirement for removal].)

→ If transferring possession of the child is necessary, it should be done with as little trauma to the child as possible.

→ If transferring possession of the child to a parent who is the victim of domestic violence, the court should consider the timing and manner of the transfer, allowing that parent to implement safety measures before taking possession of the child.

→ U.S. Marshals and local law enforcement may be engaged to securely transfer possession of the child when necessary.

Notice and Service

The Convention is silent as to procedures for notice and service. Under ICARA, "[n]otice of an action . . . shall be given in accordance with the applicable law governing notice in interstate child custody proceedings."[67] The UCCJEA requires that notice be given in a manner reasonably calculated to give actual notice but allows for notice by publication when other means are not effective.[68] The UCCJEA further provides that notice may be given "in a manner prescribed by the law of this State for service of process or by the law of the state in which the service is made" and "[p]roof of service may be made in the manner prescribed by the law of this State or by the law of the State in which the service is made."[69]

Notice to Physical Custodian

If the respondent does not have physical custody of the child, notice shall be given not only to the parent but also to whomever has physical custody of the child—for example, child protective services or other contracting foster care service.

Intervention

Intervention may be allowed in Hague Convention cases.[70] In *Walsh v. Walsh*, the First Circuit held that some cases might require intervention on behalf of children, even at late stages in the

[66] 22 U.S.C.A. § 9004(b).
[67] 22 U.S.C.A. § 9003(c).
[68] UCCJEA § 108. *[Confirm consistency in language and cite to state law codifying UCCJEA.]*
[69] UCCJEA § 108. *[Confirm consistency in language and cite to state law codifying UCCJEA.]*
[70] *See Walsh v. Walsh*, 221 F.3d 204, 213 (1st Cir. 2000); *see also In re D.T.J.*, 956 F. Supp. 2d 523, 527 (S.D.N.Y. 2013) (appointing counsel for child and then granting child's motion to intervene as a party to the case). *But see*

proceedings.[71] The court noted *in dicta* that it doubted very many cases would require intervention on behalf of the children involved, but "refuse[d] to endorse a blanket rule . . . that intervention is impermissible in Hague Convention cases."[72] The *Walsh* court also held that it is within the district court's discretion to limit the scope of the intervention.[73]

In *Sanchez v. R.G.L.*, the Fifth Circuit rejected the assertion of the children, whose return was at issue in the case, that they should be permitted to intervene.[74] The court stated that its concern was to ensure the children's interests were represented, which could be achieved by appointing a guardian *ad litem* and did not require intervention.[75]

In federal courts, intervention is governed by Rule 24 of the Federal Rules of Civil Procedure. In [State] state courts, intervention is governed by [State Rule].

Appointing an Attorney or Guardian *ad Litem*

[State specific information regarding appointment of attorneys or guardians *ad litem* in family court cases, including relevant law]. In Federal Court, Federal Rule of Civil Procedure 17(c)(2) provides that a guardian *ad litem* must be appointed to protect a minor who is unrepresented in an action.[76]

Although traditionally utilized in family law cases, courts have appointed attorneys and guardians *ad litem* in Hague Convention cases.[77] The Fifth Circuit in *Sanchez v. R.G.L.* noted that "[g]ranting the children representation in appropriate situations is consistent with the [U.S.] Supreme Court's view that 'courts can achieve the ends of the Convention and ICARA—and protect the well-being of the affected children—through the familiar judicial tools . . . .'."[78] The court in *Sanchez* ordered the court below to appoint a guardian *ad litem* on remand because it found that the interests of the children in that case were unrepresented.[79]

Sanchez v. R.G.L., 761 F.3d 495, 508 (5th Cir. 2014) (finding children were entitled to appointment of guardian *ad litem* but not entitled to intervene).

[71] *Walsh*, 221 F.3d at 213.

[72] *Id.*

[73] *Id.* (limiting intervention to a discrete issue—application of the fugitive disentitlement doctrine—which did not require additional fact finding).

[74] *Sanchez*, 761 F.3d at 508.

[75] *Id.*

[76] Fed. R. Civ. P. 17(c)(2).

[77] *See Vasconcelos v. Batista*, 512 Fed. Appx. 403, 406 (5th Cir. 2013); *Souratgar v. Lee*, 720 F.3d 96, 101 (2d Cir. 2013); *Gaudin v. Remis*, 415 F.3d 1028, 1032 (9th Cir. 2005); *Danaipour v. McLarey*, 286 F.3d 1, 8 (1st Cir. 2002); *Wasniewski v. Grzelak-Johannsen*, 549 F. Supp. 2d 965, 977 (N.D. Ohio 2008) (appointing counsel in dual role as guardian *ad litem* and the child's attorney). *But see Haimdas v. Haimdas*, 401 F. App'x 567, 568 (2d Cir. 2010) (finding district court did not abuse discretion by denying respondent's request to appoint guardian *ad litem* for children); *Clarke v. Clarke*, No. CIV. A. 08-690, 2008 WL 2217608, at *4 (E.D. Pa. May 27, 2008) (finding circumstances under which PA law permits appointing a guardian *ad litem* did not apply in this case).

[78] *Sanchez*, 761 F.3d at 508 (quoting *Chafin v. Chafin*, 133 S. Ct. 1017, 1026 (2013)).

[79] *Id.*

Although the Hague Convention does not include a best interests standard, the conditions for appointing an attorney or guardian *ad litem* is often based on the child's best interests. Courts may look to family law statutes to guide them in such appointments, but **appointment of an attorney or guardian *ad litem* does not expand the return inquiry to the best interests of the child**.

Pursuant to the [State] Family Code, the role of an [attorney for the child or guardian *ad litem* is . . .]

The court may appoint an attorney or guardian *ad litem sua sponte* or a party may request that an attorney or guardian *ad litem* be appointed. If the court is concerned about the presence of domestic violence in a particular case, the court should consider appointing a professional with training in the dynamics of domestic violence and experience with domestic violence cases.

The litigants' ability to pay for an attorney or guardian *ad litem's* services is an important consideration because cost may be a practical barrier to appointment of an attorney or guardian *ad litem* in a particular case. In cases of domestic violence, courts should also keep in mind that the battered party may appear on paper to have financial resources but may not actually have access to those resources as a result of the batterer's financial control.

To ameliorate financial barriers, courts have made *pro bono* appointments.[80] In other cases, courts have ordered non-prevailing respondents to pay those costs as part of an award of attorney's fees and costs, as authorized by ICARA section 9007.[81] If a court is considering costs and fees pursuant to ICARA, it must first determine that the costs are necessary and appropriate.[82]

Best Practices

→ Courts should use clear language specifying the attorney or guardian *ad litem*'s role in the case.
→ Courts should be sure to limit the role to issues raised under the Convention.
→ Clear language and articulated limitations will help avoid a best interests analysis or custody and parenting-time recommendations from the attorney or guardian *ad litem*, neither of which are relevant under the Convention.

[80] *See Wasniewski v. Grzelak-Johannsen*, 549 F. Supp. 2d 965, 977 (N.D. Ohio 2008); *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1343 n.5 (S.D. Fla. 2002).
[81] *See Castro v. Martinez*, 872 F. Supp. 2d 546, 558 (W.D. Tex. 2012); *Taylor v. Hunt*, No. 4:12CV530, 2013 WL 620934, at *10 (E.D. Tex. Jan. 11, 2013), *report and recommendation adopted*, No. 4:12CV530, 2013 WL 617058 (E.D. Tex. Feb. 19, 2013). Note, ICARA does not provide similarly for a non-prevailing petitioner to pay attorney fees and costs.
[82] 22 U.S.C.A. § 9007(b)(3); *see also* Convention, *supra* note 1, art. 26. For more on Attorney Fees and Costs *see* Part [__], § [__] *infra*.

Preemptive Stay or Dismissal for Absent Child

If the court has reason to believe the child at issue has been taken out of the state, the proceedings may be stayed or the petition for return of the child may be dismissed.[83]

Discovery, Evidence, and the Evidentiary Hearing

Applicable Rules

→ In federal court, federal evidentiary and procedural rules govern cases.

→ In state court, state evidentiary and procedural rules govern cases.

Although the rules of evidence and civil procedure apply in Hague Convention cases, these rules may be relaxed to accommodate the expedited nature of the proceedings.[84] Courts may limit discovery or relax the evidentiary standards *to some degree*.[85] Even with relaxed evidentiary standards, courts will typically attempt to adhere to the rules to the greatest extent possible.[86]

In federal cases, a magistrate judge may handle the evidentiary hearing, making findings of fact and providing a recommendation to the district court.[87]

Due Process

→ Expedited proceedings should not come at the expense of a party's right to due process.

→ Although expedited, Hague Convention proceedings still require the court to make findings of fact to support legal conclusions or orders.

■ Authentication (Article 30)

The Convention provides that "documents and any other information appended [to an application or petition] or provided by a Central Authority" are admissible in court (Article 30).[88] ICARA provides that a Hague Convention application, petition, and any documents included with or

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[83] Convention, *supra* note 1, art. 12. Unlike family court cases, the court loses jurisdiction in a Hague Convention case if the child is no longer present in the district or county where the court is located. For best practices to avoid removal of a child from the court's jurisdiction after the petition has been filed. *See* Part [__], § [__], *supra*.

[84] *See id*. at art. 30; 22 U.S.C.A. § 9005; s*ee also Danaipour v. McLarey*, 386 F.3d 289, 296 (1st Cir. 2004) (noting that summary proceedings may occur under the Convention but that the applicability of the Federal Rules of Evidence were not directly raised on appeal in this case).

[85] Courts have taken varied approaches to relaxed evidentiary standards. For examples, *see* Part [__], Case Notes, Procedure: Relaxed Evidentiary Standards *infra*.

[86] *See Danaipour*, 386 F.3d at 296 (referring to district courts application of the Federal Rules of Evidence even after finding that the Convention does not require their application).

[87] *See Holder v. Holder*, 392 F.3d 1009, 1021-22 (9th Cir. 2004).

[88] Convention, *supra* note 1, art. 30.

related to an application or petition is admissible without authentication.[89] However, The U.S. State Department Report, citing Pérez-Vera's Explanatory Report, indicates that "private documents" may still need to be authenticated to be admissible.[90]

Public documents that ordinarily do not require additional authentication include birth certificates, notarials, court orders, or any other document issued by a public authority.

Best Practices

→ Authenticate the documents that require certainty; if the court is *relying* on a document to make a finding and the document is a copy or not from a public authority, the best practice is to authenticate the document in accordance with the applicable rules of evidence.

→ **Public documents** that ordinarily do not require additional authentication include birth certificates, notarials, court orders, or any other document issued by a public authority.

■ Expert Witnesses

Courts in Hague Convention cases have allowed testimony from expert witnesses on a variety of issues, including matters of foreign law;[91] whether a child is of sufficient age and maturity to have his or her objections to return considered;[92] how settled the child is in the new country;[93] and the impact of domestic violence or exposure to domestic violence on children in the context of the grave risk exception.[94]

■ Foreign Law

Under Rule 44.1 of the Federal Rules of Civil Procedure, when determining ***issues of foreign law***, courts "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."[95] Additionally, a "court

[89] 22 U.S.C.A. § 9005.
[90] Text and Legal Analysis, *supra* note 4, at 10,508.
[91] *See Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 269 (3d Cir. 2007). For more on Foreign Law *see* Part [__], § [__] *infra*.
[92] *See Tsai-Yi Yang*, at 499 F.3d at 279.
[93] *See Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1230 (2014) (considering testimony of therapist who diagnosed child with post-traumatic stress disorder after first arriving in the United States and then described the child as "completely different" after being in the United States for a period of time).
[94] *See Acosta v. Acosta*, 725 F.3d 868, 873-5 (8th Cir. 2013) (considering testimony from expert witness on exposure to domestic violence and grave risk).
[95] Fed. R. Civ. P. 44.1; *see also A.A.M. v. J.L.R.C.*, 840 F. Supp. 2d 624, 629 (E.D.N.Y., 2012) (applying this rule in a Hague Convention case).

is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found,"[96] including information in the public domain.

Common examples of "relevant material" considered by courts when determining issues of foreign law include:

- English translations of foreign law;[97]
- An attorney affidavit identifying and analyzing applicable foreign law;[98] and
- Expert testimony.[99]

An analysis of foreign law is necessary to determine if the petitioner had rights of custody at the time of removal, which is an element of petitioner's *prima facie* case.

Proving Custody Rights in the Context of Foreign Law

→ Petitioners bear the burden of establishing their rights of custody under the law of the habitual residence.

→ Any law relied on to prove rights of custody must have been in effect ***at the time of*** removal or retention.

→ That law must also be in effect in the specific state or province where the parties resided within the country of habitual residence.

A court "may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable."[100]

In *Saldivar v. Rodela*, the court allowed into evidence an affidavit of a Mexican attorney explaining relevant Mexican laws.[101] Courts have also admitted administrative decisions under this section. In *Chechel v. Brignol*, the court found a document written by a government "Custody

[96] Fed. R. Civ. P. 44.1 Advisory Committee's Note; *see also Saldivar v. Rodela*, 879 F. Supp. 2d 610, 621 (W.D. Tex. 2012) ("Recognizing the peculiar nature of the issue of foreign law, Federal Rule of Civil Procedure 44.1 liberalizes the evidentiary rules for determining such law.").

[97] *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venezuela*, 575 F.3d 491, 498 n.8 (5th Cir. 2009).

[98] *Id.* (considering affidavit from Venezuela's Attorney General explaining the content of Venezuelan law); *see also Transportes Aereos Pegaso, S.A. de C.V. v. Bell Helicopter Textron, Inc.*, 623 F. Supp. 2d 518, 534 (D. Del. 2009) ("One common source that judges rely upon in determining foreign law are the affidavits of lawyers who practice law in the country at issue, or who are from the country at issue and are familiar with its laws.").

[99] *DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 848 (9th Cir. 2001).

[100] Convention, *supra* note 1, art. 14.

[101] *Saldivar v. Rodela*, 879 F. Supp. 2d 610, 621 (W.D. Tex. 2012).

Commission" to be "worthy of consideration."[102] For support, the court in *Chechel* cited to ICARA section 9005 and Article 14 of the Convention.[103]

Attorney Fees and Costs

ICARA requires the court to award attorney fees and costs to a successful petitioner **unless the court in its discretion finds an award "clearly inappropriate."**[104]

- Expenses may include "court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child."[105]
- Costs must be necessary and related to the child's return and are not unlimited.[106]

The burden of proving an award of fees is "clearly inappropriate" rests with the party opposing the award.[107]

- Courts have interpreted "clearly inappropriate" on a case-by-case basis.
- In determining the "appropriateness" of fees, courts have considered:
    - Respondent's ability to pay fees;[108]
    - Acts of family violence; and[109]
    - Petitioner's financial neglect of the children.[110]

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[102] *Chechel v. Brignol*, 510-CV-164-OC-10GRJ, 2010 WL 2510391, at *3 n.15 (M.D. Fla. June 21, 2010).
[103] *Id.*
[104] 22 U.S.C.A. § 9007(b)(3).
[105] *Id.*
[106] *Ozaltin v. Ozaltin*, 708 F.3d 355, 374-75 (2d Cir. 2013).
[107] *Saldivar v. Rodela*, 894 F. Supp. 2d 916, 923 (W.D. Tex. 2012). *See also Whallon v. Lynn*, 356 F.3d 138, 140 (1st Cir. 2004); *Ozaltin*, 708 F.3d at 375.
[108] *Rydder v. Rydder*, 49 F.3d 369, 373-74 (8th Cir. 1995) (decreasing award to a "more equitable" amount); *Larrategui v. Laborde*, No. 2:13-CV-01175 JAM, 2014 WL 2154477, at *3 (E.D. Cal. May 22, 2014) ("Although denying an award because of Respondent's financial status would not further section 9007(b)(3)'s purposes, as mentioned above, courts have recognized that they have discretion to reduce any potential award to allow for the financial condition of the respondent."); *see also Montero-Garcia v. Montero*, No. 3:13-CV-00411-MOC, 2013 WL 6048992, at *7 (W.D.N.C. Nov. 14, 2013) (reaffirming order denying fees where respondent "had no ability to pay and was completely indigent"); *Vale v. Avila*, No. 06-CV-1246, 2008 WL 5273677, at *2 (C.D. Ill. Dec. 17, 2008) ("The financial position of the respondent is a factor a court may consider in determining whether it would be clearly inappropriate to award costs and attorney fees in an ICARA action.").
[109] *Souratgar v. Lee Jen Fair*, 14-904, 2016 WL 1168733, at *1 (2d Cir. Mar. 25, 2016) ("Because [respondent] established that [petitioner] had committed multiple, unilateral acts of intimate partner violence against her, and that her removal of the child from the habitual country was related to that violence, an award of expenses to [petitioner], given the absence of countervailing equitable factors, is clearly inappropriate."); *Guaragno v. Guaragno*, No. 7:09-CV-187-O, 2011 WL 108946, at *2 (N.D. Tex. Jan. 11, 2011) ("Acts of family violence perpetrated by a parent is an appropriate consideration in assessing fees in a Hague case."); *Silverman v. Silverman*, No. CIV.00-2274 JRT, 2004 WL 2066778, at *4 (D. Minn. Aug. 26, 2004) (in denying award of fees, the court noted that "respondent has also established that petitioner has been physically and psychologically abusive toward her.").
[110] *See Whallon*, 356 F.3d at 140 ("Our focus remains on the question whether respondent has clearly established that it is likely that her child will be significantly adversely affected by the court's award."); *Silverman*, 2004 WL 2066778, at *4 ("The ability to care for dependents is well-established as an important consideration in awards of fees and costs in Hague Convention cases.").

- **Neither *pro bono* representation nor representation by a publically funded legal aid organization precludes an award** of attorney fees or costs to a successful petitioner.[111]

In the Case of Settlement

A petitioner who prevails through settlement may be entitled to attorney fees and costs.[112] An adjudication on the merits is not required to trigger this provision.[113]

Courts regularly use the lodestar method to calculate an award of attorney fees in Hague Convention cases.[114]

The Lodestar Method of Calculating Attorney's Fees

1. Multiply a reasonable number of hours worked by a reasonable hourly rate (this number is referred to as the lodestar).[115]
2. Increase or decrease the lodestar based on the particular circumstances of a specific case.[116]

There is no provision in either the Convention or ICARA providing an award of attorney fees to a prevailing respondent. Some courts, however, **have awarded *costs* to prevailing respondents** pursuant to Rule 54 of the Federal Rules of Civil Procedure, which allows a prevailing party to receive costs other than attorney fees.[117] Presumably a state court could fashion a similar result pursuant to [corresponding state rule].

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[111] *See Saldivar*, 894 F. Supp. 2d at 930-31 ("[T]he Court concludes that under ICARA, an award of expenses, including legal fees and costs, is not inappropriate where the petitioner is represented by a publicly funded legal aid entity . . ."); *see also Cuellar v. Joyce*, 603 F.3d 1142, 1143 (9th Cir. 2010) ("Withholding fees from *pro bono* counsel would also discourage pro bono representation and undermine the Convention's policy of effective and speedy return of abducted children."); *Haimdas v. Haimdas*, 720 F. Supp. 2d 183, 209 (E.D.N.Y., 2010) *aff'd*, 401 F. App'x 567 (2d Cir. 2010) ("Further, the fact that the petitioner in this case was represented by *pro bono* counsel does not provide a basis for disregarding the Convention's fee provision."). *But see Cillikova v. Cillik*, CV152823MCALDW, 2016 WL 541134, at *5, n.2 (D.N.J. Feb. 9, 2016) (noting that when attorney fees and costs are excessive, the court can consider whether petitioner would have permitted counsel to expend the same amount of resources if she had been required to actually pay for the services).

[112] *Salazar v. Maimon*, 750 F.3d 520, 522 (5th Cir. 2014).

[113] *Id.*

[114] *Saldivar*, 894 F. Supp. at 933; *see also Norinder v. Fuentes*, 657 F.3d 526, 536-37 (7th Cir 2011); *Neves v. Neves*, 637 F.Supp.2d 322, 339 (W.D.N.C.2009).

[115] *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

[116] *Id.*

[117] *White v. White*, 893 F. Supp. 2d 755, 758 (E.D. Va. 2012) ("Rule 54(d)(1), Fed.R.Civ.P., provides that '[u]nless a federal statute . . . provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party.' Because ICARA does not prohibit cost shifting, Rule 54(d)(1) gives rise to a 'presumption that costs are to be awarded to the prevailing party.' . . . A district court should deny costs only if 'there would be an element of injustice in a presumptive cost award.'") (internal citations omitted); *Thompson v. Gnirk*, 12-CV-220-JL, 2012 WL 3598854, at *17 (D.N.H. Aug. 21, 2012) ("[ICARA] makes no such provision for a prevailing *respondent* . . . . [Respondent] may, however, seek his other costs in accordance with Rule 54(d)(1) of the Federal Rules of Civil Procedure and Local Rule 54.1."); *Broda v. Abarca*, 11-CV-00286-REB, 2011 WL 900983, at *7 (D. Colo. Mar. 15, 2011) ("[R]espondent

Emergency Stay and Appeals

■ Emergency Motion to Stay Return

Generally, stays are allowed in the case of an appeal despite the Convention's expediency mandate.[118] However, a stay is not a matter of right; it is instead an exercise of judicial discretion.[119]

In *Chafin v. Chafin*, the U.S. Supreme Court, rejecting the argument that the child's return rendered respondent's appeal moot, held that "courts can achieve the ends of the Convention and ICARA . . . through familiar judicial tools of expediting proceedings and granting stays where appropriate" rather than as a matter of course.[120] Thus, the Court directed lower courts to "apply the four traditional stay factors in considering whether to stay a return order: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'"[121] In weighing these factors, a stay will generally be granted if the balance of equities supports doing so.[122] These factors are not to be applied mechanically and, when a serious legal question is involved, a stay may be granted if the moving party presents a substantial case on the merits and shows that the balance of equities weighs heavily in his or her favor.[123]

■ Standard of Review: Federal Courts

[Relevant federal standards of review.]

■ Standard of Review: **[State]** State Courts

[State standards of review.]

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is AWARDED her costs, to be taxed by the Clerk of the Court under FED. R. CIV. P. 54(d)(1) and D.C.COLO.LCivR 54.1").

[118] *See Walsh v. Walsh*, 221 F.3d 204, 213-14 (1st Cir. 2000).

[119] *See Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotations omitted).

[120] *Chafin v. Chafin*, 133 S. Ct. 1017, 1026-27 (2013) ("If these cases were to become moot upon return, courts would be more likely to grant stays as a matter of course, to prevent the loss of any right to appeal.").

[121] *Id.* at 1027 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 771 (1987)).

[122] *See* § 2904 Injunction Pending Appeal, 11 Fed. Prac. & Proc. Civ. § 2904 (3d ed.).

[123] *See United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983).

PART II. CONSIDERING DOMESTIC VIOLENCE IN A HAGUE CONVENTION CASE

This section provides non-exhaustive guidance and some context on the impact family violence has in a Return Case under the Hague Convention.

[State domestic violence law, definitions, and legislative findings can be cited here. Previous guides have cited to the state's domestic violence prevention act, the state's definition of domestic or family violence, and custody statutes that include presumptions against granting custody to an abuser. There is a lot of room in this section to weave in relevant state statutes, case law, and findings.]

The Hague Convention neither defines domestic violence nor expressly recognizes domestic violence as an exception to mandatory return. Nevertheless, any psychological and physical abuse is relevant when analyzing the "grave risk or intolerable circumstances," "well-settled," and objection of a "mature child" exceptions to a return claim under the Convention. Acts of violence may also be taken into consideration when determining the parties' shared intent regarding the child's habitual residence and in making a decision about assessing attorney's fees and costs against a victimized parent.

State Domestic Violence Law: Though courts are not bound by state law definitions of domestic violence, courts may consult state law for guidance when conducting a domestic violence analysis.

[Run down of state dv law, definitions, and legislative findings as discussed in parenthetical above.]

Relevant social science and expert testimony can also provide the court with the requisite context of domestic violence and its impact on children.

Social Science Context: Social science literature defines domestic violence as a pattern of abusive and threatening behavior that may include physical, emotional, economic, and sexual violence as well as intimidation, isolation, and coercion.[124] Definitions of domestic violence also include situations in which one party attempts to establish and exert power and control over another.[125] Domestic violence is an ongoing pattern of intimidating behavior in which the threat of serious physical violence may be present and carried out with the overall goal of controlling one's partner.[126]

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[124] Advocates for Human Rights STOPVAW, citing Anne L. Ganley & Susan Schechter, *Domestic Violence: A National Curriculum for Family Preservation Practitioners*, 17-18 (1995).
[125] *Id.*
[126] Jeffrey L. Edleson et al., *Multiple Perspectives On Battered Mothers And Their Children Fleeing For Safety to the United States: A Study of Hague Convention Cases* at 17 (FINAL REPORT, NIJ #2006-WG-BX-0006, 2010), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/232624.pdf [hereinafter Edleson et al., *Multiple Perspectives*].

Domestic Violence in Case Law: In *U.S. v. Castleman*, a criminal case that did not consider the Hague Convention, the U.S. Supreme Court noted *in dicta* that "[d]omestic violence is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context."[127] The Court recognized that in cases of domestic violence, acts of force that may be interpreted as minor in isolation are more severe when considered in the context of domestic violence because the "accumulation of such acts over time can subject one intimate partner to the other's control."[128]

In *Hernandez v. Ashcroft*, an immigration case that also did not consider the Hague Convention, the Ninth Circuit noted that:

> [I]n enacting [the Violence Against Women Act], Congress recognized that lay understandings of domestic violence are frequently comprised of "myths, misconceptions, and victim blaming attitudes" and that background information regarding domestic violence may be crucial in order to understand its essential characteristics and manifestations . . . . The literature also emphasizes that, although a relationship may appear to be predominantly tranquil and punctuated only infrequently by episodes of violence, "abusive behavior does not occur as a series of discrete events", but rather pervades the entire relationship . . . . The effects of psychological abuse, coercive behavior, and the ensuing dynamics of power and control mean that the "pattern of violence and abuse can be viewed as a single and continuing entity" . . . . Thus, "the battered woman's fear, vigilance, or perception that she has few options may persist . . . even when the abusive partner appears to be peaceful and calm" . . . . Significantly, research also shows that women are often at the highest risk of severe abuse or death when they attempt to leave their abusers.[129]

Effects on Children: Social science research has shown that children who witness domestic violence may develop a wide range of harms, including psychological and emotional problems such as depression and PTSD and external behavioral problems.[130] A 2003 study showed that exposure to domestic violence tripled a child's odds of perpetrating violence in his or her own

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[127] *United States v. Castleman*, 134 S. Ct. 1405, 1411 (2014).
[128] *Id.*
[129] *Hernandez v. Ashcroft*, 345 F.3d 824, 837 (9th Cir. 2003) (quoting H.R. REP. 103-395 and Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1208 (1993)).
[130] Bonnie E. Carlson, *Children Exposed to Intimate Partner Violence: Research Findings and Implications for Intervention*, 1 TRAUMA, VIOLENCE & ABUSE 321, 328 (2000).

relationships.[131] The same study also found that a child exposed to violence between parents is more likely to become a victim of partner violence, more so even than a child who is the victim of direct abuse.[132] In fact, according to the study, exposure to domestic violence as a child seems to be the greatest independent risk factor for victimization by a partner.[133] On the other hand, physical injury by a caretaker may directly increase a child's odds of perpetrating abuse.[134]

In looking at how to protect children from the harms of exposure to domestic violence, "[t]rauma-informed approaches recognize that supporting children's healthy attachment to the survivor-parent is crucial to their development and resiliency following exposure to domestic violence in the home."[135] Children's relationships with their non-battering parent and siblings are central to their ability to recover from exposure to domestic violence.[136]

Understanding Domestic Violence

→ Domestic violence may include:[137]

- emotional threats
- physical harm
- threats to life
- intentional isolation
- economic control
- passport control and immigration threats
- rape

→ **Coercive control is a pattern of behavior** used to dominate a partner in ways that subvert the victim's autonomy and isolate the victim; violence can be used as a way to enforce psychological control.[138]

→ The court may hear testimony from an expert witness regarding the dynamics of domestic violence and its impact on the respondent and children.[139]

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[131] Miriam K. Ehrensaft et. al., *Intergenerational Transmission of Partner Violence: A 20-Year Prospective Study*, 71 J. OF CONSULTING & CLINICAL PSYCHOL. 741, 747 (2003). *See also* Charles L. Whitfield, *Violence Childhood Experiences and the Risk of Intimate Partner Violence in Adults*, 18 J. OF INTERPERSONAL VIOLENCE 166, 176 (2003) ("Childhood physical abuse increased the risk of victimization among women and the risk of perpetration by men more than 2-fold; childhood sexual abuse increased these risks 1.8-fold for both men and women; and witnessing domestic violence increased these risks approximately 2-fold for women and men.").

[132] Ehrensaft, *supra* note [__] at 749.

[133] *Id.*

[134] *Id.*

[135] Carole Warshaw, MD, *Thinking About Trauma in the Context of Domestic Violence: An Integrated Framework*, SYNERGY, 17 (FVPSA/OVW Anniversary Special Issue 1 of 2) 2, 4 (2014) (Adapted from an article by Carole Warshaw, MD).

[136] Lundy Bancroft, *The batterer as parent*, SYNERGY 6(1), 8 (Winter 2002) (*Newsletter of the National Council of Juvenile and Family Court Judges*) ("There is a wide consensus that children's recovery from exposure to domestic violence (and from divorce) depends largely on the quality of their relationship with the non-battering parent and with their siblings").

[137] Taryn Lindhorst & Jeffrey L. Edleson, *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention*, 38 (Claire Renzetti, ed., Northeastern University Press, 2012).

[138] Edleson et al., *Multiple Perspectives*, *supra* note [__], at 17.

[139] *See Acosta v. Acosta*, 725 F.3d 868, 873 (8th Cir. 2013).

→ Similarly, the court may consult social science literature for guidance on the dynamics of domestic violence and its impact on the respondent and children.[140]

[140] *See Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000).

PART III. PETITIONER'S CASE FOR RETURN

The petitioner has the burden of proving by a preponderance of the evidence[141] that the child was *wrongfully* removed or retained from his or her country of habitual residence.

Removal or retention is wrongful within the meaning of the Convention when it violates the petitioner's rights of custody and those rights were actually being exercised at the time of the removal or retention or would have been exercised but for the removal or retention.[142]

Before making any findings in the *prima facie* case, the court may, pursuant to Article 15, "request that [petitioner] obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State."[143] Each country's Central Authority must assist "so far as practicable" in obtaining this decision or determination.[144] The Convention provides no further guidance as to the mechanism or time limits for a petitioner to obtain this decision or determination from the child's habitual residence. Use of Article 15 is discretionary and the mechanics of its application have been determined on a case-by-case basis.[145]

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[141] 22 U.S.C.A. § 9003(e)(1)(A).
[142] Convention, *supra* note 1, art. 3.
[143] *Id.* at art. 15.
[144] *Id.*
[145] *See generally In re Application of Adan*, 437 F.3d 381, 394 (3d Cir. 2006) ("[P]ursuant to Article 15 of the Convention, the District Court may request that the parties obtain from the Argentine courts a determination of whether the removal of [child] from that country was wrongful under the Convention, which would necessarily include an adjudication of [petitioner]'s custody rights under Argentine law at the time she was removed . . . . Although such a request is within the District Court's discretion, we are of the opinion that a determination of [petitioner]'s custody rights at the time of removal by an Argentine court (provided, of course, that the Argentine courts have authority under Argentine law to make such a determination at this stage) would be very helpful in properly determining the wrongfulness of [child]'s removal."); *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1148 (E.D. Wash. 2007) ("Although the typical procedure under Article 15 would be for this Court to request a determination of wrongfulness by a German court, because the Bayreuth Local Court has already made a determination, this Court must determine whether to give the decision full faith and credit under ICARA, [22 U.S.C.A. § 9003(g)]."); *Kufner v. Kufner*, 480 F. Supp. 2d 491, 504 (D.R.I. 2007) *aff'd*, 519 F.3d 33 (1st Cir. 2008) ("[T]he Court asked the parties to submit joint questions to be sent, pursuant to Article 15 of the Convention, to the Central Authority in Germany for an advisory opinion concerning German custody law."); *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634, 636 (E.D.N.Y. 2000) ("By letter . . . the Principal Legal Officer in the Australian Central Authority for the Hague Convention, set forth the Australian law concerning Petitioner's rights in regard to their children pursuant to the procedures under Article 15 of the Convention."); *Viragh v. Foldes*, 612 N.E.2d 241, 247 n.11 (Mass. 1993) ("We reject [petitioner]'s argument that the judge erred by not formally requesting a determination from the Hungarian authorities concerning the wrongfulness of the children's removal or retention under Hungarian law. Article 15 provides that the judicial authorities of a contracting nation have the discretion to request such a determination . . . .").

§ 1.00. Elements of Petitioner's *Prima Facie* Case

To determine whether the petitioner has made a *prima facie* case for return the court must find that the removal or retention was ***wrongful***; in order to determine if the removal or retention was wrongful, the court must establish:

- The date of removal or retention;[146]
- The child's habitual residence immediately prior to removal or retention;[147]
- The petitioner's rights under the law of the child's habitual residence at that time;[148]
- Whether those rights amount to "rights of custody" within the meaning of the Convention;[149] and
- Whether the petitioner was actually exercising those rights or would have been exercising those rights but for the removal or retention.[150]

If the petitioner fails to prove the child was removed from his or her habitual residence, the Convention **does not apply** and **the petition for return must be dismissed**.

If the petitioner fails to prove the existence of custody rights or that he or she was actually exercising those rights, the remedy of return is not available and the petition for return must be dismissed.[151]

§ 2.00. Removal, Retention, and Habitual Residence

Determining the child's habitual residence at the time of removal or retention is considered the threshold issue in a Hague Convention case.[152] Thus, this section breaks down the habitual residence analysis into two steps: (1) determining the date of removal or retention, and (2) determining whether the child was removed from his or her habitual residence immediately prior to that date. If the child was not taken from his or her country of habitual residence, the analysis

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[146] Convention, *supra* note 1, art. 3(a). Note, the date of removal or retention is relevant to both the habitual residence analysis and the "well-settled" exception, discussed in Part IV, *infra*.
[147] *Id.*
[148] *Id.* The petitioner's rights need not be established by formal court order but may arise by operation of law or by agreement. For more on custody rights *see* Part [__], § [__] *infra*.
[149] *Id.* at art. 5(a).
[150] *Id.* at art. 3(b).
[151] In this case, the petitioner may amend the petition to request enforcement of access rights in lieu of the remedy of return or file a new petition for access rights.
[152] *See Larbie v. Larbie*, 690 F.3d 295, 310 (5th Cir. 2012) ("Because wrongful-retention analysis depends on first determining [child's] country of 'habitual residence,' we begin there."); *Gallardo v. Orozco*, 954 F. Supp. 2d 555, 567 (W.D. Tex. 2013) (defining threshold issue as whether Requesting State was child's habitual residence); *In re S.J.O.B.G.*, 292 S.W.3d 764, 776 (Tex. App.—Beaumont 2009, no pet.) (beginning analysis with threshold determination of habitual residence); *see also Mozes v. Mozes*, 239 F.3d 1067, 1084 (9th Cir. 2001) ("Should the district court . . . reaffirm its holding that the children's habitual residence had shifted to the United States . . . the case should end there . . . .").

ends there—the removal or retention was not wrongful, thus the Convention does not apply, and the petition must be dismissed.[153]

As a practical matter, the habitual residence analysis will not necessarily involve discrete analytical steps requiring the court to determine the date of removal or retention before moving to the next issue of habitual residence. Courts will often hear the entire case presented by the petitioner and respondent, depending on the issues raised or motions brought in a particular instance, and then make its ruling. In some cases the court may make an initial ruling with regard to the *prima facie* case after the petitioner rests, and consider the respondent's defenses only if necessary. If petitioner fails to prove the *prima facie* case, the petition for return must be dismissed without consideration of any defenses. However, understanding the elements of a Convention case as involving a multi-step process will enable the court to clearly articulate the requisite findings when ruling on the petition.

Transnational Requirement

→ To be considered a removal within the meaning of the Convention, the respondent and child must actually cross an international border.

Removal

Removal—The physical taking of a child, by a parent, relative, or other person, without the permission of a party with custodial rights.

The date on which the respondent and child left the Requesting State is a factual determination to be made by the court. Although this date may be a fact in contention, in most cases the date of removal will be unambiguous.

Retention

Retention—The keeping of a child, by a parent, relative, or other person, outside of a country beyond a previously agreed-upon time period.

The date on which the child's absence from the Requesting State becomes wrongful can be less obvious and may be a fact in dispute between the parties.

[153] *See Larbie*, 690 F.3d at 312 (rendering judgement in respondent's favor based in part on finding that Requesting State was not child's habitual residence); *see also Mozes*, 239 F.3d at 1072 ("'Habitual residence is the central-often outcome-determinative-concept on which the entire system is founded.").

Although the date of retention can be more difficult to pinpoint than the date of removal, **retention has been interpreted as a fixed, rather than a continuing, event**.[154]

To establish the specific date of retention courts have looked to the date on which the petitioner was "truly on notice" the respondent would not be returning with the child.[155] In some cases, this has been the date the respondent and child were supposed to return to the Requesting State but failed to do so.[156] In other cases, this has been the date the respondent communicated his or her intention not to return the child, either expressly or as manifested by his or her actions,[157] or the date the petitioner communicated a desire to have the child returned.[158]

Habitual Residence

The petitioner must prove that the Requesting State was the child's habitual residence immediately before removal or retention.

The habitual residence analysis is a "fact-intensive determination" that will depend heavily on the facts of a particular case.[159] It may be more straightforward in cases in which the only transnational "move" involves the alleged wrongful removal or retention. However, determining habitual residence when the family has relocated more than once can be difficult.

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[154] *See Viteri v. Pflucker*, 550 F. Supp. 2d 829, 835 (N.D. Ill. 2008) ("[A]lthough there is little judicial authority on this issue, the judicial authority offered by the parties supports the interpretation of 'wrongful retention' as a solitary event."); *In re H.* and *In re S.*, (1991) 2 A.C. 476 (H.L.) (holding that a removal/retention is "a single event," and "cannot be a continuing event"). *See also Yaman v. Yaman*, 730 F.3d 1, 13 (1st Cir. 2013) (finding Convention language indicates "clear trigger point" for date of retention); *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005) (determining a single date as date of retention); *De La Vera v. Holguin*, CIV.A. 14-4372 MAS, 2014 WL 4979854, at *7 (D.N.J. Oct. 3, 2014) (identifying range within which retention occurred and then setting specific date for the purpose of wrongful retention analysis).

[155] *See Blanc v. Morgan*, 721 F. Supp. 2d 749, 762 (W.D. Tenn. 2010) ("Although [respondent] offered indications of her hesitancy to return with [child] before this point, the Court finds that March 2009 was the first point at which [petitioner] was truly on notice of [respondent]'s decision not to return or allow [child] to return."); *McKie v. Jude*, CIV.A. 10-103-DLB, 2011 WL 53058, at *6 (E.D. Ky. Jan. 7, 2011) ("[T]o determine the date of wrongful retention courts will look to the date where the non-abducting parent was truly on notice that the abducting parent was not going to return with the child."); *Riley v. Gooch*, CIV. 09-1019-PA, 2010 WL 373993, at *8-9 (D. Or. Jan. 29, 2010) ("… [T]he date of retention is that point when the noncustodial parent knows the custodial parent will not return the child.").

[156] *See Toren v. Toren*, 191 F.3d 23, 28 (1st Cir. 1999); *Falk v. Sinclair*, 692 F. Supp. 2d 147, 162 (D. Me. 2010); *Philippopoulos v. Philippopoulou*, 461 F. Supp. 2d 1321, 1323-24 (N.D. Ga. 2006).

[157] *See Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001); *Cabrera v. Lozano*, 323 F. Supp. 2d 1303, 1312-13 (S.D. Fla. 2004); *Zucker v. Andrews*, 2 F. Supp. 2d 134, 140 (D. Mass. 1998).

[158] *See Karkkainen v. Kovalchuk*, 445 F.3d 280, 290 (3rd Cir. 2006); *Slagenweit v. Slagenweit*, 841 F. Supp. 264, 270 (N.D. Iowa 1993), *dismissed*, 43 F.3d 1476 (8th Cir. 1994), and *dismissed*, 43 F.3d 1476 (8th Cir. 1994); *De La Vera v. Holguin*, CIV.A. 14-4372 MAS, 2014 WL 4979854, at *7 (D.N.J. Oct. 3, 2014). *But see Toren*, 191 F.3d at 28 (finding no remedy for "anticipatory retention" where there was an agreed upon date of return).

[159] *Larbie v. Larbie*, 690 F.3d 295, 310 (5th Cir. 2012) (quoting *Whiting v. Krassner*, 391 F.3d 540, 546 (3d Cir. 2004)).

Defining Habitual Residence

→ Neither the Convention nor ICARA define habitual residence.[160]

→ Courts interpret the phrase according to its ordinary meaning, rather than a legal definition that a particular jurisdiction has attached to the phrase.[161]

→ Although habitual residence has been interpreted to be the same as an ordinary residence, it is not necessarily the same as domicile.[162]

→ Likewise, the court should not employ a determination mirroring "home state" under the UCCJEA, though some of the same factors will be relevant.

→ Judicial determinations regarding habitual residence lack uniformity across jurisdictions.[163]

There are three general approaches to the habitual residence analysis: (1) shared parental intent; (2) the child's perspective; and (3) a mixed approach. Each approach places different weight on the parent's intentions as compared to the child's experience.

The **shared parental intent approach** (also referred to as settled purpose or settled intent) presumes that a child's habitual residence is determined by the parents' intent for the child to either remain temporarily or settle in a particular location.[164] Courts focusing on the **child's perspective** look to whether the child has been in a place long enough to be "acclimatized" and whether the child's presence has a "degree of settled purpose" from the child's point of view.[165] The last methodology, employed by the Third and Eighth Circuits, is a **mixed approach** looking to "the settled purpose of the move . . . from the child's perspective," along with other factors including parental intent, the passage of time, and the child's acclimatization to the new country.[166]

Habitual Residence in [State/Circuit]

[This section will focus specifically on how your state and federal courts have handled habitual residence. If there is a significant difference between state and federal courts, you may want to split this into two sections (2.3.1. Habitual Residence in [State]: Federal Courts and 2.3.2. Habitual Residence in [State]: State Courts.]

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[160] *Id.* (quoting *Mozes,* 239 F.3d at 1072).

[161] *See Norinder v. Fuentes,* 657 F.3d 526, 534 (7th Cir 2011).

[162] *See Nunez-Escudero v. Tice-Menley,* 58 F.3d 374, 379 (8th Cir. 1995) (citing *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995)); *Friedrich v. Friedrich,* 983 F.2d 1396, 1401 (6th Cir. 1993).

[163] *See Larbie*, 690 F.3d at 310 ("Courts use varying approaches to determine a child's habitual residence, each placing different emphasis on the weight given to the parents' intentions.")

[164] *See Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001) (focusing the inquiry on the persons entitled to fix the child's residence). *See also Gitter v. Gitter*, 396 F.3d 124, 132 (2d Cir. 2005) (following *Mozes*. finding it more useful to focus on the intent of the child's parents or others who may fix residence).

[165] *Robert v. Tesson*, 507 F.3d 981, 991 (6th Cir. 2007) (quoting *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995)).

[166] *Stern v. Stern*, 639 F.3d 449, 452 (8th Cir. 2011).

Habitual Residence and Domestic Violence

In cases of domestic violence, the court should account for the coercive and controlling nature of abuse and consider how such abuse may have impacted any apparent "shared intent" as to habitual residence.[167] If one party was coerced into moving, the court may find the parties lacked the requisite shared intent to establish a new habitual residence.[168]

Whether or not there was coercion impacting the parties' shared intent as to habitual residence depends on the unique circumstances of each case.

Coercive and controlling factors may include:

- Control over access to passport or destruction of passport;
- Control over immigration paperwork, legal status in the new country, or ability to work in the new country;
- Deception causing relocation;
- Being forced to relocate or to remain in a country by potentially life-endangering threats;[169] or
- Forced isolation from family, friends, and the victims' support network.

Coercion to Achieve Forum Shopping

→ Failing to consider how coercion may have impacted a family's "shared choice to relocate" would thwart the Convention's objective of discouraging forum shopping by allowing a batterer to employ coercive tactics to achieve adjudication in a chosen forum.

Conditional Moves

If a move is conditioned on certain factors, courts may determine whether those conditions impact the habitual residence analysis. A battered partner, for example, may agree to relocate on the condition that the abuse will stop or under the belief that he or she will be protected from the abusive spouse in the new country.

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[167] *See* Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life passim* (2007) (explaining that in an abusive relationship, the decision on where to live may not be a mutual decision, but another factor in a broader pattern of coercive control). *See generally* Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000-2001).

[168] *See Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1056 (E.D. Wash. 2001) ("Where the Court finds verbal and physical abuse of a spouse of the kind and degree present in this case, the conduct of the victimized spouse asserted to manifest "consent" must be carefully scrutinized."); *Application of Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993) (finding habitual residence never changed to [Requesting State] where respondent and child were detained in [Requesting State] against respondent's will).

[169] Edleson et al., *Multiple Perspectives*, *supra* note [__], at 84-85 (finding that battered respondents have reported experiencing a combination of many of these tactics).

The Eleventh Circuit recognized the concept of contingent consent and habitual residence in *Ruiz v. Tenorio*.[170] The court concluded that the children's habitual residence did not change from the United States to Mexico, even after almost three years in Mexico, because the relocation was "clearly condition[ed]" on the marriage improving.[171] The court, affirming the decision below, emphasized that the move was for a "trial period" and the petitioner had specifically promised that the family would return to the United States if their situation did not improve in Mexico.[172]

§ 3.00. Rights of Custody

"For the purpose of the Convention 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." [173]

Courts interpret rights of custody broadly.[174] This inquiry does not require a custody determination; rather, the petitioner must prove that his or her rights under the law of the child's habitual residence amount to "rights of custody" within the Convention's meaning.[175] Relatedly, the petitioner need not have had "custody" of the child; "the violation of a single right of custody suffices to make the removal or retention of a child wrongful."[176] These rights may arise by operation of law; judicial or administrative decision; or agreement having legal effect.[177]

The Convention does not differentiate between adopted and biological children.[178]

If the petitioner does not possess rights of custody, removal is not wrongful within the Convention's meaning, and the remedy of return is not available.[179]

Law of the Habitual Residence

The "rights of custody" analysis requires an examination of foreign law.

If the petitioner's rights under the law of the habitual residence are not clear from the letter of the law, the court may require additional explanation. In *Abbott*, the U.S. Supreme Court relied on a

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[170] *Ruiz v. Tenorio*, 392 F.3d 1247, 1254 (11th Cir. 2004) (relying on the Ninth Circuit's habitual residence analysis established in *Mozes*).
[171] *Id.*
[172] *Id. But see Robert v. Tesson*, 507 F.3d 981, 991 (6th Cir. 2007) (criticizing the Ninth Circuit's habitual residence analysis established in *Mozes* and citing *Ruiz* as an example of the problematic results reached under *Mozes* as inconsistent with the aims of the Convention).
[173] Convention, *supra* note 1, art. 5.
[174] *Abbott v. Abbott*, 560 U.S. 1, 19-20 (2010).
[175] Convention, *supra* note 1, art. 3 (a).
[176] *In re J.J.L.-P.*, 256 S.W.3d 363, 374 (Tex. App.—San Antonio 2008, no pet.).
[177] Convention, *supra* note 1, art. 3.
[178] *See* Convention, *supra* note 1, art. 1.
[179] *Abbott v. Abbott*, 560 U.S. 1, 9 (2010).

letter from a Chilean agency in determining the petitioner's rights under Chilean law.[180] A declaration or affidavit by an attorney from the country of habitual residence as to that country's law is also an "acceptable form of proof in determining issues of foreign law."[181] On rare occasions, the court may require an expert to explain the petitioner's rights under the law of the country of habitual residence.

Thus, the court must first determine the nature and extent of the petitioner's custody rights in the country of habitual residence and may then determine whether those rights amount to "rights of custody" as defined in the Convention.

Foreign Law Establishing Custody Rights

→ Petitioner's rights must have been in effect *at the time of the removal*; and

→ Petitioner's rights must be from the state or province where the child resided *within* the habitual residence country, notwithstanding any habitual residence choice of law rules that dictate otherwise.[182]

Article 7(e) of the Convention permits Central Authorities "to provide information of a general character as to the law of their [country] in connection with the application of the Convention."[183]

Chasing Orders

In some cases the petitioner may seek a custody order from the court of habitual residence **after the child has been removed or retained**. These orders are referred to as "chasing orders" and cannot change a permissible removal into a wrongful retention after the fact.

The Fourth Circuit held that "the only reasonable reading of the Convention is that a removal's wrongfulness depends on rights of custody *at the time of removal*."[184]

Similarly, the Seventh Circuit held that the Convention "is not a jurisdiction-allocation or full-faith-and-credit treaty. It does not provide a remedy for the recognition and enforcement of foreign custody orders or procedures for vindicating a wronged parent's custody rights more generally."[185]

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[180] *Abbott*, 560 U.S. at 10.
[181] *Whallon v. Lynn*, 230 F.3d 450, 458 (1st Cir. 2000) (relying on Federal Rules of Civil Procedure and the Pérez-Vera Explanatory Report).
[182] *See Shalit v. Coppe*, 182 F.3d 1124, 1129-30 (9th Cir. 1999), *as amended on denial of reh'g and reh'g en banc* (Sept. 14, 1999).
[183] Convention, *supra* note 1, art. 7.
[184] *White v. White*, 718 F.3d 300, 306 (4th Cir. 2013). *See also Madrigal v. Tellez*, EP-15-CV-181-KC, 2015 WL 5174076, at *14 (W.D. Tex. Sept. 2, 2015) ("Given the Convention's goal of restoring the pre-abduction status quo, 'the only reasonable reading of the Convention is that a removal's wrongfulness depends on rights of custody *at the time of removal.*'").
[185] *Redmond v. Redmond*, 724 F.3d 729, 741 (7th Cir. 2013).

The Court emphasized that in such cases the UCCJEA provides the appropriate vehicle for relief.[186]

Ne Exeat and *Patria Potestas* Rights

A *ne exeat* right confers the authority to consent before the other parent may take the child to another country.[187] In *Abbott v. Abbott*, the U.S. Supreme Court held that a *ne exeat* right is a custody right within the meaning of the Convention.[188]

Rights of *patria potestas* are rights of parental authority and responsibility commonly conferred on a non-custodial parent by operation of law.[189] Courts have found that rights of *patria potestas* are sufficient to establish rights of custody within the meaning of the Convention.[190]

Rights of Custody vs. Rights of Access

Access Cases

This Guide does not include an in-depth analysis of access cases.

Article 5 of the Convention distinguishes between "rights of custody" and "rights of access." Rights of access "include the right to take a child for a limited period of time to a place other than the child's habitual residence."[191] U.S. courts, including the Supreme Court, have found that rights of access do not confer custodial rights upon a parent and thus do not invoke the remedy of return under the terms of the Convention.[192]

When rights of access are at issue, Article 21 of the Convention authorizes submission of an application to the Central Authority of the States involved "in the same way as an application for the return of the child."[193]

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[186] *Id.*
[187] *Abbott v. Abbott*, 560 U.S. 1, 5 (2010).
[188] *Id.* at 11-12.
[189] *See Whallon v. Lynn*, 230 F.3d 450, 456 n.7 (1st Cir. 2000).
[190] *See Sierra v. Tapasco*, 4:15-CV-00640, 2016 WL 5402933, at *7 (S.D. Tex. Sept. 28, 2016) (following *Whallon* and holding *patria potestas* rights under Mexican law are 'rights of custody' under the Convention.).
[191] Convention, *supra* note 1, art. 5(b).
[192] *See Abbott*, 560 U.S. at 13.
[193] Convention, *supra* note 1, art. 21.

§ 4.00. Actually Exercised

Finally, the petitioner must prove that he or she was actually exercising his or her rights of custody at the time of the removal or retention, or would have exercised his or her rights of custody but for the removal or retention.[194]

Courts have interpreted "exercise of custody" liberally.[195] Courts have found that a parent is "exercising" rights of custody when that parent "keeps, or seeks to keep, any sort of regular contact" with the child.[196]

[194] *Id.* at art. 3(b).

[195] *See e.g. Friedrich v. Friedrich*, 78 F.3d 1060, 1063-65 (6th Cir. 1996) ("The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find 'exercise' whenever a parent with *de jure* custody rights keeps, or seeks to keep, any**345* sort of regular contact with his or her child"); *see also Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 344 (5th Cir. 2004) (adopting the reasoning in *Friedrich*).

[196] *Friedrich*, 78 F.3d at 1065. *See also Rodriguez v Yanez*, 817 F.3d 466, 473 (5th Cir. 2016) (holding the district court erred in concluding petitioner was not exercising custody rights at the time of removal when petitioner visited the child around 8 times a year and contributed to her financial support); *Larbie v. Larbie*, 690 F.3d 295, 307 (5th Cir. 2012) (noting that it is "relatively easy" to make this final showing and that courts "liberally find" that rights of custody were actually exercised).

PART IV. EXCEPTIONS TO RETURN: RESPONDENT'S DEFENSES

§ 1.00. Evaluating the Exceptions without Engaging in a Best Interests Analysis

The best interests of a child is the legal standard in domestic custody cases. **But the Hague Convention does not address custody, regardless of whether the case is being heard in state or federal court.**[197] Therefore a Hague Convention hearing should not involve a best interests analysis.

To avoid improperly evaluating the merits of any underlying child custody claims, courts presiding over a Convention case must distinguish between facts relevant under the Convention and "best interests" factors.

Although some overlap may exist, the distinction ultimately comes down to relevance: if evidence is relevant to an element of the Hague Convention case, that evidence can be considered even if it would also be pertinent to a best interests analysis. Evidence having no bearing on an element of a Hague Convention case must not be considered in ruling on a petition for the child's return.

As the First Circuit explains in a discussion of the grave risk analysis:

> The Convention assigns the duty of the grave risk determination to the country to which the child has been removed. It is not a derogation of the authority of the habitual residence country for the receiving U.S. courts to adjudicate the grave risk question. Rather, it is their obligation to do so under the Convention and its enabling legislation. Generally speaking, where a party makes a substantial allegation that, if true, would justify application of the Article 13(b) exception, the court should make the necessary predicate findings.[198]

Similarly, in *Lozano v. Montoya Alvarez*, the U.S. Supreme Court acknowledges that the "well-settled" exception allows the court to "open[] the door to consideration of . . . the child's interest in settlement."[199]

The Convention presumes that prompt return to the child's habitual residence is in the child's best interests.[200] The exceptions to return, however, indicate that the Convention drafters understood

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[197] 22 U.S.C.A. § 9001(b)(4). *See also* Text and Legal Analysis, *supra* note 4, at 10,510.
[198] *Danaipour v. McLarey*, 286 F.3d 1, 18 (1st Cir. 2002).
[199] *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1234-35 (2014). *See also* Pérez-Vera, Explanatory Report, *supra* note 4, at ¶ 107 ("it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it . . . .").
[200] *See* Pérez-Vera, Explanatory Report, *supra* note 4, at ¶ 25.

this presumption to be rebuttable.[201] "For the most part, the[] exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area."[202] The Convention's exceptions to mandatory return—often referred to as affirmative defenses—acknowledge that, depending on the circumstances, the child's interest in a particular case may outweigh any interest in prompt return.[203]

§ 2.00. The "Well-Settled" Exception (Article 12)

"The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, **unless it is demonstrated that the child is now settled in its new environment**."[204]

The respondent must prove this exception by a preponderance of the evidence.[205]

One-Year Requirement

The period of one year is from the date of wrongful removal or retention to the date of the commencement of the proceedings.[206] The proceedings "commence" when the petition for return is filed in a court with jurisdiction over the case.[207]

Equitable tolling does not apply to the one-year time period because it is not a statute of limitations;[208] a petition for return can be filed beyond the one-year period set forth in Article

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[201] *Id.*
[202] *Id.*
[203] *See Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1234-35 (2014) ("[T]he expiration of the 1-year period opens the door to consideration of a third party's interests, *i.e.* the child's interest in settlement."); *Yaman v. Yaman*, 730 F.3d 1, 10 (1st Cir. 2013) (upholding lower court's decision to deny return where lower court reasoned that return focused on the interest of the child and not just on what is equitable between petitioner and respondent); *see also* Pérez-Vera, Explanatory Report, *supra* note 4, at ¶ 29 ("[T]he interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.").
[204] Convention, *supra* note 1, art. 12 (emphasis added).
[205] 22 U.S.C.A. § 9003(e)(2)(B).
[206] *Id.*
[207] 22 U.S.C.A. §§ 9003(b), (f)(3) (defining "commencement of proceedings" from Article 12 as "filing a petition for the relief sought in any court which has jurisdiction . . . and is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed."). *See also Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1152 (E.D. Wash. 2007) (the one-year period is measured from when the petition was filed in court); *Belay v. Getachew*, 272 F. Supp. 2d 553, 561 (D. Md. 2003) (the filing of the petition in court commences the judicial proceedings); *Wojcik v. Wojcik*, 959 F. Supp. 413, 418 (E.D. Mich. 1997) (finding contact with the Central Authority does not commence the proceedings). *But see In re A.V.P.G.*, 251 S.W.3d 117, 124 (Tex. App.—Corpus Christi 2008, no pet.) (finding petitioner filed within one-year even though he failed to file with the court until two weeks after the one-year mark because he filed with the Central Authority and the Department of Protective Services notified the court before the one-year period had expired).
[208] *Lozano*, 134 S. Ct. at 1226.

12.[209] The court may consider the reasons for a petitioner's delay in filing the petition (for example, the respondent's successful concealment of the child's whereabouts) in determining whether the child is well-settled in his or her new environment.[210] But reasons for the petitioner's delay do not bar respondent from raising the defense.

Determining whether one year has passed will require the court to determine the date of wrongful removal or retention (if it has not already done so as part of the habitual residence analysis).[211]

"Well-Settled" in New Environment

Even if the case is commenced after the one year period, courts are still mandated to order return, unless the court finds the child is "now settled in [the] new environment."[212]

Neither the Convention nor ICARA defines "settled." The U.S. State Department Report advises that "nothing less than substantial evidence of the child's significant connections to the new country" will satisfy this exception.[213]

Factors considered in determining whether a child is "well-settled" in the new environment have included:

- The child's age;[214]
- Duration of the child's residence in the new environment;[215]
- Stability of the new residence;[216]
- Consistent schooling or day care;[217]
- Having close friends and relatives in the new environment;[218]
- Consistent participation in a religious community or extracurricular activities;[219]
- The child's aptitude in learning a new language (when relevant);
- The respondent's ability to maintain stable housing and employment in the new environment;[220] and

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[209] *Id.* at 1231.
[210] *Id.* at 1236.
[211] *See supra*, The Date of Removal or Retention, Part III, §§ 2.1, 2.2.
[212] Convention, *supra* note 1, art. 12.
[213] Text and Legal Analysis, *supra* note 4, at 10,509.
[214] *In re A.V.P.G.*, 251 S.W.3d 117, 125 (Tex. App.—Corpus Christi 2008, no pet.).
[215] *Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 848 (S.D. Tex. 2006) (holding that child was "well-settled," in part because she had lived in her current country of residence for more than two-thirds of her life).
[216] *In re A.V.P.G.*, 251 S.W.3d at 125.
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *See In re B. Del C.S.B.*, 559 F.3d 999, 1009 (9th Cir. 2009); *In re Lozano*, 809 F. Supp. 2d 197, 231 (S.D.N.Y. 2011) *aff'd sub nom. Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012) *aff'd sub nom. Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 188 (2014); *Cabrera v. Lozano*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004); *Wojcik v. Wojcik*, 959 F. Supp. 413, 421 (E.D. Mich. 1997).

- The child's and respondent's immigration statuses.[221]

With regard to immigration status, the Fifth Circuit, in unification with the Second and Ninth Circuits, concluded that "immigration status is neither dispositive nor subject to categorical rules, but instead is one relevant factor in a multifactor test."[222] Thus, immigration status alone cannot undercut a finding of "well-settled" where the other factors weigh in favor of such.[223]

Courts may also compare the child's connections in the Requested State with those in the Requesting State.[224] However, courts have been clear that "having a more comfortable material existence" in the new environment will not be enough to establish the child is settled under Article 12 of the Convention.[225]

"Well-Settled" and Domestic Violence

→ If a child clearly exhibited distress and trauma due to domestic violence exposure or direct abuse by the petitioner and removal from that environment has resulted in positive changes in the child's behavior, such circumstances are relevant to the child's "settledness" within the meaning of the Convention.[226]

Discretion to Return

Unlike other exceptions to return, Article 12 does not explicitly confer discretion to return a child despite the court's finding that the child is "well-settled" in the new environment.[227]

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[221] *See Hernandez v. Garcia Pena*, 820 F.3d 782, 788 (5th Cir. 2016) ("Courts diverge . . . with regard to the significance of immigration status. . . .").
[222] *Id.*
[223] *Id. See also In re B. Del C.S.B.*, 559 F.3d at 1010 ([Child]'s current immigration status-a status similar to that of many millions of undocumented immigrants-cannot undermine all of the other considerations which uniformly support a finding that she is "settled" in the United States."). *But see Cabrera*, 323 F. Supp. 2d at 1314 (considering immigration status of both respondent and child and noting the child's illegal immigration status undermines any stability in the new country); *In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001) (noting, among other factors, the uncertainty of both the respondent and child's immigration status in the United States).
[224] Text and Legal Analysis, *supra* note 4, at 10,509. *See also Wojcik v. Wojcik*, 959 F. Supp. 413, 421 (E.D. Mich. 1997) ("the father has shown no evidence that the children have maintained any ties to France.").
[225] *Lops v. Lops*, 140 F.3d 927, 946 (11th Cir. 1998).
[226] *In re Lozano*, 809 F. Supp. 2d 197, 231 (S.D.N.Y. 2011) *aff'd sub nom. Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012) *aff'd sub nom. Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 188 (2014).
[227] *Compare* Convention, *supra* note 1, art. 12 ("shall also order the return . . . unless . . ." *with* Convention, *supra* note 1, art. 13 ("the judicial or administrative authority of the requested State **is not bound** to order the return of the child if . . ." and "**may also refuse to order the return** of the child if . . .") (emphasis added).

Courts, however, have generally held that they have discretion to return a child to his or her country of habitual residence if the circumstances warrant ordering return regardless of whether the child is "well-settled."[228]

Despite the lack of explicit language conferring discretion, the First Circuit held that the Convention does not affirmatively bar a court from ordering return after finding that a child is well-settled in the new environment.[229] Nevertheless, the court upheld the lower court's decision to deny return based on the "well-settled" exception.[230]

§ 3.00. Consent and Acquiescence (Article 13(a))

If the petitioner consented or subsequently acquiesced to the removal or retention of the child, the court is not required to order return.[231] The respondent must prove this exception by a preponderance of the evidence.[232]

Courts differentiate between consent and acquiescence. Therefore *either* the petitioner's consent to removal or retention *or* subsequent acquiescence will be sufficient under this exception.[233] Consent involves petitioners' actions before the removal or retention, whereas acquiescence connotes agreement after the fact.[234]

Consent is generally inferred from informal action[235] while acquiescence requires a level of formality.[236] Thus, informal statements may suffice to establish consent, but formal acts or statements such as "testimony in a judicial proceeding, a convincing written renunciation of rights, or a consistent attitude over a significant period of time" will be required to establish subsequent acquiescence.[237]

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[228] *See e.g. Mendez-Lynch v. Mendez-Lynch*, 220 F. Supp. 2d 1347, 1364 (M.D. Fla. 2002) ("[e]ven if [the children] are well-settled, the Court finds that the goals of the Hague Convention would be furthered under the circumstances of this case by returning the boys to Argentina."). *See also* Convention, *supra* note 1, art. 18 ("The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.").
[229] *Yaman v. Yaman*, 730 F.3d 1, 4 (1st Cir. 2013).
[230] *Id.*
[231] Convention, *supra* note 1, art. 13(a).
[232] 22 U.S.C.A. § 9003(e)(2)(B).
[233] *See Gonzalez-Caballero v. Mena*, 251 F.3d 789, 794 (9th Cir. 2001); *Friedrich v. Friedrich*, 78 F.3d 1060, 1070 (6th Cir. 1996). *See also In re J.J.L.-P.*, 256 S.W.3d 363, 375 (Tex. App.—San Antonio 2008, no pet.) (recognizing that consent and acquiescence are "analytically distinct").
[234] *In re J.J.L.-P.*, 256 S.W.3d at 375 (quoting *Baxter v. Baxter*, 423 F.3d 363, 371 (3d Cir. 2005)).
[235] *See Baxter*, 423 F.3d at 371.
[236] *See In re A.V.P.G.*, 251 S.W.3d 117, 126 (Tex. App.—Corpus Christi 2008, no pet.).
[237] *Friedrich*, 78 F.3d at 1070.

Both consent and acquiescence are questions of the petitioner's subjective intent. [238]

Consent

Since consent may be established by informal actions or statements, courts must consider the specific facts and circumstances of each case to determine whether the petitioner consented to the child's removal or retention. The Fifth Circuit has cautioned, "[i]n examining a consent defense, it is important to consider what the petitioner actually contemplated and agreed to in allowing the child to travel outside [his or her] home country."[239] Evidence of the petitioner's consent may be introduced through emails, text messages, social media postings, letters, or other writings. Even if the petitioner did not explicitly or impliedly assent in writing, the court may find consent was given if the petitioner maintained an attitude and behavior consistent with consent. For example, if the petitioner assisted the respondent in making extensive travel arrangements, obtaining travel documents for the children, or packing substantial belongings, these actions may be construed as consent.[240]

Apparent Consent

- The petitioner's failure to pursue the child may be considered circumstantial evidence of consent.[241]
- The opposite is also true: a petitioner's hot pursuit tends to undermine a claim that the petitioner consented to the child's removal or retention, and evidence that removal was "deliberatively secretive" may undercut the argument that the petitioner assented.[242]
- Although inaction could amount to consent to removal or retention, inaction is not necessarily indicative of consent. The petitioner may not have known about the Hague Convention or the available remedies, or may have lacked the resources to seek help.

[238] *In re J.J.L.-P.*, 256 S.W.3d 363, 375 (Tex. App.—San Antonio 2008, no pet.) (holding consent defense requires showing subjective intent); *In re A.V.P.G.*, 251 S.W.3d 117, 126 (Tex. App.—Corpus Christi 2008, no pet.) ("[A]cquiescence is a subjective test.").
[239] *Larbie v. Larbie*, 690 F.3d 295, 309 (5th Cir. 2012) ("The nature and scope of the petitioner's consent, and any conditions or limitations, should be taken into account.") (internal quotation marks omitted).
[240] *See Gonzalez-Caballero v. Mena*, 251 F.3d 789, 794 (9th Cir. 2001).
[241] *Application of Ponath*, 829 F. Supp. 363, 368 (D. Utah 1993) ("This conclusion [that petitioner consented to removal] is further supported by petitioner's failure, for almost six months, to make any meaningful effort to obtain return of the minor child.").
[242] *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996). *See also Saldivar v. Rodela*, 879 F.Supp.2d 610, 628 (W.D. Tex. 2012) (citing *Friedich*, 78 F.3d at 1069); *Vazquez v. Vazquez*, No. 3:13-1445, 2013 WL 7045041, *25 (N.D. Tex. Aug. 27, 2013) ("Petitioner also presented credible, compelling, and consistent evidence . . . of the events surrounding [child]'s removal and all that she did after realizing that [child] was gone.").

Acquiescence

Acquiescence is more difficult to prove than consent because of the requirement that *post hoc* assent be formally expressed. Continued contact and even visits with the child after removal or retention are not typically interpreted as acquiescence.[243]

Attempts to reconcile are normally not interpreted as acquiescence within the meaning of the Convention,[244] nor are the parties' efforts to mediate or negotiate a settlement prior to the petition being filed with the court.[245]

In *Ostevoll v. Ostevoll*, an Ohio district court found the petitioner had acquiesced in the removal of the children to the United States because he "demonstrated a consistent attitude of acquiescence over the year and a half [period]" the children resided in the United States.[246] Though the petitioner filed a petition for return shortly after the respondent and children left the country of habitual residence, the petitioner "consistently engaged in delaying tactics which belie[d] his stated intentions of seeking the return of his children."[247] Among other failures to participate in the legal system, the court observed that the petitioner never formally instituted custody or visitation proceedings in a court of either the United States or the habitual residence and, instead, sent the respondent a letter through his attorney stating he "would permit her to keep the children in the United States if he was paid the sum of $1.5 million."[248]

As the decision in *Ostevoll* demonstrates, a finding of acquiescence requires a consideration of the petitioner's subjective intent and is generally driven by the particular facts of a case.

§ 4.00. Grave Risk and Intolerable Situation (Article 13(b))

A court "is not bound to order the return of the child" where "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[249]

Unlike the preceding exceptions, the respondent must prove this exception by **clear and convincing evidence**.[250]

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[243] *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 150 (S.D. Fla. 2002).
[244] *Pesin v. Osorio Rodriguez*, 77 F. Supp. 2d 1277, 1289 (S.D. Fla. 1999).
[245] *Mendez-Lynch v. Mendez-Lynch*, 220 F. Supp. 2d 1347, 1361 (M.D. Fla. 2002).
[246] *Ostevoll v. Ostevoll*, C-1-99-961, 2000 WL 1611123, at *19 (S.D. Ohio Aug. 16, 2000).
[247] *Id.*
[248] *Id.* The court does note that while as a general rule courts should not infer acquiescence from negotiations, given the evidence in this case the court did not interpret this the type of negotiations referred to by the general rule.
[249] Convention, *supra* note 1, art. 13(b) (emphasis added).
[250] 22 U.S.C.A. § 9003(e)(2)(A).

Some federal courts have held that the **subsidiary facts** also must be proven by a **preponderance of the evidence**.[251]

Neither "grave risk" nor "intolerable situation" is defined by the Convention, but Article 13 provides that "[i]n considering the circumstances referred to in this Article, the judicial or administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."[252]

In discussing Article 13(b), the Pérez-Vera Explanatory Report confirms that "the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation."[253]

Although the grave risk exception is commonly raised by respondents, considerable inconsistency exists among courts in their interpretation and application of the defense. In a case where the respondent has raised the grave risk exception, courts are often concerned about extending the inquiry beyond the scope of the Convention and into elements relevant to the child's best interests or the underlying merits of a custody case.[254]

The court in the second appeal of *Friedrich v. Friedrich* articulated two guiding principles embodied in the Convention: (1) the merits of an underlying custody dispute must not be adjudicated as part of an abduction claim, and (2) the pre-abduction status quo should be restored to deter parents from international forum shopping.[255] In this vein, the grave risk exception was not intended to be used as a vehicle to litigate the child's best interests, and a court should not deny return based on where the child would be happiest, who would be the better parent, or the merit of respondent's reasons for leaving.[256] Following this approach, the court in *Silverman v. Silverman*

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[251] *Danaipour v. McLarey*, 286 F.3d 1, 13 (1st Cir. 2002) ("The district court held that subsidiary facts must be proved by a preponderance of the evidence, a standard we accept.") *See also Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013); *Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 404 (E.D.N.Y. 2005). Courts in the First and Second Circuits have relied on this standard in Hague Convention cases, which is derived from non-Hague Convention cases in Massachusetts state court and the DC Court of Appeals.

[252] Convention, *supra* note 1, art. 13.

[253] Pérez-Vera, Explanatory Report, *supra* note 4, at ¶ 29.

[254] *See* best interest discussion *supra*, Part IV, § 1.00.

[255] *Friedrich v. Friedrich*, 78 F.3d 1060, 1063-64 (6th Cir. 1996). *See also Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 344 (5th Cir. 2004) ("The Convention was designed to 'restore the pre-abduction status quo.'") (quoting *Friedrich*, 78 F.3d at 1064).

[256] *See e.g. Friedrich*, 78 F.3d at 1068 ("[t]he exception for grave harm to the child is not a license for a court in the abducted to country to speculate on where the child would be happiest."); *Nunez-Escudero*, 58 F.3d at 377 ("[i]t is not relevant to this Convention exception who is the better parent in the long run, or whether [respondent] had a good reason to leave her home in Mexico . . ."). *See also* Text and Legal Analysis, *supra* note 4, at 10,510 ("[t]his provision was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests."); *Castro v. Martinez*, 872 F. Supp. 2d 546, 556 (W.D. Tex. 2012) (citing Text and Legal Analysis); *Vazquez v. Estrada*, No. 10-

supported the assertion that the grave risk exception is limited to two scenarios: "sending a child to a 'zone of war, famine, or disease,' ***or*** **in cases of serious abuse or neglect**."[257]

Although identified as a scenario triggering the grave risk exception, respondents rarely rely on the argument that the habitual residence is a war zone, and even when the issue is raised courts are reluctant to deny a petition for return based on a finding that the child would be returned to a "zone of war, famine, or disease."[258]

Though "serious abuse or neglect" is a basis to deny return pursuant to the grave risk exception, courts have struggled to delineate specific factors constituting abuse or neglect that is serious enough to either pose a grave risk of physical or psychological harm to the child or qualify as an otherwise intolerable situation.

In *Walsh*, the First Circuit stated that "the harm must be a great deal more than minimal."[259] The Second Circuit, in *Blondin v. Dubois*, characterized the grave risk exception as a spectrum:

> [A]t one end of the spectrum are those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child's preferences; at the other end of the spectrum are those situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation. The former do not constitute a grave risk of harm under Article 13(b); the latter do.[260]

Similarly, in *Simcox v. Simcox*, the Sixth Circuit identified three broad categories of abuse cases:

> First, there are cases in which the abuse is relatively minor . . . at the other end of the spectrum, there are cases in which the risk of harm is clearly grave, such as where there is credible evidence of sexual

2519, 2011 WL 196164, at *5 (N.D. Tex. 2011) (stating the grave risk defense is not intended to encompass "situations such as the return to a home where money is in short supply or where educational opportunities are more limited.").
[257] *Silverman v. Silverman*, 338 F.3d 886, 900 (8th Cir. 2003) (emphasis added). Note, however, that in a Hague Convention case, a finding of grave risk does not require a finding of child abuse or neglect as defined by state law.
[258] *See id*. at 901 ("the evidence centered on general regional violence, such as suicide bombers, that threaten everyone in Israel. This is not sufficient to establish a 'zone of war' which puts the children in 'grave risk of physical or psychological harm' under the Convention."); *Freier v. Freier*, 969 F. Supp. 436, 442 (E.D. Mich. 1996) ("[w]ith respect to Respondent's anxiety and fear about the ongoing tension in the country, it must be noted that she has lived there for a number of years, raised children there for some fourteen years and that her parents have spent extended periods of time there as well."); *Vazquez v. Estrada*, 3:10-CV-2519-BF, 2011 WL 196164, at *5 (N.D. Tex. Jan. 19, 2011) (finding that [respondent] failed to establish that returning the child to Mexico would expose her to a grave risk of physical harm based on "spiraling violence and surge in murders in Monterrey" and "specific violent acts that have been committed in the school [the child] attended . . . and in the neighborhood where Petitioner resides.").
[259] *Walsh v. Walsh*, 221 F.3d 204, 218 (1st Cir. 2000).
[260] *Blondin v. Dubois*, 238 F.3d 153, 162 (2d Cir. 2001).

> abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect . . . . Third, there are those cases that fall somewhere in the middle, where the abuse is substantially more than minor, but less obviously intolerable. Whether, in these cases, the return of the child would subject it to a "grave risk" of harm or otherwise place it in an "intolerable situation" is a fact-intensive inquiry that depends on careful consideration of several factors, including the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings[261] that would sufficiently ameliorate the risk of harm to the child caused by its return.[262]

Spousal Abuse Is a Distinct Consideration

→ Child abuse and spousal abuse both pose a grave risk of harm or an otherwise intolerable situation for the child; evidence of either is therefore relevant to the merits of this exception.

→ To deny return under the grave risk exception based on allegations of spousal abuse, the court must find the abuse (1) occurred and (2) creates a grave risk that return would expose the child to physical or psychological harm or an otherwise intolerable situation.

Past Physical Abuse to the Child

Compared to cases involving only spousal abuse, courts will more readily find a "grave risk" of exposure to harm if there is evidence *the child* has been the target of direct physical or sexual abuse by the petitioner.

The grave risk exception focuses on future harm.[263] Past abuse indicates a risk of continuing abuse if the child is returned. There is also a risk that return would trigger the trauma of past abuse, exposing the child to psychological harm or an otherwise intolerable situation. These risks are not mutually exclusive; both should be considered when evaluating the 13(b) exception in a case with evidence of past physical abuse.

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[261] Undertakings are discussed in full, *infra* Part IV, § 4.4.

[262] *Simcox v. Simcox*, 511 F.3d 594, 607-8 (6th Cir. 2007).

[263] *See* Convention, *supra* note 1, art. 13(b) ("return ***would*** expose the child to physical or psychological harm . . .") (emphasis added). *See also Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005) ("The gravity of risk involves not only the ***probability*** of harm, but also the magnitude of the harm if the probability materializes.") (emphasis added).

Exposure and Co-Occurrence

The grave risk exception requires evidence to support the conclusion of future harm to the child. **Proving future harm, however, does not require evidence of past abuse directly to the child.**[264]

Evidence of past domestic violence against the respondent can, on its own, support a finding under the grave risk exception. Evidence of past domestic violence indicates a risk of exposure to future violence, either in continuation against the battered parent[265] or against the batterer's future partners.[266] Also, evidence of past domestic violence may be evidence of propensity for direct physical harm to the child.[267]

■ Relevant Social Science

□ Exposure

Exposure to domestic violence is often defined as witnessing or observing the abuse, which may be understood to mean "direct visual observation of the incident"; however, in social science the definition of child exposure to domestic violence has been expanded to include "multiple experiences of children living in homes where an adult is using physically violent behavior in a pattern of coercion against an intimate partner."[268] Exposure may include hearing the violence and witnessing its aftermath, for example seeing bruises on a parent's body; moving with the victim parent to a shelter; or becoming directly involved in the violence by intervening in an incident or trying to distract the perpetrator during an incident.[269] Moreover, separation does not necessarily

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[264] *See Miltiadous v. Tetervak*, 686 F. Supp. 2d 544, 554 (E.D. Pa. 2010) ("Respondent's evidence of spousal abuse compels a finding that the grave risk of harm affirmative defense applies here."). *See also Acosta v. Acosta*, 725 F.3d 868, 876 (8th Cir. 2013); *Khan v. Fatima*, 680 F.3d 781, 786 (7th Cir. 2012) ("If the mother's testimony about the father's ungovernable temper and brutal treatment of her was believed, it would support an inference of a grave risk of psychological harm to the child if she continued living with him."); *Baran v. Beaty*, 526 F.3d 1340, 1352 (11th Cir. 2008); *Van De Sande*, 431 F.3d at 570; *Walsh*, 221 F.3d at 219.

[265] *See* Douglas A. Brownridge, *Violence against women post-separation*, 11 AGGRESSION AND VIOLENT BEHAVIOR 514, 516-19 (2006) (reviewing studies shows increased risk for both lethal and non-lethal violence post-separation).

[266] *See* LUNDY BANCROFT ET AL., THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS, 197 (SAGE Publications, Inc. 2nd ed. 2012) ("Post-separation, children run the risk that their father will abuse a new partner, as it is common for batterers to abuse women serially").

[267] *See Walsh*, 221 F.3d at 220 ("[B]oth state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser.").

[268] *See* TARYN LINDHORST & JEFFREY L. EDLESON, BATTERED WOMEN, THEIR CHILDREN, AND INTERNATIONAL LAW: THE UNINTENDED CONSEQUENCES OF THE HAGUE CHILD ABDUCTION CONVENTION, 106-8 (Claire Renzetti, ed., Northeastern University Press, 2012).

[269] *See id.* (citing Katherine M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. OF CONSULTING AND CLINICAL PSYCHOL. 339-52 (2003), Garcia O'Hearn et al., *Mothers' and Fathers' Reports of Children's Reactions to Naturalistic Marital Conflict*, 36 J. OF THE AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY 1366-1373 (1997), and Einat Peled, *The Experience of Living with Violence for Preadolescent Children of Battered Women*, 29 YOUTH AND SOCIETY 395-430 (1998)). Please note that this is not to suggest that moving to a

decrease a child's exposure to domestic violence—research suggests that children may witness violence more often after a separation than before.[270]

Research has shown that children who are exposed to domestic violence in their households suffer negative psychological, developmental, emotional, and behavioral problems similar to those of children who suffer direct abuse or maltreatment.[271] Child custody statutes and court rulings in the United States also recognize that exposure to domestic violence against a parent raises grave risks of both psychological and physical harm to the child.[272]

A Lesser Standard for Finding Abuse

Finding abuse or neglect in a Hague Convention case does not require a finding of abuse or neglect as defined by state law.

Studies confirm that children exposed to domestic violence suffer psychological effects similar to those suffered by children victimized directly. In fact, children victimized by exposure to domestic violence scored as low on emotional health measures as did children who were physically abused.[273] Studies also report an association between exposure to domestic violence and current child problems or later adult problems, even when a child has not been directly abused.[274] For instance, several studies report that children exposed to adult domestic violence exhibit more aggressive and antisocial behaviors as well as fearful and inhibited behaviors when compared to non-exposed children.[275] Children who are bystanders to domestic abuse also show lower social competence,[276] poorer academic performance, and are found to show higher than average anxiety,

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shelter is itself the harm, rather it is often a necessary safety measure victims and their children must take due to the perpetration of domestic violence.

[270] *See* Jennifer L. Hardesty & Grace H. Chung, *Intimate Partner Violence, Parental Divorce, and Child Custody: Directions for Intervention and Future Research*, FAM. REL., 55, 200–210 (2006).

[271] *See e.g.* Bonnie E. Carlson, *Children Exposed to Intimate Partner Violence: Research Findings and Implications for Intervention*, 1 TRAUMA, VIOLENCE & ABUSE 321 (2000); B.B. ROBBIE ROSSMAN ET. AL., CHILDREN AND INTER-PARENTAL VIOLENCE: THE IMPACT OF EXPOSURE, (2000).

[272] *See e.g.*, [cite to state's custody statutes and case law that supports assertion].

[273] Katherine M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. OF CONSULTING AND CLINICAL PSYCHOL. 339-52 (2003).

[274] *See* Jeffrey L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. OF INTERPERSONAL VIOLENCE 839-70 (1999); Gayla Margolin, *Effects of Witnessing Violence on Children*, in VIOLENCE AGAINST CHILDREN IN THE FAMILY AND THE COMMUNITY 57-101 (Penelope K. Trickett & Cynthia J. Schellenbach eds., Am. Psychological Ass'n, Washington, D.C. 1998).

[275] Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence*, 11 VIOLENCE AGAINST WOMEN 115-138, 120 (2005) (citing John W. Fantuzzo et al., *Effects of Interparental Violence on the Psychological Adjustment and Competencies of Young Children*, 59 J. OF CONSULTING AND CLINICAL PSYCHOL. 258-65 (1991)); H.M. Hughes, *Psychological and Behavioral Correlates of Family Violence in Child Witnesses and Victims*, 58 AM. J. OF ORTHOPSYCHIATRY 77-90 (1988).

[276] *Id.*, (citing Jackie L. Adamson & Ross A. Thompson, *Coping With Interparental Verbal Conflict by Children Exposed to Spouse Abuse and Children from Nonviolent Homes*, 13 J. OF FAM. VIOLENCE 213-32 (1998)).

depression, trauma symptoms, and temperament problems than children who were not exposed to family violence.[277]

The magnitude of the impact depends on the degree of violence; extent of exposure; the presence of additional risk factors, such as substance abuse by caregivers; and the existence of characteristics that ameliorate a risk factor or are otherwise associated with a lower likelihood of negative outcomes, such as a protective parent or other adult.

□ Co-Occurrence

Studies indicate that children exposed to adult domestic violence are at a greater risk of physical or sexual abuse than children who are not; this is referred to as co-occurrence. Reviews of the co-occurrence of documented child maltreatment in families where adult domestic violence is present have found almost half the families experienced both forms of violence.[278] The majority of studies found a co-occurrence of 30 percent to 60 percent.[279]

Co-occurrence is relevant in a Hague Convention case because Article 13(b) specifically requires the court to consider the possibility of future harm. The social science research regarding co-occurrence indicates that children are at a greater risk of future physical harm in cases involving domestic violence, which may impact the court's analysis under the grave risk exception even when that child has not been the direct target of past physical abuse.[280]

Intolerable Situation

Article 13(b) gives courts discretion to deny return of a child where there is a grave risk that return would expose the child to physical or psychological harm **or otherwise place the child in an intolerable situation**.[281]

Though Article 13(b) of the Convention expresses two separate exceptions to return—(1) where return presents a grave risk of exposure to harm and (2) where return presents an otherwise intolerable situation—few decisions have parsed out the distinction between these two elements

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[277] *Id.*

[278] Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. OF FAM. PSYCHOL. 578-99 (1998).

[279] Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134-54 (1999).

[280] *See Acosta v. Acosta*, 725 F.3d 868, 876 (8th Cir. 2013) (affirming that past abuse was not required under the grave risk exception and finding that "[t]he evidence presented to the district court supports its finding that [petitioner's] inability to control his temper outbursts presents a significant danger that he will act irrationally towards himself and his children"); *Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005) (indicating that under the grave risk exception the court should give weight to petitioner's propensity for violence); *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000) (relying on credible social science, the court noted "that serial spousal abusers are also likely to be child abusers").

[281] Convention, *supra* note 1, art. 13(b).

of the 13(b) exception.[282] Instead, courts have largely found that where grave risk of exposure to harm exists, return would also present an intolerable situation.

Conflation of the grave risk and intolerable situation exceptions may derive, at least in part, from the U.S. State Department's Text and Legal Analysis:

> "[I]ntolerable situation" was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an "intolerable situation" and subjected to a grave risk of psychological harm.[283]

At least one federal district court has acknowledged a distinction between risk of harm and an intolerable situation.[284] However, even in that case, both of the 13(b) exceptions were established, with the court separately finding that (1) returning the petitioner's two older children would pose a grave risk of harm due to prior child and spousal abuse, (2) separating those children from their mother and a younger sibling would constitute an intolerable situation, and (3) separating the youngest child from his mother and siblings would likewise constitute an intolerable situation.[285]

Ameliorative Measures and the Court's Discretion

The court "is not bound to order the return of the child" even if the respondent proves there is a grave risk that return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation.[286] If the court does exercise its discretion to return the child despite the existence of a grave risk or intolerable situation, the court may consider whether the petitioner or the Requesting State can implement measures to ensure the child's safe return. Those measures include assessing the Requested State's ability to protect the child with restraining or protective orders, conditioning return on certain agreements or concessions by the petitioning party ("undertakings"), and "mirror orders" to ensure the country of habitual residence will enforce the petitioning party's promises.

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[282] *See e.g. Blondin v. Dubois*, 19 F. Supp. 2d 123, 128 (S.D.N.Y. 1998), *vacated*, 189 F.3d 240 (2d Cir. 1999) (finding that return "would present a grave risk of psychological harm or an intolerable situation," but not distinguishing between the two).
[283] Text and Legal Analysis, *supra* note 4, at 10,504.
[284] *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1061 (E.D. Wash. 2001)
[285] *Id.*
[286] Convention, *supra* note 1, art. 13.

Jurisdictions differ as to the scope of a court's discretion once a respondent has proven the grave risk exception. Some courts have held that an inquiry into ameliorative measures—examination of the Requested State's ability to protect the children, alternative care arrangements, and other undertakings that would facilitate safe return, as well as the ability of the Requested State's authorities to enforce any such arrangement—is required before a court can deny return. Jurisdictions requiring an analysis of ameliorative measures, however, vary in the extent of the analysis required. Other courts have held that while ameliorative measures may be utilized by a court, inquiry and the extent of the analysis is also at the court's discretion.

Ameliorative measures that come into effect after the child has been returned are essentially unenforceable by U.S. courts.

■ Requested State's Ability to Protect Child

In *Friedrich v. Friedrich*, the Sixth Circuit *in dicta* narrowed discretion to deny return under Article 13(b), explaining that "there is a grave risk of harm in cases of serious abuse or neglect when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."[287] Some courts have followed *Friedrich*, citing this language and holding that return may be denied only if the country of habitual residence is not willing or able to protect the child.[288]

In the first appeal of *Blondin v. Dubois*, the Second Circuit remanded the case "for further consideration of the range of remedies that might allow *both* the return of the children to their home country *and* their protection from harm."[289] The appellate court instructed the lower court to consider ameliorative measures available through the French government, including alternate placement options.[290] On remand the district court found France offered resources to protect the children from future physical harm; however, due to severe abuse they had previously suffered at the hands of their father while residing in France and the progress the children were making in their settled environment in the United States, return to France under any circumstances would cause severe psychological harm.[291] The appellate court affirmed.[292]

Although the ultimate decision in *Blondin* was to deny return of the children to France, cases following the first *Blondin* appeal are often cited to support a two-pronged approach to the Article 13(b) exception. Such an approach requires children be returned unless the court finds that (1)

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[287] *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996).
[288] *See e.g. In re Application of Adan*, 437 F.3d 381, 395 (3d Cir. 2006) (requiring respondent to establish on remand that the courts in Requested State cannot or will not protect the child).
[289] *Blondin v. Dubois*, 189 F.3d 240, 249 (2d Cir. 1999).
[290] *Id.*
[291] *Application of Blondin v. Dubois*, 78 F. Supp. 2d 283, 298 (S.D.N.Y. 2000), *aff'd sub nom.* 238 F.3d 153 (2d Cir. 2001).
[292] *Blondin v. Dubois*, 238 F.3d 153, 161 (2d Cir. 2001).

return would pose a grave risk of exposure to physical or psychological harm or otherwise place the child in an intolerable situation and (2) the country of habitual residence is unwilling or unable to protect the child from that harm.[293]

Additional Considerations

→ Courts should consider the possible psychological harm to a child who, after experiencing severe emotional distress or trauma, is then separated from his or her protective parent as a result of return.[294]

→ The court should also consider whether there would be risk to *the respondent* following the child's return. If so, the court should evaluate whether there would be a corresponding risk that the child would be exposed to physical or psychological harm and how that corresponding risk might impact the efficacy of any ameliorative measures.[295]

→ Courts may look to the laws of the habitual residence when determining whether return would be safe; however, the touchstone is ***whether the children will be protected "in fact, and not just in legal theory***."[296]

→ A number of courts in other jurisdictions refuse to consider the ability of the country of habitual residence to ameliorate risk if an Article 13(b) exception has been established.[297]

■ Undertakings and Mirror Orders

An *undertaking* is a commitment from the petitioner. Undertakings before the child is returned—payment of transportation costs, dismissal of criminal charges—can be enforced, but undertakings that happen after return are essentially unenforceable. Thus, undertakings after return, when utilized by the court, are taken in good faith because on their own there is no mechanism for enforcement. The court can, however, ask the petitioner to make a good faith effort towards undertakings he or she has agreed to.

A *mirror order* is a foreign court order from the country of habitual residence that mirrors a U.S. order. The purpose of a mirror order is to ensure post-return undertakings are enforceable.

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[293] *See e.g. In re Application of Adan*, 437 F.3d at 395. *But see Miltiadous v. Tetervak*, 686 F. Supp. 2d 544, 557 (E.D. Pa. 2010) ("Similar to *Blondin*, in light of the sole, unimpeached and uncontroverted testimony of Dr. Davison that [the child's] return to Cyprus would trigger post-traumatic stress disorder, there is no need for the Court to consider alternative living arrangements or reach out to the Cyprus authorities for their input.").

[294] *See* J. Erickson & A. Henderson, *Diverging Realities: Abused Women and Their Children*, *in* EMPOWERING SURVIVORS OF ABUSE: HEALTH CARE FOR BATTERED WOMEN AND THEIR CHILDREN, 138-155 (J. Campbell ed., 1998).

[295] *See Abbott v. Abbott*, 560 U.S. 1, 22 (2010).

[296] *Van De Sande v. Van De Sande*, 431 F.3d 567, 570-71 (7th Cir. 2005) ("There is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as domestic violence relations.").

[297] *See e.g. Danaipour v. McLarey*, 386 F.3d 289, 293 (1st Cir. 2004) ("Article 13(b) does not require separate consideration either of undertakings or of steps which might be taken by the courts of the country of habitual residence.").

However, mirror orders are not enforceable by U.S. courts, and the enforceability of such orders will be up to the courts in the habitual residence.

Neither the Convention nor ICARA address undertakings or mirror orders. The use of undertakings and mirror orders has developed through case law and has no statutory foundation. The use of undertakings to ensure that the process of return is handled safely and appropriately is good practice when done properly; however, relying on undertakings to ensure a child's safety from domestic violence is precarious because a court's jurisdiction over a Hague Convention case ends when the child is either returned to his or her habitual residence or return is denied.

To avoid overstepping jurisdictional authority, undertakings should be limited to the circumstances attending return of the child and should not be extended to the child's living conditions in the habitual residence country thereafter. Similar jurisdictional concerns exist with mirror orders.

Safety and Discretion

→ The court can deny return if it is concerned that the child cannot be returned safely without an undertaking or mirror order addressing the living conditions in the habitual residence country.

Although the court cannot order the petitioner to do anything outside of the United States, courts inclined to use ameliorative measures can ask the petitioner to agree to provisions that would help ensure the safety of the respondent and child upon return. These provisions include, but are not limited to:

- An agreed restraining or protective order;
- Withdrawal of any criminal charges against the respondent to ensure the respondent may return and care for the child without arrest;
- Monetary arrangements for the petitioner to provide support or housing for the respondent and child upon return; and
- Making arrangement or paying for return transportation.

□ Undertakings and Domestic Violence

Domestic violence is relevant when determining whether undertakings are appropriate. Undertakings, however, are difficult to enforce, especially in situations involving domestic violence: "[I]n cases of child abuse, the balance may shift against return plus conditions."[298] Accordingly, courts should be mindful and wary about the adequacy of undertakings to address domestic violence concerns.

[298] *See Van De Sande*, 431 F.3d at 572. *See also Simcox v. Simcox*, 511 F.3d 594, 610-11 (6th Cir. 2007) (remanding for the lower court to consider appropriate undertakings but acknowledging that "no such arrangement" may be feasible in which case the petition should be denied).

The effectiveness of protective measures is highly dependent on the petitioner's willingness to make a good faith effort to follow through on undertakings. Courts should therefore consider a history of refusing to follow court orders, particularly those involving protective orders or criminal domestic violence, as weighing against the adequacy of those measures to address safety concerns.[299]

In general, undertakings and mirror orders provide little protection to victims of domestic violence and their children. In *Baran*, the Eleventh Circuit acknowledged that undertakings could be useful in some situations, but cautioned against using them where parental violence is alleged: "When grave risk of harm to a child exists as a result of domestic abuse . . . courts have been increasingly wary of ordering undertakings to safeguard the children."[300] Attorneys have described undertakings as being of limited usefulness, and mirror orders, although preferable to undertakings alone, as seldom enforced.[301] Reunite International conducted a study of 22[302] families with 33 children located in the United Kingdom and returned to other countries in Europe following Hague Convention proceedings.[303] Twelve of the cases involved court-stipulated undertakings that were to be implemented upon return of the child, half of which involved protecting the child from violence.[304] In two-thirds of these cases, court-stipulated undertakings were not implemented in the other country.[305] Undertakings that focused on child safety upon return were not carried out in *any* of the cases in which they were made.[306] Four mothers from another study (*Multiple Perspectives*) reported that none of the conditions to return was enforced when the mothers and their children returned to the country of habitual residence.[307] Reunite International concluded in their study of European cases that, "although the giving of undertakings by the applicant parent is often considered as a token of good faith by the courts of the requested State, the frequent failure to honor such undertakings must call into question whether such an assumption is supportable."[308] This study also found that mirror orders provided no greater guarantee of enforceability.[309]

The failure of mirror orders and undertakings to provide more than theoretical protections is significant because their provisions are intended to protect children where return would otherwise

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[299] *See Walsh v. Walsh*, 221 F.3d 204, 220-21 (1st Cir. 2000).
[300] *Baran v. Beaty*, 526 F.3d 1340, 1351 (11th Cir. 2008).
[301] Edleson et al., *Multiple Perspectives*, *supra* note [__], at 255.
[302] Although both this study and the Multiple Perspectives study involved 22 participants (22 families in the Reunite study and 22 mothers in Multiple Perspectives) these studies are not related and the similarity is a coincidence.
[303] Reunite Int'l Child Abduction Centre, *The Outcomes for Children Returned Following an Abduction*, 30-34 (2003) *available at* http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Outcomes%20Report.pdf [hereinafter *Outcomes for Children*].
[304] *Id*.
[305] *Id*.
[306] *Id*.
[307] Edleson et al., *Multiple Perspectives*, *supra* note [__], at 255.
[308] *See Outcomes for Children*, *supra* note [__], at 6.
[309] *Id*.

present a grave risk or intolerable situation. Courts that order return based on presumed protections of ameliorative measures should consider the likelihood of their actual effectiveness before relying on such measures to mitigate an established risk of harm.

§ 5.00. Mature Child's Objection to Return (Article 13)

A court "may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."[310] The respondent must prove this exception by a preponderance of the evidence.[311]

The Convention does not indicate at what age a child becomes sufficiently mature for his or her view to be taken into account, nor does it specify ages at which the child would be considered too young to trigger consideration of the exception.[312]

In [State], courts hear from children in a variety of ways, including […].

Relevance to Convention

State court rules often apply best interests standards, which are not applicable in Hague Convention cases. State rules may, however, provide some guidance as to the ways in which a court can hear from a child where appropriate under the Convention. Nonetheless, the court must not extend the inquiry into a best interests analysis that may be appropriate in a custody proceeding, but not in a Hague Convention case.

The mature child exception has multiple prongs. First the court must determine whether the child objects to returning to the country of habitual residence and then, if the child does object, whether the child is "of sufficient age and maturity" for the court to afford weight to the child's preference.[313] If the court finds both prongs support consideration of the child's objections, the court must determine what weight the child's objections will carry and whether to deny the petition for return on that basis.[314]

Age and Level of Maturity

[310] Convention, *supra* note 1, art. 13.
[311] 22 U.S.C.A. § 9003 (e)(2)(B).
[312] *See Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001).
[313] Linda D. Elrod, *Please Let Me Stay: Hearing the Voice of the Child in Hague Abduction Cases*, 63 OKLA. L.REV. 663, 667 (2011) [hereinafter Elrod, *Please Let Me Stay*].
[314] *Id.*

Courts have broad discretion in determining the sufficiency of the child's age and maturity and the extent to which a child's preference is viewed conclusively.[315]

Courts vary greatly in determining sufficient age of maturity to consider a child's views. The Western District of Arkansas found children ages 11, 13, and 15 sufficiently mature after they stated their wishes both in chambers and through letters to the court.[316] The court also noted that, even if the youngest had been too young or immature to state her wishes, the bond between the children would have supported allowing the exception to apply to her as well.[317] In another case, the Ninth Circuit refused to find the child had reached an age of maturity when he had not yet completed kindergarten.[318]

Some courts, however, narrowly construe the defense. In *Tahan v. Duquette*, for example, the intermediate appellate court held the standard did not apply to a nine-year-old as a matter of law.[319]

In *England v. England*, the Fifth Circuit held that a 13-year-old was not sufficiently mature because "[s]he ha[d] been diagnosed with Attention Deficit Disorder, ha[d] learning disabilities, [took] Ritalin regularly, and [was], not surprisingly, scared and confused by the circumstances producing this litigation."[320]

Maturity Depends on the Child

A child's age is not determinative of maturity. Rather, determination of a child's level of maturity requires an individualized, fact-specific inquiry.

Weight of Child's Objection

The court can deny a petition based solely on the objection of a mature child.[321] But if the court denies return based *solely* on a mature child's objection, a "stricter standard" must be applied to consideration of the child's wishes than would apply if more than one exception has been established: for example, if the court is considering the objections of a mature child who has also been in the new country for over a year and is well-settled.[322] A child who is too young or immature

[315] *Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001). (finding an 8-year-old's views were properly considered as part of the analysis under the grave risk exception; the court rejected drawing arbitrary lines due to age and noted that each child's circumstances should be considered individually).
[316] *Kofler v. Kofler*, CIV. 07-5040, 2007 WL 2081712, at *8-9 (W.D. Ark. July 18, 2007).
[317] *Id.* at *9; *cf. McManus v. McManus*, 354 F. Supp. 2d 62, 72 (D. Mass. 2005) (relying in part on the close relationship of younger siblings to older siblings in deciding to allow younger children to remain in the United States).
[318] *Holder v. Holder*, 392 F.3d 1009, 1017 (9th Cir. 2004).
[319] *Tahan v. Duquette*, 259 N.J. Super. 328, 335 (App. Div. 1992).
[320] *See England v. England*, 234 F.3d 268, 272 (5th Cir. 2000).
[321] *De Silva v. Pitts*, 481 F.3d 1279, 1286 (10th Cir. 2007) (quoting the second *Blondin* appeal, *supra*, 238 F.3d 153, 166 (2d Cir. 2001)).
[322] *Id.*; *see also Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 278 (3d Cir. 2007).

to have his or her objections considered under the mature child exception alone may nevertheless have his or her objections considered "as one part of a broader analysis under Article 13(b)."[323]

The Ninth Circuit, in addressing maturity and weight of a child's objection, noted the importance of a court ensuring a child's statements reflect his or her "own, considered views."[324] Relatedly, the Fifth Circuit has cautioned that a child's objection may be afforded little if any weight if it is found to be the product of undue influence.[325] In cases of domestic violence, courts should consider whether domestic violence or child abuse bear on the child's ability to develop and articulate considered views[326] or whether any fear of the abuser has lead the child to give false statements.[327]

Relevant Evidence

Evidence must be presented to establish both the child's maturity *and* the child's objection.

Testimony from adults who have a close relationship to the child—such as teachers, coaches, pastors, caretakers, or relatives—relating to the child's ability to make reasoned choices and to understand the consequences of his or her decisions is relevant to the child's maturity. The child's ability to articulate a preference and the logic the child uses in determining his or her preference, as well as the child's emotional, cognitive, and developmental level, may also be relevant to determining the child's level of maturity.[328]

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[323] *Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001).
[324] *Gaudin v. Remis*, 415 F.3d 1028, 1037 n.3 (9th Cir. 2005).
[325] *E.g.*, *Dietz v. Dietz*, 349 Fed. App'x 930, 935 (5th Cir. 2009) ("A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child") (citations omitted).
[326] *See e.g. Wissink v. Wissink*, 749 N.Y.S.2d 550 (App. Div. 2002), as discussed in Thomas E. Hornsby (Judge, ret.), *Do Judges Adequately Address the Causes and Impacts of Violence in Children's Lives in Deciding Contested Custody Cases*, 4 FAM. & INTIMATE PARTNER VIOLENCE Q. 209, 232-233 (2012) (discussing how the abuser in *Wissink* bonded with the parties child, and even enlisted her in physically abusing the mother, and that while the child preferred the abusive father's custody that did not mean it was in her best interest to remain in his home). *See also State v. Moran*, 728 P.2d 248, 253-54 (Ariz. 1986) (allowing expert testimony to explain why an abused child would say she wants to return to her abuser's home); John Meyers, *Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection*, 28 J. FAM. L. 1, 18 (1989/1990) (arguing that courts should be skeptical if children prefer the batterer, as it may well be a psychological coping mechanism); Holt S., Buckley H., and Whelan S., *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 J. OF CHILD ABUSE & NEGLECT 787, 803 (2010) (explaining that school age children may blame themselves for abuse in the home and may try to rationalize the abuser's behavior; most will hide their "secret" from everyone).
[327] *See Noergaard v. Noergaard*, 197 Cal. Rptr. 3d 546, 560 (Cal. App. 4th Dist., 2015) (holding trial court was required to afford respondent opportunity to present evidence where petitioner alleged, among other things, that petitioner had "exercised his position as an alleged custodial abuser to manipulate [child's] testimony" and the child's recanted allegation of abuse at least in part because of her fear that her mother, the respondent, would be incarcerated if she told the court about the abuse).
[328] Elrod, *Please Let Me Stay*, *supra* note [__], at 679.

The court may hear from the child directly through testimony, which can be done *in camera*,[329] or accept letters from him or her written directly to the court.[330] This will allow the court to assess the child's level of maturity and may also establish the basis of the child's objections.

One court appointed an expert to testify as to a child's maturity level of a child.[331]

No Bright-Line Rules

→ There is no minimum age at which a child's testimony or other input must be considered by the court in a Hague Convention case, rather this determination is made on a case by case basis.[332]

→ The law does not mandate that the court take testimony from the child to determine his or her objection to return or level of maturity.

→ If the court chooses to take testimony from the child, it should do so in the least traumatic manner.

§ 6.00. Human Rights and Fundamental Freedoms (Article 20)

Finally, courts may refuse to return a child if return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[333]

The respondent must prove by clear and convincing evidence that return of the child would violate fundamental principles of human rights of the United States.[334] In identifying "fundamental principles," the court can look at the range of domestic and international laws, including treaties, to which the United States is a party. The respondent must show that the "fundamental principle" not only exists in the United States but also has international recognition, and that it is invoked

[329] *See e.g. Simcox v. Simcox*, 511 F.3d 594, 604 (6th Cir. 2007).
[330] *See Silverman v. Silverman*, 338 F.3d 886, 907-8 (8th Cir. 2003).
[331] *Andreopoulos v. Nickolaos Koutroulos*, CIVA.09CV00996WYDKMT, 2009 WL 1850928, at *9 (D. Colo. June 29, 2009) (discussing therapist's testimony that the child had demonstrated age-appropriate maturity and morality levels). *But see Dietz v. Dietz*, No. 07–1398, 2008 WL 4280030, *27-28 (W.D. La. Sept. 17, 2008) *aff'd sub nom. Dietz v. Dietz*, 349 F. App'x 930 (5th Cir. 2009) (declining to accept psychologist's testimony in determining whether either the grave risk of harm or mature child exceptions applied); *Tahan v. Duquette*, 259 N.J. Super. 328, 334 (App. Div. 1992) (noting that the Hague Convention reserves considerations of "psychological profiles, detailed evaluations of parental fitness, evidence concerning lifestyle and the nature and quality of relationships [which] all bear upon the ultimate issue [of custody] to the appropriate tribunal in the place of habitual residence.").
[332] *See* Pérez-Vera, Explanatory Report, *supra* note 4, at ¶ 30. *See also Blondin v. Dubois*, 238 F.3d 153, 167 (2d Cir. 2001) (declining to read an age limit into the Convention with regards to taking a child's views into account).
[333] Convention, *supra* note 1, art. 20.
[334] 22 U.S.C.A. § 9003(e)(2)(A).

and applied in wholly domestic matters in the United States and not only raised as an exception under the Convention.[335]

One court rejected this defense based on the absence of "clear evidence that the rights of the [parties] or, more importantly, the rights of the minor children, would not be protected in Mexico."[336]

The U.S. State Department maintains that Article 20 was meant to be "restrictively interpreted and applied" on the "rare occasion that return of a child **would utterly shock the conscience** of the court or **offend all notions of due process**."[337] Courts that have ruled against application of the Article 20 defense have cited the U.S. State Department's analysis to support a strict reading of Article 20.[338]

[335] Pérez-Vera, Explanatory Report, *supra* note 4, at ¶ 118.
[336] *March v. Levine*, 136 F. Supp. 2d 831, 855 (M.D. Tenn. 2000) *aff'd* 249 F.3d 462 (6th Cir. 2001).
[337] Text and Legal Analysis, *supra* note 4, at 10,511. *See also Tokic v. Tokic*, 4:16-CV-1387, 2016 WL 4046801, at *9 (S.D. Tex. July 27, 2016) (internal citations omitted).
[338] *See e.g. Tokic v. Tokic*, 4:16-CV-1387, 2016 WL 4046801, at *9 (S.D. Tex. July 27, 2016); *Hazbun Escaf v. Rodriquez*, 200 F. Supp. 2d 603, 614 (E.D.Va.,2002); *Aldinger v. Segler*, 263 F. Supp. 2d 284, 290 (D.P.R. 2003).

PART V. CASE SCENARIOS

The case scenarios below were first developed as part of the Hague Domestic Violence Project's work for a study commissioned by the National Institute of Justice. More detailed versions of the scenarios can be found in that study, available at haguedv.org.

These scenarios are designed for use as a self-training tool. They were drafted to contain myriad issues that a court may have to consider when determining the outcome of a petition for return involving allegations of domestic violence.

Following each scenario is a discussion of the issues raised in that scenario and commentary on how a court might evaluate the issues presented.

§ 1.00. No Physical Violence; Determining Habitual Residence

Mary-Lou and Luke met in high school and are now married. Mary-Lou, 23 years old, is the respondent in a Hague Convention case. She testified that after they were married Luke decided he wanted to move to France, where he had grown up. She reluctantly agreed to go to France, believing Luke would not like it and would want to move back to the United States soon after.

After a few months in Paris Mary-Lou became pregnant. She testified that after telling him that she was pregnant, Luke changed. Although Luke had always been controlling, Mary Lou testified that his behavior toward her became more intense; he would not let Mary-Lou leave the house alone, and she was not allowed to answer the door or phone if he was not there. She told the court that as her pregnancy advanced, Luke's behavior became even more aggressive. He started threatening her, telling her that she was ugly, stupid, and that she would not be able to survive without him. She told the court that Luke's behavior upset her, but she stayed with him because she had nowhere else to go. Mary-Lou is not a French citizen, has no family in France, and does not speak the language.

Luke's threats continued and then worsened after Marty-Lou gave birth. Mary-Lou testified that Luke would yell at her for hours while she was holding the baby. At times, he threatened to have her deported if she ever told anyone she was unhappy with him. He also threatened to leave her, take custody of their son, and ensure she would never see the child again. Luke also threatened to make her and her son "disappear," stating no one would ever miss them. She testified that on one occasion, while she was feeding the baby, Luke became angry that she was not paying attention to him and threatened to throw their child out the window.

After the last threat Mary-Lou called her sister, who sent her a plane ticket back to the United States. After Mary-Lou fled the country with their son, Luke filed a petition under the Hague Convention for return of their son to France. Mary-Lou testified she is afraid of Luke, does not want to go back to France, and does not want her son returned to France without her.

Issue #1: Habitual Residence

The first issue for the court to consider is whether the child was removed from his country of habitual residence, and therefore the court must determine whether France was the child's habitual residence. Although this scenario involves multiple moves (Luke and Mary-Lou's move from the United States to France and then Mary-Lou and the child's move back to the United States), it is important to note that the child was born in France and had never lived in United States prior to removal. For this reason the court may find that the child's habitual residence was France.[339] However, Mary-Lou testified she was reluctant to move to France and believed that the move might only be for a short period of time. Based on this testimony, the court may consider whether or not she intended for France to become her habitual residence or the habitual residence of her child.[340] Finally, the court might consider Luke's controlling and abusive behavior towards Mary-Lou in analyzing whether she or the child could be considered settled in France, thereby making it their habitual residence.[341]

Issue #2: Petitioner's Custody Rights

If the court determines France was the child's habitual residence, the petitioner's custody rights at the time of removal will be determined under French law. The court will then need to determine whether those rights amount to "rights of custody" under the Convention.

Issue #3: Grave Risk

If the petitioner establishes a *prima facie* case of wrongful removal, the burden will shift to the respondent to prove that one or more of the Convention's exceptions to return applies.

To establish an exception pursuant to Article 13(b), the respondent must prove by clear and convincing evidence[342] that there is a grave risk that return would expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation.[343]

In this scenario, Mary-Lou has testified to Luke's controlling behavior, his threats of violence toward both her and the child, and his yelling at her while she was holding the child. Although Mary-Lou has not alleged any incidents of past physical abuse to her or the child, the court can

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[339] A child's place of birth is not automatically the child's habitual residence, although a child born where both parents have their habitual residence would normally be regarded as a habitual resident of that country. *Holder v. Holder*, 392 F.3d 1009, 1020 (9th Cir. 2004) (citing *Delvoye v. Lee*, 329 F.3d 330, 334 (3d Cir. 2003)).

[340] *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001) (finding "that a settled intention to abandon one's prior habitual residence is a crucial part of acquiring a new one").

[341] *See Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1055 (E.D. Wash. 2001) (finding, in part, that petitioner's abusive and controlling behavior adversely affected any potential acclimatization to Greece).

[342] 22 U.S.C.A. § 9003 (e)(2)(A).

[343] Convention, *supra* note 1, art. 13(b) (emphasis added).

still consider Luke's behavior in determining whether there was domestic abuse and if so, whether that abuse supports a grave risk finding under Article 13(b).[344]

Additionally, courts may consider whether grave risk exists when return would jeopardize the respondent's safety.[345]

§ 2.00. Adoptive Parent Takes Child across International Border

Beth is the respondent in a Hague Convention case. Beth has testified that after graduating from college she moved to Greece to teach English. While in Greece, Beth met Nick, the petitioner in this case.

Beth and Nick worked at the same school. They began dating very soon after Beth arrived in Greece. Beth testified that Nick was very jealous during their relationship. If she received praise from a colleague or student's parent, he would get angry. If she talked to other people at work, he would get angry. Nick's jealous behavior continued throughout their relationship. Beth, however, decided she wanted to stay with him in Greece.

Beth and Nick married and purchased a house together in Greece. Beth testified that during this time, she and Nick were "starting their life together."

Nick has a son from a previous marriage. Both parties testified that Nick's son had no contact with his biological mother and Beth had legally adopted him. Beth testified that when she started her own business, Nick's abusive behavior worsened. He continued to act jealously, taunting Beth about how she conducted herself around other men. This behavior then escalated to physical abuse. Beth testified that Nick began hitting her and would do so in front of their son.

Beth testified that she had been considering leaving Nick when she found out that she was pregnant. By the time their daughter was born the abuse had increased in frequency to almost daily. Next, Nick began threatening the children. Beth testified that she saw bruising on their infant daughter's legs. She said that it looked as if Nick had been twisting her legs, and she believed he was doing it during diaper changes when Beth was not watching.

Beth testified that she had wanted to leave Nick, but that she was too scared. She was afraid that if she tried to leave and Nick caught her, he would kill her.

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[344] *See Baran v. Beaty*, 526 F.3d 1340, 1352 (11th Cir. 2008) (finding that petitioner's threats of harm to the child, even without past physical violence, can pose a grave risk of future harm to the child). In *Baran*, the court found that the father's temper, which had been thoroughly documented in the record, along with his threats of harm to the child, were enough to constitute a grave risk and denied return. *Id.*

[345] *Abbott v. Abbott*, 560 U.S. 1, 22 (2010) (explaining *in dicta* that if a respondent could show that return would put her own safety at risk, a "court could consider whether this is sufficient to show that the child too would suffer 'psychological harm' or otherwise be placed in an 'intolerable situation.'").

She testified that when she received a call from the hospital saying their son had come in with broken ribs and a broken arm, she knew Nick had done it. Beth tried to report this incident to the police but was told it was a "family matter" and "none of their business." Beth left the police station without filing a report.

Beth believed that if she did not take the children and leave, Nick would eventually kill them. She left Greece, taking both children to her parents' house in the United States. She knew Nick would be furious with her and had worried about him filing a petition under the Hague Convention. However, she explained that when she spoke to him after arriving in the United States, he seemed more concerned that if he made an issue of her leaving it would draw attention to his violent behavior than he was about Beth and the children returning to Greece.

Nick knew that if Beth were to go to the United States she would go to her parents' home. He called her there shortly after she left Greece. Both parties testified that Nick wanted to speak to the children over the phone and that Beth facilitated this. Nick neither called again nor asked either Beth or the children to return to Greece. Beth believed that he did not want to have any contact with her or the children after the initial phone call. Thereafter, the only contact Nick made was sending birthday cards to the children.

Beth testified that she and the children were doing well at her parents' house and she was surprised to be served with the petition for return under the Hague Convention eight months after her only post-removal conversation with Nick.

Issue #1: Adopted Child vs. Biological Child

The Convention does not differentiate between adopted and biological children; rather it seeks "to ensure that rights of custody . . . under the law of one Contracting State are effectively respected in the other Contracting States."[346] Rights of custody under the Convention may result from judicial order, agreement, or by operation of law.[347] The analysis is the same as it would be if both parents were the child's biological parents, and this is true whether the adoptive parent is the respondent or the petitioner.

Issue #2: Habitual Residence

Because both children were born in Greece and, until Beth fled to the United States, both parents intended for the children's habitual residence to be in Greece, this issue is likely undisputed.

[346] Convention, *supra* note 1, art. 1.
[347] *Id.* at art. 3.

Issue #3: Article 12: "Well-Settled" in the New Environment

Assuming the court finds Nick has established a *prima facie* case for return under the Convention, the burden will shift to Beth to prove one or more exceptions to return. Although Beth testified that she and the children are doing well in their current location, the Article 12 "well-settled" exception is not available to her because the petition was filed with the court less than one year from the date she removed the children from Greece.[348]

Issue #4: Article 13(a): Consent or Subsequent Acquiescence

Although Beth left Greece without telling Nick she was leaving or where she was going, Nick knew she went to her parents' house with the children and contacted her there shortly after she arrived in the United States. He spoke to the children once and sent birthday cards, but never asked that they return to Greece. Despite knowing where the children were located, Nick did not try to stay in contact with Beth or the children and waited eight months before filing a petition for their return.[349] Based on these facts, the court may consider whether the petitioner's actions amounted to consent or subsequent acquiescence to the removal of the children from Greece to the United States.[350]

Issue #5: Article 13(b): Grave Risk

In this scenario, the respondent alleges the petitioner physically abused her and both the children. Courts have held that past abuse of the child constitutes a grave risk of future physical or psychological harm or an otherwise intolerable situation if the child is returned.[351] In addition, the court may consider not only physical abuse of the children, but also the effect of the spousal abuse on the children.[352] With abuse as serious as that described in this scenario—prolonged abuse of mother and children culminating in broken bones to one child and bruises to the other child—a court could find the respondent has met her burden of proving the grave risk exception.

Although there is more evidence of abuse to the older child, even if a court did not credit the allegation of abuse to the younger child, the court could still deny return of both children on the grounds that both children would face a grave risk or intolerable situation if returned.[353]

Issue #6: Discretion to Return: Ameliorative Measures and Country's Ability to Protect

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[348] *Id*. at art. 12.
[349] *See Application of Ponath*, 829 F. Supp. 363, 368 (D. Utah 1993) ("This conclusion [that petitioner consented to removal] is further supported by petitioner's failure, for almost six months, to make any meaningful effort to obtain return of the minor child.").
[350] Convention, *supra* note 1, art. 13(a))
[351] *See Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 399 (E.D.N.Y. 2005).
[352] *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1058 (E.D. Wash. 2001).
[353] *See Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 459-60 (D. Md. 1999) (finding grave risk exception met in part based on physical and psychological abuse of two oldest children).

If the court is deciding whether to exercise its discretion to order return despite finding that return would pose a grave risk of exposure to physical or psychological harm to the child, the court should give weight to Beth's testimony regarding her attempts to report the abuse to the police. Considering Beth's thwarted attempts to protect herself and the children while still in Greece, the court may find that even with ameliorative measures it cannot protect the children from the grave risk, thus warranting a denial of the petition for return.[354]

§ 3.00. Alcohol and Drug Abuse; Extreme Physical Abuse; Some Children Left Behind

Tracy, a Canadian citizen, is the respondent in this case. During the course of the hearing, Tracy testified to a long history of abuse. As a child, Tracy's father was sexually and physically abusive to both her and her mother. Subsequently, Tracy was abused by various partners beginning at the age of 14.

Tracy met Dave, the petitioner in this case, when she was 18 years old and had a relationship with him for 10 years while living in Canada. Dave and Tracy are not married. They have four children together.

Tracy testified that Dave had been controlling and verbally abusive toward her from the beginning of their relationship. She stated that over time the abuse escalated to physical and sexual violence.

At 19, Tracy became pregnant with their first child. She testified that she was afraid to have a baby because she did not think she was prepared to be a mother, and feared that the stress of having a child would make Dave more violent. Tracy testified that after she gave birth Dave's abuse worsened; the physical abuse became more regular and she often had to wear turtlenecks and long pants, even in the middle of summer, to cover the bruising.

Tracy told the court that Dave would come home from work and drink alcohol or take drugs. When he was intoxicated he would hit her. She said that he often made her go out and get the alcohol or drugs for him. If she refused he would abuse her, but if she did get them for him the abuse would be even worse after he was intoxicated. Tracy testified that she felt completely alone. She did not have any friends or family who could help her. She testified that after every incident of abuse Dave apologized and promised that the abuse would stop. Tracy believed him every time, despite the repeated abuse.

At 21, Tracy became pregnant with their second child and at 24, she became pregnant with twins. By the time she was 25 years old, she and Dave had four children together. She testified that they

[354] *See Van De Sande v. Van De Sande*, 431 F.3d 567, 570-71 (7th Cir. 2005) ("There is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as domestic violence relations.").

struggled financially and that she was often fired from jobs because she was too injured or bruised to go to work.

Tracy testified that Dave never physically abused the children, but that he often abused her in front of them. She told the court that the children understood what was happening in the house, and that they were terrified of Dave. She testified that the worst incident happened after she came home from work late because she had given a co-worker a ride home. She said that Dave was waiting for her with a gun. He told her that she was late and that now she was going to die. Dave fired the gun, shooting Tracy in the leg. A neighbor, hearing the gunshot, called the police right away.

Tracy testified that it was this incident with the gun that finally gave her the courage to leave Dave because she knew that if she stayed he would kill her. Tracy's sister lives in the United States. Tracy testified at the hearing that she believed her sister's house was the only place she could go to be safe.

Tracy left Canada with the twins. The two older children did not want to go with her. Tracy testified that leaving the children behind was the hardest decision she has ever had to make, but that she could not stay with Dave. Tracy wants the two older children to come live with her once she is settled in the United States.

Dave contacted an attorney shortly after Tracy left Canada. Tracy has been served with documents from the Canadian court requiring her to return the children to Canada. Dave has also filed a petition for return of the twins under the Hague Convention.

Issue #1: Children Left Behind and Documents from Canadian Court

The court in a Hague Convention case has no jurisdiction to hear issues regarding children that were not wrongfully removed or retained from their country of habitual residence.[355]

If Tracy is going to seek custody or relocation of her older children, that case will be handled separately. Correspondingly, unless there are documents regarding Dave's rights of custody under Canadian law at the time of removal or retention, documents from the Canadian family court regarding the children's return are not relevant to the Hague Convention case.

Issue #2: Article 13(b): Grave Risk

It is clear from Tracy's testimony that her health and safety would be at risk if she returned to Canada. She was isolated in Canada, and her only family lives in the United States. In *Abbott*, the U.S. Supreme Court noted that when a respondent can show that return would put his or her own safety at risk, the court can consider whether that is sufficient to indicate a grave risk or otherwise

[355] *See* Convention, *supra* note 1, art. 12 (court may order return where child has been wrongfully removed or retained as per Article 3 of the Convention).

intolerable situation for the child.[356] Additionally, courts have acknowledged that spousal abuse may create a grave risk to the children.[357]

Although the abuse was not directed at the children, there is a risk that they will be subject to physical abuse by Dave in the future (co-occurrence) and that they will be exposed to psychological harm by returning to an abusive environment.

If the court orders the children to return to Canada, Tracy must then choose between accompanying the children back to Canada where she will be at risk or protecting herself by remaining in the United States while the children are returned without her.

Issue #3: Drug and Alcohol Abuse

The petitioner's drug and alcohol abuse is an appropriate factor to consider under the grave risk exception.[358] However, the court should be careful not to put such weight on this factor that it is engaging in a best interests analysis. The Hague Convention does not address custody, nor does it allow for a best interests analysis in determining whether a petition for return should be granted.[359] But the drug and alcohol abuse can be considered in the context of petitioner's abusive behavior in determining whether return poses a grave risk of exposure to physical or psychological harm to the children.

§ 4.00. Custody Agreement; Child's Objection to Return; Kidnapping Charges

Lisa, the respondent, testified that she was in an abusive relationship with Diego, the petitioner, for 15 years. Lisa is from the United States and Diego is from Argentina. Lisa moved to Argentina at age 20 to live with Diego, and remained there with him for 15 years until they divorced.

Diego and Lisa have three children, ages 7, 10, and 13 years old at the time of the hearing. Lisa testified that in their custody agreement, Lisa has physical and sole legal custody of the children, but Diego has the children in his care for three weeks out of the year. Lisa testified that she took the children and left Argentina because Diego continued to interfere with her life even after their divorce. Diego did not consent to Lisa removing the children from Argentina. Lisa believes that

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[356] *Abbott v. Abbott*, 560 U.S. 1, 22 (2010).

[357] *See Acosta v. Acosta*, 725 F.3d 868, 876 (8th Cir. 2013); *Baran v. Beaty*, 526 F.3d 1340, 1352 (11th Cir. 2008); *Van De Sande*, 431 F.3d at 570; *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000). *See also Khan v. Fatima*, 680 F.3d 781, 786 (7th Cir. 2012) ("If the mother's testimony about the father's ungovernable temper and brutal treatment of her was believed, it would support an inference of a grave risk of psychological harm to the child if she continued living with him."); *Miltiadous v. Tetervak*, 686 F. Supp. 2d 544, 554 (E.D. Pa. 2010) ("Respondent's evidence of spousal abuse compels a finding that the grave risk of harm affirmative defense applies here.").

[358] *Baran v. Beaty*, 526 F.3d 1340, 1346 (11th Cir. 2008) ("The evidence presented was sufficient to support the court's conclusion that Baran's violent temper and abuse of alcohol would expose [the child] to a grave risk of harm were he to be returned to Australia.").

[359] Text and Legal Analysis, *supra* note 4, at 10,510.

under their custody agreement, she is permitted to relocate the children unilaterally and is not required to seek Diego's permission.

Lisa testified that Diego physically abused her during their marriage but did not physically abuse the children. She told the court that after their divorce, Diego would "hang around" outside her house, wait for the children at school even though he did not have custody, and sit outside her office. She testified that she never felt safe in Argentina because Diego would not leave her alone and the police never took any action in response to her complaints. Lisa felt isolated in Argentina without her family and she did not have any help taking care of the children.

Lisa returned to the United States with the children 10 months ago, and they have been living with her family since then. The children spent three weeks with Diego in Argentina this past summer as per their custody agreement, but afterward they told Lisa that they do not want to go back to Argentina again. Lisa testified that she believes the children are old enough to make this decision for themselves, and that if they do not want to return to Argentina then she will not send them back. Lisa has also testified that she is scared to go back to Argentina because she now faces kidnapping charges for taking the children to the United States.

Issue #1: Rights of Custody

The Hague Convention differentiates between rights of custody and rights of access.[360] Custody rights are defined by the Convention as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."[361] Rights of access, on the other hand, are defined as "the right to take a child for a limited period of time to a place other than the child's habitual residence."[362] This inquiry does not require a custody determination; rather, Diego must prove that his rights under the parties' custody agreement as per Argentinian law (assuming Argentina is the children's habitual residence) amount to "rights of custody" within the meaning of the Convention.[363]

In this scenario, and according to Lisa's understanding of their custody agreement, Lisa has physical custody of the children for most of the year—49 out of 52 weeks—and "sole legal custody." In her testimony she describes the petitioner's time with the children as "custody," but it is unclear from her testimony alone what rights Diego has under Argentinian law. It is Diego's burden to prove that the rights he has under Argentinian law amount to rights of custody under the Convention. It is important to note that merely labeling a party's rights "custody" or "visitation" does not end the inquiry. Rather, the court must determine the actual rights conferred by the country of habitual residence and what they amount to under the Convention's meaning.

[360] Convention, *supra* note 1, art. 5.
[361] *Id.*
[362] *Id.*
[363] *Id.* at art. 3.

If the court finds that Diego has rights of access and not custody rights, he may file a petition for access to the children but cannot seek return pursuant to the Convention.[364]

Custody rights, however, have been interpreted broadly by courts. In *Abbott* the U.S. Supreme Court looked to the law of Chile (the children's habitual residence in that case), which provided the father with a *ne exeat* right[365] by operation of law rather than by judicial order, and determined that the *ne exeat* right was a custody right within the meaning of the Convention because the right was construed both as a right relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.[366] Similarly, in some countries even when one parent is awarded sole custody of the child the non-custodial parent maintains *patria potestas* rights, rights of parental authority and responsibility that have been found sufficient to establish rights of custody for the purpose of the Convention.[367] This court will need more information about Diego's rights under Argentinian law to make a determination on this issue.

Issue #2: Article 13(a): Consent or Acquiescence

If Diego does prove that he has rights of custody, and otherwise proves his *prima facie* case, the court will turn to the respondent's defenses.

The children visited Diego in Argentina and then returned to their mother in the United States. Diego had to know where the children had been located because they were in his care for a period of time and then he sent them back to their mother. Moreover, prior to filing his petition he did not make any attempts to have them returned to Argentina nor did he communicate that he wanted them to return. Acquiescence usually requires a level of formality, including "a consistent attitude over a significant period of time."[368] Diego's cooperation in returning the children to the United States should at least be considered by the court in determining whether he acquiesced to the children's removal.

Issue #3: Article 13: The Objection of a Mature Child

The children in this case are 7, 10, and 13 years old. Lisa has testified that they do not want to return to Argentina, and she is asserting Article 13, the mature child exception. Under this exception a court "may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."[369] The Convention does not indicate at what age a child is sufficiently mature

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[364] *Id.* at art. 21.
[365] "*[N]e exeat* right: the authority to consent before the other parent may take the child to another country." *Abbott v. Abbott*, 560 U.S. 1, 5 (2010).
[366] *Id.* at 11.
[367] See e.g. *Whallon v. Lynn*, 230 F.3d 450, 452 (1st Cir. 2000).
[368] *Friedrich v. Friedrich*, 78 F.3d 1060, 1070 (6th Cir. 1996).
[369] Convention, *supra* note 1, art. 13.

enough for his or her view to be taken into account, nor does it articulate ages that are too young to consider.[370]

In this scenario, Lisa has represented her belief that the children do not want to be returned to Argentina. However, the court must make a factual determination as to whether the children do in fact object to being returned, and if so, whether they are mature enough for the court to take their objection into consideration and how much weight to afford their objection. The Ninth Circuit, in addressing maturity, has noted the importance of ensuring that a child's statements reflect his or her "own, considered views."[371]

This can be the court's sole basis to deny return if respondent meets her burden in proving the exception.[372]

§ 5.00. Date of Retention; Determining Habitual Residence

Jenny is the respondent in this Hague Convention case. She and Andrew, the petitioner, have been married for seven years by the date of the hearing. During the hearing, Jenny testified that they started dating during college in the United States. She told the court that Andrew was controlling from the beginning, but that she loved him. Jenny and Andrew were married after college and had their first child. Jenny testified that after their first child was born Andrew became increasingly controlling, but that she made attempts to ignore his behavior. Two years after their first child was born Jenny became pregnant with their second child.

Jenny testified that shortly after the birth of their second child, Andrew informed her that his employer was transferring him to Australia. Jenny did not want to move to Australia because all of her family lived close to them in the United States, Jenny had a job that she loved, and she did not want to relocate her family. Jenny testified that she told Andrew that she did not want to move, but she later agreed because Andrew said that if he did not take the transfer to Australia, his employer would fire him. Andrew earned more money than Jenny, and she was concerned about the financial impact on the family if he lost his job.

Jenny testified that she agreed to move to Australia because it seemed like the only practical option. Once the family arrived in Australia, Andrew's controlling behavior worsened and Andrew became physically violent. Jenny told the court that Andrew never hit the children, but he did hit her in their presence.

She testified that she and the children were isolated and afraid in Australia, constantly worrying that their actions would cause an attack on Jenny. Andrew held all of the family's passports,

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[370] *See Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001).
[371] *Gaudin v. Remis*, 415 F.3d 1028, 1037 n.3 (9th Cir. 2005). *See also* Elrod, *Please Let Me Stay*, *supra* note [__], at 686-87 ("If the child's objection appears to be the result of parental indoctrination or undue influence, the court may order return over the child's objections.").
[372] *See Anderson v. Acree*, 250 F. Supp. 2d 876, 883 (S.D. Ohio 2002) (citing *Blondin*, 238 F.3d at 166).

identification, and other travel documents. Jenny testified that he had promised several times to file her application for a work permit but never did. Because of this, Jenny had no access to money without going through Andrew. Jenny told the court that Andrew took away her credit cards and gave her a set budget, monitoring her spending and movement.

Jenny testified that when she told her sister what happening in Australia, her sister encouraged her to return to the United States. Jenny's sister offered to help her "get back on her feet" once she returned. Shortly after that conversation Jenny learned that Andrew had not been forced to take the transfer to Australia, but rather had *requested* the transfer and threatened to quit if his company did not permit it. Jenny testified that learning this information was what triggered her decision to take the children back to the United States.

Jenny asked Andrew if she should take the children to the United States for a vacation and he agreed. Once back there, Jenny filed for divorce and custody of the children. Immediately after being served with the divorce papers, Andrew filed a petition for return of the children to Australia.

Issue #1: Date of Retention

Jenny took the children to the United States with Andrew's permission; therefore, this is a case involving retention, not removal. Andrew must prove that the children's habitual residence was Australia prior to their retention in the United States.[373] Retention refers to a parent keeping the child out of the country beyond the limits of the other parent's permission. In this scenario, Andrew agreed that Jenny would take the children to the United States on vacation, but the facts here do not indicate whether a specific time frame was agreed to by the parties. In determining the date of retention or the date a retention became wrongful, courts have looked to the date on which the petitioner was "truly on notice" that the respondent was not returning with the child.[374] If Jenny had purchased round-trip plane tickets, a court might find that retention did not occur until the date of the return ticket had passed.[375] Andrew might argue, however, that he was truly on notice when Jenny filed for divorce in the United States, even if the agreed-upon time period for the vacation had not yet elapsed.[376] This distinction is important because in some jurisdictions courts have held that communicating an intention not to return amounts to retention.[377]

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[373] *See* Convention, *supra* note 1, art. 3.
[374] *See Blanc v. Morgan*, 721 F. Supp. 2d 749, 762 (W.D. Tenn. 2010); *see also McKie v. Jude*, CIV.A. 10-103-DLB, 2011 WL 53058, at *6 (E.D. Ky. Jan. 7, 2011).
[375] *See Toren v. Toren*, 191 F.3d 23, 28 (1st Cir. 1999); *Falk v. Sinclair*, 692 F. Supp. 2d 147, 162 (D. Me. 2010); *Philippopoulos v. Philippopoulou*, 461 F. Supp. 2d 1321, 1323-24 (N.D. Ga. 2006).
[376] *Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001) (upholding lower court's finding that respondent's act of filing for divorce and custody in the United States communicated her intention not to return, thereby constituting retention).
[377] *Id.*

Issues #2: Habitual Residence

Once the court determines the date of wrongful retention, it must then turn to whether Australia was actually the children's habitual residence immediately prior to that date. The children were born in the United States and lived there continuously until the move to Australia. Jenny was reluctant to move to Australia and the move, which Andrew said was necessary to keep his job, was predicated on a lie. Andrew must prove that the children's habitual residence changed from the United States to Australia during the time spent there.

The court may look to whether the parties had a "settled purpose" or "shared intent" to relocate.[378] Because the move was predicated on a lie and Jenny was denied the opportunity to make an informed decision about the move, the court may find that the parties could not have had a settled purpose or intent, and that Australia never became the children's habitual residence.

Issue #3: Complaint for Divorce

Since the petition for return was filed immediately after the divorce was filed, the two cases may conflict and thus the court must determine how to proceed. Once a judicial or administrative authority is notified of a "wrongful removal or retention" in the Contracting State the child has been removed to or retained in, any matter regarding the merits of custody must be stayed until a decision is made in the Hague Convention case; the exception to this requirement is when a petition is not filed within a reasonable time following notice.[379]

[378] *See id.* at 1076 (holding that a child's habitual residence is based on the intention of the person or persons entitled to fix the child's residence).
[379] Convention, *supra* note 1, art. 16. *See also* Text and Legal Analysis, *supra* note 4, at 10,509.

PART VI. CASE NOTES

This section provides a review of relevant case law, arranged by subject matter and court. It is not an exhaustive list of Hague Convention cases; rather, it serves to highlight frequently cited cases, as well as [] Circuit and [State] State Court Hague Convention decisions.

[We recommend organizing cases by subject and court. Previous guides have ordered cases as follows: (1) U.S. Supreme Court, (2) [X] Circuit and [State] District Courts, (3) [State] State Courts, (4) All Other Federal Circuit Courts of Appeal, (4) All Other Federal District Courts, and (5) All Other State Courts. We have included some of the most frequently cited cases below, organized by subject but not by court since that will change depending on what state the guide is being developed for. It is important, however, that cases are added to include key state and federal cases in your region. You may also add subjects depending on case law in your region. We recommend using the table of contents as a guide for subject areas.].

[As an alternative to including an entirely separate Part for case notes, "Case Notes" subjections may be added to the sections above where there are relevant case notes for those topics.].

[Please note: rather than using footnotes in this section we have incorporated citations into the text to mirror the way cases would be cited in a brief or court opinion.].

Procedure: Discovery, Evidence, and the Evidentiary Hearing

West v. Dobrev (Tenth Circuit, 2013): The intermediate appellate court, citing Article 11 and *March*, found the trial court had discretion to determine procedures necessary under the Convention, including right to discovery or an evidentiary hearing. 735 F.3d 921, 929-30 (10th Cir. 2013). The court also noted the respondent in this case had the opportunity to challenge the petitioner's assertion regarding the child's habitual residence but failed to do so. *Id*.

Karkkainen v. Kovalchuk (Third Circuit, 2006): The Circuit Court of Appeals held the district court properly applied the Federal Rules of Evidence, admitting hearsay testimony that fell under an exception and was properly limited. 445 F.3d 280, 289 (3d Cir. 2006).

Van de Sande v. Van de Sande (Seventh Circuit, 2005): The lower court granted summary judgment for the children's return. The appellate court held that the respondent had produced sufficient evidence of grave risk of harm and remanded the case for a hearing on the return issue: "[Respondent] presented at the summary judgment stage sufficient evidence of a grave risk of harm to her children, and the adequacy of conditions that would protect the children if they were returned to their father's country is sufficiently in doubt, to necessitate an evidentiary hearing in order to explore these issues fully." 431 F.3d 567, 572 (7th Cir. 2005).

Holder v. Holder (Ninth Circuit, 2004): The intermediate appellate court upheld a district court's decision to utilize a magistrate judge to handle the evidentiary hearing and issue a report and recommendation on the matter. 392 F.3d 1009, 1021-22 (9th Cir. 2004).

March v. Levine (Sixth Circuit, 2001): The intermediate appellate court upheld the district court's decision to resolve the case without "resorting to a full trial on the merits or a plenary evidentiary hearing." 249 F.3d 462, 474 (6th Cir. 2001) (quoting the lower court's decision, *March v. Levine*, 136 F. Supp. 2d 831 (M.D. Tenn. 2000)). The appellate court agreed with the lower court's ruling that neither the Convention nor ICARA requires discovery or an evidentiary hearing and observed that Hague Convention cases are appropriate for resolution by summary judgment. *Id*. It should be noted, however, that even though the respondents argued on appeal that they should have been allowed to conduct discovery and have an evidentiary hearing to further develop their arguments pursuant to the treaty exceptions, due to procedural issues regarding their motion for discovery, the appellate court only considered the matters of discovery and an evidentiary hearing on the issue of habitual residence. *Id.* at 473. In addition, despite resolving the case on summary judgment without discovery or an evidentiary hearing, the lower court admitted a "voluminous amount of evidence into the record in conjunction with the parties' briefs and independently sought information under the terms of the treaty" *Id.* at 468. In addition, with the assistance of a licensed clinical psychologist, both children were heard from by the court *in camera*. *Id.*

Avendano v. Smith (District Court of New Mexico, 2011): The court reasoned that ICARA section 9005, which permits admission of documents attached or related to the petition without authentication, supports a finding that the Federal Rules of Evidence apply to Hague Convention cases because section 9005 carves out an exception that would not be necessary if the rules did not apply. 2011 WL 3503330, at *1 (D.N.M. Aug. 1, 2011).

Velez v. Mitsak (Court of Appeals of Texas, El Paso 2002): The court held the respondent was entitled to challenge elements of the petitioner's *prima facie* case and to be heard by the court on the defenses she raised. "It was surely not contemplated by the drafters of the Convention that the provision requiring contracting states to use the most expeditious procedures available to implement the objectives of the Convention would override a party's right to present evidence on possible defenses." 89 S.W.3d 73, 84 (Tex. App.—El Paso 2002), *opinion clarified*, 89 S.W.3d 84 (Tex. App.—El Paso 2002, no pet.).

The Date of Removal or Retention

Karkkainen v. Kovalchuk (Third Circuit, 2006): The court declined to determine whether a child can be wrongfully retained without petitioner unequivocally communicating desire to have the child returned, and found that the petitioner had "clearly communicated her opposition" to the child remaining in the United States prior to filing petition for return, thereby trigging wrongful retention. 445 F.3d 280, 290 (3rd Cir. 2006).

Baxter v. Baxter (Third Circuit, 2005): The appellate court distinguished between removal (the circumstances of departure) and retention (the decision to remain permanently). 423 F.3d 363, 369 (3d Cir. 2005). The court concluded the lower court focused too narrowly by considering only the circumstances of departure and not the respondent's decision to remain in the United States beyond the petitioner's consent. *Id.*

Mozes v. Mozes (Ninth Circuit, 2001): The appellate court affirmed the lower court's determination that the date of wrongful retention was "the moment . . . when [respondent] asked the Los Angeles County Superior Court to grant her custody of [the children]." 239 F.3d 1067, 1070 (9th Cir. 2001).

Toren v. Toren (First Circuit, 1999): The Circuit Court of Appeals found that the date of retention did not occur until the agreed upon time period had expired, even though the respondent had clearly communicated her intent not to return the children to Israel by filing for divorce and custody in the United States before the planned date of return. *Toren v. Toren*, 191 F.3d 23, 28 (1st Cir. 1999).

De La Vera v. Holguin (District Court of New Jersey, 2014): "In determining the date of a wrongful retention, the Third Circuit has agreed that '[t]he wrongful retention does not begin until the noncustodial parent . . . *clearly* communicates her desire to regain custody and asserts her parental right to have [her child] live with her.'" 2014 WL 4979854, at *6 (D.N.J. Oct. 3, 2014) (quoting *Karkkainen v. Kovalchuk,* 445 F.3d 280, 290 (3rd Cir. 2006)).

Determining Habitual Residence

Murphy v. Sloan (Ninth Circuit, 2014): Following *Mozes*, the court described the Ninth Circuit's approach to habitual residence as "tak[ing] into account the shared, settled intent of the parents and then ask[ing] whether there has been sufficient acclimatization of the child to trump this intent." 764 F.3d 1144, 1150 (9th Cir. 2014).

Larbie v. Larbie (Fifth Circuit, 2012): The court adopted the "last shared intent" approach and held that the habitual residence inquiry should begin with the parents' intent regarding the child's residence, particularly when the child is very young. 690 F.3d 295, 310 (5th Cir. 2012). "We join the majority of circuits that 'have adopted an approach that begins with the parents' shared intent or settled purpose regarding their child's residence.' . . . This approach does not ignore the child's experience, but rather gives greater weight to the parents' subjective intentions relative to the child's age. For example, parents' intentions should be dispositive where, as here, the child is so young that 'he or she cannot possibly decide the issue of residency.' . . . In such cases, the threshold test is whether both parents intended for the child to 'abandon the [habitual residence] left behind.'" *Id.* at 310-11 (omitting internal citations).

Papakosmas v. Papakosmas (Ninth Circuit, 2007): "[E]ven when the settled intent of a child's parent is not clear, a district court should find a change in habitual residence if the objective facts

point unequivocally to a person's ordinary or habitual residence being in a particular place." 483 F.3d 617, 622 (9th Cir. 2007) (omitting internal citations).

Gitter v. Gitter (Second Circuit, 2005): The court held that when the child has moved to a new location and the parents intend that location to be the child's habitual residence, that location becomes the child's habitual residence. 396 F.3d 124, 133 (2d Cir. 2005). The court further held the opposite is true: if the child moves to a new location but the parents do not intend his or her habitual residence to change, the child's habitual residence has not changed unless "the evidence points unequivocally to the conclusion that the child has become acclimatized to his new surroundings and that his habitual residence has consequently shifted." *Id*.

Holder v. Holder (Ninth Circuit, 2004): The court looked first to the subjective intent of the parents, not the children, and then considered whether children had acclimatized. 392 F.3d 1009, 1016-17 (9th Cir. 2004).

Headifen v. Harker (Western District of Texas, 2013): When there is no shared parental intent to change the habitual residence and no unequivocal facts demonstrating the child has become acclimated to the new country the original habitual residence applies. 2013 WL2538897, at *10 (W.D. Tex. June 7, 2013).

Saldivar v. Rodela (Western District of Texas, 2012): Because the parents never shared a settled intention about the child's habitual residence, the court considered whether the child was "highly acclimatized" to the country that she was residing in at the time of the alleged wrongful removal. 879 F.Supp.2d 610, 620 (W.D.Tex. 2012).

Habitual Residence and Domestic Violence

Silverman v. Silverman (Eighth Circuit, 2003): The court stated *in dicta* that "[h]abitual residence is not established when the removing spouse is coerced involuntarily to move to or remain in another country." 338 F.3d 886, 900 (8th Cir. 2003) (citing *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1055 (E.D. Wash. 2001) and *Application of Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993), but distinguishing the facts in that case from the facts in those cases). In this particular case, however, the court found residence was not coerced because the abuse began two months after relocation. *Id*.

Tsarbopoulos v. Tsarbopoulos (Eastern District of Washington, 2001): The court found the respondent had been verbally and physically abused and acknowledged that the abuse, along with other factors, impacted the habitual residence analysis. 176 F. Supp. 2d 1045, 1056 (E.D. Wash. 2001). "Where the Court finds verbal and physical abuse of a spouse of the kind and degree present in this case, the conduct of the victimized spouse asserted to manifest 'consent' must be carefully scrutinized." *Id*. The court held that abuse of the respondent precluded the family from acclimatizing to Greece, and "[a]s a consequence, [the respondent] cannot be said to have made

Greece the habitual residence of her children or to have joined [petitioner] in his intent to do so." *Id*.

Application of Ponath (District of Utah, 1993): The court ruled that habitual residence necessarily entails an element of voluntariness in "settled purpose." 829 F. Supp. 363, 367 (D. Utah 1993). The court found the respondent and her child were detained in Germany by means of verbal, emotional, and physical abuse, and such coercion "removed any element of choice and settled purpose" that may have been present in the family's decision to visit Germany. *Id*.

Actually Exercised

Rodriguez v. Yanez (Fifth Circuit 2016): The court found that petitioner maintained "*some* sort of relationship" with the child, and held that is enough to demonstrate exercise. 817 F.3d 466, 473 (5th Cir. 2016). The quality of the relationship is not relevant to this inquiry. *Id*. "This Court, like many others, has adopted the expansive interpretation of "exercise" articulated by the Sixth Circuit . . . 'Once [the court] determines that the parent exercised custody rights in any manner, the court should stop—completely avoiding the question whether the parent exercised the custody rights well or badly. These matters go to the merits of the custody dispute and are, therefore, beyond the subject matter jurisdiction of federal courts.'" *Id.* (omitting internal citations).

"Well-Settled" in New Environment

Yaman v. Yaman (First Circuit, 2013): The appellate court found no abuse of discretion in the lower court's finding that the child was well-settled and corresponding decision to deny the petition for return because the lower court had "looked at a great number of factors and gave meticulous attention to the concerns raised by the case."[380]

In re B. Del C.S.B. (Ninth Circuit, 2009): Although neither the respondent nor the child were legal residents of the United States, the court held the child's immigration status "[could not] undermine all of the other considerations which uniformly support[ed] a finding that [the child was] 'settled' in the United States . . . . Neither text nor history suggests that lawful immigration status is a prerequisite, or even a factor of great significance, for a finding that a child is 'settled' in a new environment."[381]

In re B. Del C.S.B. (Ninth Circuit, 2009): "We consider a number of factors that bear on whether the child has 'significant connections to the new country. . . .' These factors include: (1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the

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[380] *Yaman v. Yaman*, 730 F.3d 1, 22 (1st Cir. 2013).

[381] *In re B. Del C.S.B.*, 559 F.3d 999, 1010 (9th Cir. 2009). *But see Cabrera v. Lozano*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004) (considering immigration status of both respondent and child and noting that the child's illegal immigration status undermines any stability in the new country); *In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001) (noting, among other factors, the uncertainty of both the respondent and child's immigration status in the United States).

child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and (6) the respondent's employment and financial stability. In some circumstances, we will also consider the immigration status of the child and the respondent.'"[382]

In re B. Del C.S.B. (Ninth Circuit, 2009): "In general, [immigration status] will be relevant only if there is an immediate, concrete threat of deportation."[383]

In re B. Del C.S.B. (Ninth Circuit, 2009): "Although all of these factors, when applicable, may be considered in the 'settled' analysis, ordinarily the most important is the length and stability of the child's residence in the new environment."[384]

Castellanos Monzon v. De La Roca (District Court of New Jersey, 2016): The court found that the child's age, the stability of the child's new residence, the child's regular attendance in school, the respondent's and the child's stepfather's employment status, and the respondent's and stepfather's level of involvement with the child all weighed in favor of finding the child settled in the United States.[385] The court also considered the child's and respondent's uncertain immigration statuses in the United States, holding this factor weighs against a finding of settledness but is not alone determinative.[386] In addition, the court declined to address the respondent's grave risk claim, but credited testimony from the respondent regarding her fear of the petitioner and from an expert regarding familial domestic violence in Guatemala, and relied on the same to support its decision not to exercise discretion to return.[387]

In re Lozano (Southern District of New York, 2011): The district court relied on evidence from the respondent, the child's therapist, and the child's school records to conclude that the child was well-settled in her new environment.[388] The court did not make specific findings about physical abuse of the child or the bystander impact of domestic violence; however, it considered testimony from the child's therapist about the child's dramatic improvement from the time she first arrived in New York to the time of the hearing in finding that the child was settled in New York.[389] Ultimately the court relied on the totality of the circumstances, finding "the description of the

[382] *In re B. Del C.S.B.*, 559 F.3d at 1009 (quoting Text and Legal Analysis, *supra* note 4 at 10, 509).
[383] *Id.*
[384] *Id.*
[385] *Castellanos Monzon v. De La Roca*, CV160058FLWLHG, 2016 WL 1337261, at *13-14 (D.N.J. Apr. 5, 2016).
[386] *Id.* at *14.
[387] *Id.* at *15.
[388] *In re Lozano*, 809 F. Supp. 2d 197, 231 (S.D.N.Y. 2011) *aff'd sub nom. Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012) *aff'd sub nom. Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 188 (2014) (noting that much of this evidence was undisputed).
[389] *Id.*

child's life, as presented to the Court, suggests stability in her family, educational, social, and most importantly, home life."[390]

Silvestri v. Oliva (District Court of New Jersey, 2005): "In determining whether the 'settled' exception applies, the Court should consider any relevant factor informative of the child's connection with his or her living environment."[391]

Past Physical Abuse to the Child

Elyashiv v. Elyashiv (Eastern District of New York, 2005): The court found the petitioner physically abused the respondent and two of their three children.[392] The acts of violence included the petitioner "routinely us[ing] his belt, shoes or hand to hit [the children] approximately once or twice a week," often when they "interfered" with his sleep, and one incident in which the petitioner smothered his son's face with a pillow to stop him from crying.[393] Based on the evidence of abuse, the court concluded there was clear and convincing evidence to sustain the Article 13(b) defense to return.[394] Specifically, the court determined that returning the two children who had been physically abused by the petitioner would "surely expose them to a grave risk of both physical and psychological harm given the abject physical abuse they experienced when living with their father, their witnessing their father's abuse of their mother, as well as each other, and the uprooting from their "well-settled" environment in the United States to the country where they were physically and emotionally abused, coupled with the relapse they would suffer of their post-traumatic stress disorders and the likelihood that [one child] would be suicidal."[395]

Tsarbopoulos v. Tsarbopoulos (Eastern District of Washington, 2001): The court held that "[w]hen spousal and child abuse have been found by the Court, the Court must consider the effect of both forms of abuse on the children in determining whether the Article 13(b) exception applies."[396] To sustain a finding of abuse, the court credited the testimony of the children's therapists and teacher, and concluded the middle child had "suffered sexual abuse which she associated with her father" and the oldest child "had been subjected to significant physical and emotional abuse which he associated with his father."[397] Based in part on this evidence, the court

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[390] *Id.* at 233.
[391] *Silvestri v. Oliva*, 403 F. Supp. 2d 378, 387-88 (D.N.J. 2005) (citing *In re Koc*, 181 F. Supp. 2d 136, 152 (E.D.N.Y. 2001), report and recommendation adopted (Apr. 3, 2001)).
[392] *Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 399 (E.D.N.Y. 2005). *See also Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 459-60 (D. Md. 1999) (finding grave risk exception met in part based on physical and psychological abuse of two oldest children).
[393] *Elyashiv*, 353 F. Supp. 2d at 399.
[394] *Id.* at 408.
[395] *Id.*
[396] *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1058 (E.D. Wash. 2001).
[397] *Id.* at 1059.

found the respondent met her burden of proving that returning to Greece would present a grave risk of physical and psychological harm to the children.[398]

Exposure and Co-Occurrence

Abbott v. Abbott (2010): The Court explained *in dicta* that if the respondent could show return would put her own safety at risk, a "court could consider whether this is sufficient to show that the child too would suffer 'psychological harm' or otherwise be placed in an 'intolerable situation.'"[399]

Gomez v. Fuenmayor (Eleventh Circuit, 2016): Affirming the lower court's decision, the appellate court held that threats and violence against a parent can pose a grave risk of harm to the child as well.[400] "Although a pattern of threats and violence was not directed specifically at [the child], serious threats and violence directed against a child's parent can, and in this case did, nevertheless pose a grave risk of harm to the child."[401]

Acosta v. Acosta (Eighth Circuit, 2013): The court opined that "[a]lthough there [was] little evidence that [the petitioner] physically abused the children, the lack of such evidence [did] not necessarily render Article 13(b) inapplicable."[402] The lower court had concluded that return would expose the children to grave risk based on evidence that the petitioner had assaulted others in the children's presence, including a taxi driver and the respondent; had shoved one of the children, demonstrating that he was "either unwilling or unable to shield the children from his rage"; and had made telephonic threats to kill the children and commit suicide.[403] The Eighth Circuit upheld the lower court's finding that petitioner's violent temper would expose the children to a grave risk of harm if returned because the evidence showed a high probability that [the petitioner] would "react with violence, threats, or other verbal abuse towards the children, [respondent], or others."[404]

Baran v. Beaty (Eleventh Circuit, 2008): The appellate court held that "[t]o deny return, the district court was not required to find [the child] had previously been physically or psychologically harmed; it was required to find returning him to Australia would expose him to a present grave risk of physical or psychological harm, or otherwise place him in an intolerable situation."[405] The court upheld the lower court's finding of grave risk based on evidence that the petitioner:

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[398] *Id.* at 1061.
[399] *Abbott v. Abbott*, 560 U.S. 1, 22 (2010). Foreign courts have also considered petitioner's abuse of respondent under the grave risk exception and have denied return of the child, holding that the child's return would present a grave risk to the child. *See, e.g.*, *Pollastro v. Pollastro*, 43 O.R. (3d) 485 (Can. 1999) (holding that the child's interests are inextricably tied to the mother's psychological and physical security and citing a series of risks resulting from the child's exposure to domestic abuse).
[400] *Gomez v. Fuenmayor*, 812 F.3d 1005, 1010 (11th Cir. 2016).
[401] *Id.* at 1007.
[402] *Acosta v. Acosta*, 725 F.3d 868, 876 (8th Cir. 2013).
[403] *Id.*
[404] *Id.* at 875 (quoting the district court).
[405] *Baran v. Beaty*, 526 F.3d 1340, 1346 (11th Cir. 2008).

> abuses alcohol on a daily or near-daily basis . . . is only marginally able to care for his own basic needs, . . . has no close family members or friends that could reasonably be expected to have meaningful involvement in [the child's] day-to-day care and protection, . . . is emotionally unstable and prone to uncontrolled destructive outbursts of rage, . . . was physically and verbally abusive toward [respondent] in [the child]'s presence, . . . physically endangered [the child] (both intentionally and unintentionally) when [the child] lived under his roof, and . . . repeatedly and pointedly stated to [respondent] after [the child]'s birth that he did not want [the child], that [the child] should have been aborted, that [the child] would die if [the child] 'became an American,' and that [respondent] could not blame him if 'something happened to' [the child].[406]

Simcox v. Simcox (Sixth Circuit, 2007): The Sixth Circuit reversed and remanded the lower court's order for return of the children, concluding the respondent met her burden of proving return would present a grave risk of harm to the children. The Sixth Circuit afforded equal weight to evidence that the children endured physical abuse by the petitioner—frequent belt whipping, spanking, pulling of their hair and ears—and evidence that the children were at risk of psychological harm after witnessing petitioner's abuse of their mother.[407] The Sixth Circuit observed that the "'Convention's purposes [would] not . . . be furthered by forcing the return of children who were the direct or indirect victims of domestic violence.'"[408]

Van De Sande v. Van De Sande (Seventh Circuit, 2005): The Court of Appeals reversed and remanded the lower court's order to return the children, noting that the district judge "was unduly influenced by the fact that most of the physical and all of the verbal abuse was directed to [the respondent] rather than to the children."[409] The court stated the lower court should have afforded weight to the petitioner's threats to kill the children, his propensity for violence, and the fact that much of the abuse to respondent was carried out in the children's presence.[410]

Walsh v. Walsh (First Circuit, 2000): The appellate court held that the district court erred in discounting the grave risk of harm to children exposed to domestic violence in light of evidence that the petitioner had an "uncontrollably violent temper;" credible social science literature acknowledging an established risk of co-occurrence, meaning "that serial spousal abusers are also likely to be child abusers"; and state and federal laws recognizing "that children are at increased

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[406] *Id.* at 1345-46.
[407] *Simcox v. Simcox*, 511 F.3d 594, 608-9 (6th Cir. 2007).
[408] *Id.* at 605 (quoting Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUMAN RIGHTS L.REV. 275, 352-53 (2002)).
[409] *Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005).
[410] *Id.*

risk of physical and psychological injury themselves when they are in contact with a spousal abuser."[411]

Miltiadous v. Tetervak (Eastern District of Pennsylvania, 2010): The court found a child suffered post-traumatic stress disorder after exposure to spousal abuse and concluded that returning the child to her habitual residence would pose a grave risk of physical and psychological harm.[412] Despite a dearth of evidence that petitioner's second child was psychologically traumatized, the court similarly denied the petition to return that child due to the likelihood of co-occurrence.[413]

Tahan v. Duquette (Superior Court of New Jersey, Appellate Division, 1992): "To hold, as the trial court did, that the proper scope of inquiry precludes any focus on the people involved is, in our view, too narrow and mechanical. Without engaging in an exploration of psychological make-ups, ultimate determinations of parenting qualities, or the impact of life experiences, a court in the petitioned jurisdiction, in order to determine whether a realistic basis exists for apprehensions concerning the child's physical safety or mental well-being, must be empowered to evaluate the surroundings to which the child is to be sent and the basic personal qualities of those located there." [414]

Requested State's Ability to Protect Child

Baran v. Beaty (Eleventh Circuit, 2008): the Eleventh Circuit agreed with the decision in Van De Sande, and "decline[d] to impose on a responding parent a duty to prove that her child's country of habitual residence is unable or unwilling to ameliorate the grave risk of harm which would otherwise accompany the child's return." [415]

Van De Sande v. Van De Sande (Seventh Circuit, 2005): The Seventh Circuit reversed and remanded the lower court's decision to return despite that court's finding of severe abuse of respondent and children.[416] In so holding, the appellate court remarked that the law on the books may differ from the law as applied, particularly in domestic relations cases, and held that a trial court "must satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser's custody . . . to define the issue not as whether there is a grave risk of harm, but as whether the lawful custodian's country has good laws or even as whether it both has and zealously enforces such laws, disregards the language of the Convention and its implementing statute . . . ."[417] The court criticized the "acknowledged dictum" in *Friedrich* that ostensibly

[411] *Walsh v. Walsh*, 221 F.3d 204, 219-20 (1st Cir. 2000).
[412] *Id*.
[413] *Id*.
[414] *Tahan v. Duquette*, 259 N.J. Super. 328, 335 (App. Div. 1992).
[415] *Baran v. Beaty*, 526 F.3d 1340, 1348 (11th Cir. 2008).
[416] *Van De Sande v. Van De Sande*, 431 F.3d 567, 570-71 (7th Cir. 2005).
[417] *Id*.

created the "requirement" to consider the child's habitual country's ability to protect from grave risk. [418]

Gaudin v. Remis (Ninth Circuit, 2005): The Ninth Circuit, following the decisions in *Friedrich* and *Blondin*, explained that "the question is simply whether any reasonable remedy can be forged that will permit the children to be returned to their home jurisdiction for a custody determination, while avoiding the 'grave risk of psychological harm'" that would result from the harm or intolerable situation identified by the court.[419]

Walsh v. Walsh (First Circuit, 2000): The First Circuit, denying return, noted that it was confident Ireland would issue appropriate protective orders, but found the relevant issue to be the petitioner's history of violating court orders, and not whether Ireland would issue such orders.[420]

Undertakings and Domestic Violence

Baran v. Beaty (Eleventh Circuit, 2008): The Eleventh Circuit upheld the lower court's decision to deny return, concluding undertakings would be inappropriate due to the petitioner's violent temper, lengthy abuse of the respondent, and threats to the child.[421]

Danaipour v. McLarey (First Circuit, 2002): "Where substantial allegations are made and a credible threat exists, a court should be particularly wary about using potentially unenforceable undertakings to try to protect the child."[422]

Walsh v. Walsh (First Circuit, 2000): The First Circuit reversed the lower court's decision to return the children to Ireland with undertakings to ensure their safety, holding the lower court had "underestimated the risks to the children and overestimated the strength of the undertakings."[423] The court emphasized that the petitioner in that case had repeatedly failed to obey court prior orders and had a well-documented history of violence and found undertakings would therefore be inadequate to protect the children.[424]

Simcox v. Simcox (Northern District of Ohio, 2008): After the appellate court questioned whether any undertakings would mitigate the risk upon return, the district court found that no undertakings "would adequately protect the children" and the petition was denied.[425]

Blondin v. Dubois (Southern District of New York, 2000). On remand, the district court found that due to the severity of abuse and trauma the children suffered, no measures—neither

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[418] *Id*.
[419] *Gaudin v. Remis*, 415 F.3d 1028, 1036 (9th Cir. 2005).
[420] *Walsh v. Walsh*, 221 F.3d 204, 221 (1st Cir. 2000).
[421] *Baran v. Beaty*, 526 F.3d 1340, 1352 (11th Cir. 2008).
[422] *Danaipour v. McLarey*, 286 F.3d 1, 26 (1st Cir. 2002).
[423] *Walsh*, 221 F.3d at 221.
[424] *Id.* at 220-21.
[425] *Simcox v. Simcox*, 1:07CV96, 2008 WL 2924094, at *4 (N.D. Ohio July 24, 2008).

undertakings by the petitioner nor state-based protections—would ameliorate the risk of harm to the children if returned to France.[426] The appellate court affirmed.[427] Later cases, however, have distinguished *Blondin* by finding either that the abuse in a particular case does not rise to the level of abuse in *Blondin* or that the children in a particular case have not been diagnosed with the same level of post-traumatic stress syndrome.[428]

[426] *Application of Blondin v. Dubois*, 78 F. Supp. 2d 283, 298 (S.D.N.Y. 2000), *aff'd sub nom.* 238 F.3d 153 (2d Cir. 2001).
[427] *Blondin v. Dubois*, 238 F.3d 153, 168 (2d Cir. 2001).
[428] *See e.g. Souratgar v. Lee*, 720 F.3d 96, 104 (2d Cir. 2013) (distinguishing from *Blondin* in finding that there was no evidence of any actual psychological harm and therefore "there is nothing in the record beyond speculation that [the child] would suffer unavoidable psychological harm if returned to Singapore.").

APPENDIX A

HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

(Concluded 25 October 1980)

The States signatory to the present Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I—SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II—CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures-

a) to discover the whereabouts of a child who has been wrongfully removed or retained;
b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional
a. measures;
c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
d) to exchange, where desirable, information relating to the social background of the child;
e) to provide information of a general character as to the law of their State in connection with the application of the
a. Convention;
f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights
a. of access;
g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III—RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.
The application shall contain -

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
b) where available, the date of birth of the child;
c) the grounds on which the applicant's claim for return of the child is based;
d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.
e) The application may be accompanied or supplemented by -
f) an authenticated copy of any relevant decision or agreement;
g) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
h) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

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

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV—RIGHTS OF ACCESS

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.
The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V—GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalisation or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.
However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.
Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.
However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.
Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.
Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI—FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.
It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.
The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.
Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.
Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;
2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.
If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

1) the signatures and ratifications, acceptances and approvals referred to in Article 37;
2) the accessions referred to in Article 38;
3) the date on which the Convention enters into force in accordance with Article 43; (4) the extensions referred to in Article 39;
4) the declarations referred to in Articles 38 and 40;
5) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
6) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

APPENDIX B

INTERNATIONAL CHILD ABDUCTION REMEDIES ACT (ICARA)

22 U.S.C.A. 9001 et seq.
Formerly cited as 42 USC 11601 et seq.

§ 9001. Findings and declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this Act the Congress recognizes --

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

§ 9002. Definitions

For the purposes of this chapter –

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 653 of Title 42;

(4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 9006(a) of this title.

§ 9003. Judicial remedies

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court

which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence--

> **(A)** in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and
>
> **(B)** in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing--

> **(A)** by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and
>
> **(B)** by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter--

> (1) the term “authorities”, as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;
>
> (2) the terms “wrongful removal or retention” and “wrongfully removed or retained”, as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and
>
> (3) the term “commencement of proceedings”, as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

§ 9004. Provisional remedies

(a) Authority of courts

In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 9003(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 9003(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

§ 9005. Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 9003 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

§ 9006. United States Central Authority

(a) Designation

The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

(c) Regulatory Authority

The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

(d) Obtaining information from Parent Locator Service

The United States Central Authority may, to the extent authorized by the Social Security Act [42 U.S.C.A. 301 et. seq.], obtain information from the Parent Locator Service.

(e) Grant authority

The United States Central Authority is authorized to make grants to, or enter into contracts or agreements with, any individual, corporation, other Federal, State, or local agency, or private entity or organization in the United States for purposes of accomplishing its responsibilities under the Convention and this chapter.

(f) Limited liability of private entities acting under the direction of the United States Central Authority

(1) Limitation on liability

Except as provided in paragraphs (2) and (3), a private entity or organization that receives a grant from or enters into a contract or agreement with the United States Central Authority under subsection (e) of this section for purposes of assisting the United States Central Authority in carrying out its responsibilities and functions under the Convention and this chapter, including any director, officer, employee, or agent of such entity or organization, shall not be liable in any civil action sounding in tort for damages directly related to the performance of such responsibilities and functions as defined by the regulations issued under subsection (c) of this section that are in effect on October 1, 2004.

(2) Exception for intentional, reckless, or other misconduct

The limitation on liability under paragraph (1) shall not apply in any action in which the plaintiff proves that the private entity, organization, officer, employee, or agent described in paragraph (1), as the case may be, engaged in intentional misconduct or acted, or failed to act, with actual malice, with reckless disregard to a substantial risk of causing injury without legal justification, or for a purpose unrelated to the performance of responsibilities or functions under this chapter.

(3) Exception for ordinary business activities

The limitation on liability under paragraph (1) shall not apply to any alleged act or omission related to an ordinary business activity, such as an activity involving general administration or operations, the use of motor vehicles, or personnel management.

§ 9007. Costs and fees

(a) Administrative costs

No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 9003 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 9003 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

§ 9008. Collection, maintenance, and dissemination of information

(a) In general

In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c) of this section, receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority--

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

(b) Requests for information

Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities

Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a) of this section, the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which--

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of Title 13;

shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a) of this section.

(d) Information available from Parent Locator Service

To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) of this section can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping

The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

§ 9009. Office of Children's Issues

(a) Director requirements

The Secretary of State shall fill the position of Director of the Office of Children's Issues of the Department of State (in this section referred to as the "Office") with an individual of senior rank who can ensure long-term continuity in the management and policy matters of the Office and has a strong background in consular affairs.

(b) Case officer staffing

Effective April 1, 2000, there shall be assigned to the Office of Children's Issues of the Department of State a sufficient number of case officers to ensure that the average caseload for each officer does not exceed 75.

(c) Embassy contact

The Secretary of State shall designate in each United States diplomatic mission an employee who shall serve as the point of contact for matters relating to international abductions of children by parents. The Director of the Office shall regularly inform the designated employee of children of United States citizens abducted by parents to that country.

(d) Reports to parents

(1) In general

Except as provided in paragraph (2), beginning 6 months after November 29, 1999, and at least once every 6 months thereafter, the Secretary of State shall report to each parent who has requested assistance regarding an abducted child overseas. Each such report shall include information on the current status of the abducted child's case and the efforts by the Department of State to resolve the case.

(2) Exception

The requirement in paragraph (1) shall not apply in a case of an abducted child if--

(A) the case has been closed and the Secretary of State has reported the reason the case was closed to the parent who requested assistance; or

(B) the parent seeking assistance requests that such reports not be provided.

§ 9010. Interagency coordinating group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of Title 5 for employees of agencies.

§ 9011. Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter.

APPENDIX C

Sample Language

The sample language below is intended to serve as a template for courts; however, it is by no means complete and should not be considered fully comprehensive or reflective of a final order. Hague Convention cases, particularly those involving allegations of domestic violence, will often require the court to articulate specific findings of fact to support its determination under each factor. These templates may assist courts in structuring their orders and navigating through the elements of a Hague Convention case, but courts are not bound by the options provided below, and if they choose to utilize they sample language they should be sure to adapt it to the circumstances of each case individually.

Sample Language: Jurisdiction

1) A petition for the return of the minor child(ren), _____, has been filed with this Court pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("Convention") and the International Child Abduction Remedies Act ("ICARA").

2) The minor child(ren) at issue are currently located in the State of New York, _____ County.

3) The minor child, _____, born _____ (D.O.B.), is under the age sixteen, and therefore the Convention applies to this child.

4) The minor child, _____, was removed from or retained outside of [Requesting State], which is a Contracting State to the Convention.

5) [Requesting State] is a treaty partner with the United States, and therefore the Convention is in force between [Requesting State] and the United States.

Sample Language: Petitioner's *Prima Facie* Case and Ordering Return

Note that this language is intended for use where the petitioner has successfully proven by a preponderance of the evidence that the removal or retention was wrongful. To prove that the removal or retention was wrongful, the petitioner must prove every element of the* prima facie *case. If one of these elements is not met, then the petition for return must be dismissed.

If the petitioner establishes the elements of the* prima facie *case, the burden will shift to respondent to prove that one of the exceptions to return applies.

1) The minor child[ren] at issue in this petition was/were removed from [Requesting State] on [date of removal].

Or

1) The minor child[ren] at issue in this petition was/were retained in the United States, and retained outside of [Requesting State]. The Court finds, based on the following facts _____, that the date of retention is [date].

2) The Court finds, based on the following facts _____, that [Requesting State] was the child[ren]'s country of habitual residence immediately before removal or retention.

3) The Court finds that the removal/retention was in breach of [Petitioner]'s rights of custody under the law of the child[ren]'s habitual residence pursuant to [existing custody order/agreement between parties/operation of law].

4) The Court finds, based on the following facts _____, that [Petitioner] was actually exercising his/her rights of custody at the time of the removal/retention, or would have been exercising those rights but for the removal/retention.

Return

This matter comes before the Court by way of Petitioner's application for the return of the parties' child(ren), [name, D.O.B.], to [country of habitual residence] pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, implemented through the International Child Abduction Remedies Act, 42 U.S.C.A. § 9001 *et seq*. For the reasons set forth [on the record/in the Opinion filed on this date],

IT IS on this [date] day of [month], [year], ORDERED that:

1) The Petition is GRANTED and [child(ren)] shall be returned to [country of habitual residence] in accordance with this Order and the [findings made on the record/Opinion filed on this date].

2) Respondent, or any other person having actual control of [child(ren)], shall return [child(ren)] to [country of habitual residence], to be accompanied by Petitioner, or another relative and/or guardian designated by Petitioner, within [number] (#) days of the date of entry of this Order.

3) [Child(ren)]'s passports, currently in the possession of Respondent, shall be surrendered to Respondent's attorney, [name]/Petitioner's attorney, [name]/Court, within [time period] (#) of the date of entry of this Order, to be given to [child(ren)]'s designated chaperone so that [child(ren)] may return to [country of habitual residence] in accordance with this Order.

Sample Language: Exceptions to Return

Note that the exceptions to return are not mutually exclusive and the court may deny return based on any combination of the following.

I. Well Settled Exception

1) The minor child[ren] at issue in this petition was/were removed/retained from [Requesting State] on [date of removal/removal]. This petition was filed with the court on [filing date]. One year or more elapsed from the date of removal/retention to the date of the filing. Therefore, as provided under Article 12 of the Convention, the Court is not obligated to order return of the child[ren] at issue if the Court finds that the child is now settled in his/her/their new environment.

2) The Court finds, based on the following facts _____, that the Respondent has shown by a preponderance of the evidence that the child[ren] is/are now settled in his/her/their new environment.

3) For these reasons, the petition for child[ren]'s return to [Requesting State] is denied.

II. Consent or Subsequent Acquiesce

1) The Court finds by a preponderance of the evidence, based on the following facts _____, that [Petitioner] consented to the removal/retention of the minor child[ren].

OR

1) The Court finds by a preponderance of the evidence, based on the following facts _____, that [Petitioner] subsequently acquiesced to the removal/retention of the minor child[ren].

2) For this reasons, the petition for child[ren]'s return to [Requesting State] is denied.

III. Grave Risk or Intolerable Situation

1) The Court finds by clear and convincing evidence, based on the following facts _____, that there is a grave risk that the child[ren]'s return would expose him/her/they to physical harm/psychological harm/both physical and psychological harm or otherwise place him/her/they in an intolerable situation.

2) For these reasons, the petition for child[ren]'s return to [Requesting State] is denied.

IV. Mature Child's Objection

1) The Court finds, based on the following facts _____, that the Respondent has shown by a preponderance of the evidence that the child[ren] object to being returned to [Requesting State].

2) The Court finds, based on the following facts _____, that [minor child] has reached an age and degree of maturity at which it is appropriate to take account of his/her views.

3) For these reasons, the petition for child[ren]'s return to [Requesting State] is denied.

V. Human Rights and Fundamental Freedoms

1) The Court finds by clear and convincing evidence, based on the following facts _____, and pursuant to [U.S. Law], that return of [child[ren] at issue] would violate fundamental principles of the United States relating to the protection of human rights and fundamental freedoms.

APPENDIX D

Explanatory Report on the 1980 Hague Child Abduction Convention
Elisa Pérez-Vera

Rapport explicatif de Mlle Elisa Pérez-Vera

Introduction

I *Conclusions des travaux de la Conférence de La Haye de droit international privé*

1 La Convention sur les aspects civils de l'enlèvement international d'enfants a été adoptée en séance plénière le 24 octobre 1980 par la Quatorzième session de la Conférence de La Haye de droit international privé, à l'unanimité des Etats présents.[1] Le 25 octobre 1980, les délégués signèrent l'Acte final de la Quatorzième session contenant le texte de la Convention et une Recommandation qui contient la formule modèle à utiliser pour les demandes de retour des enfants déplacés ou retenus illicitement.

A cette occasion, la Conférence de La Haye s'est écartée de sa pratique, les projets de Conventions adoptés au cours de la Quatorzième session ayant été ouverts à la signature des Etats immédiatement après la séance de clôture. Quatre Etats ont signé la Convention à cette occasion (le Canada, la France, la Grèce et la Suisse), de sorte qu'elle porte la date du 25 octobre 1980.

2 En ce qui concerne le point de départ des travaux qui ont abouti à l'adoption de la Convention, ainsi que les conventions existantes en la matière ou ayant un rapport direct avec elle, nous renvoyons à l'introduction du Rapport de la Commission spéciale.[2]

3 La Quatorzième session de la Conférence, qui a siégé du 6 au 25 octobre 1980, a confié l'élaboration de la Convention à sa Première commission, dont le Président était le professeur A. E. Anton (Royaume-Uni) et le Vice-président le doyen Leal (Canada); l'un et l'autre avaient déjà été respectivement Président et Vice-président de la Commission spéciale. D'autre part, le professeur Elisa Pérez-Vera a été confirmé dans ses fonctions de Rapporteur. M. Adair Dyer, Premier secrétaire au Bureau Permanent, qui avait élaboré d'importants documents pour les travaux de la Conférence, a été chargé de la direction scientifique du secrétariat.

4 Au cours de treize séances, la Première commission a procédé à une première lecture de l'avant-projet élaboré par la Commission spéciale. Simultanément, elle a nommé un Comité de rédaction qui, au fur et à mesure de la pro-

[1] Allemagne, Australie, Autriche, Belgique, Canada, Danemark, Espagne, Etats-Unis, Finlande, France, Grèce, Irlande, Japon, Luxembourg, Norvège, Pays-Bas, Portugal, Royaume-Uni, Suède, Suisse, Tchécoslovaquie, Venezuela et Yougoslavie. Les Représentants de la République Arabe d'Egypte, d'Israël et de l'Italie, quoique ayant pris une part active aux travaux de la Première commission, n'ont pas participé au vote. Le Maroc, le Saint-Siège et l'Union des Républiques Socialistes Soviétiques ont envoyé des observateurs. Au cours des travaux, la Première commission a également disposé du concours précieux des observateurs du Conseil de l'Europe, du Commonwealth Secretariat et du Service Social International.

[2] Rapport de la Commission spéciale, Nos 3 et 7 à 15.

Explanatory Report by Elisa Pérez-Vera

TRANSLATION OF THE PERMANENT BUREAU

Introduction

I *Results of the work of the Hague Conference on private international law*

1 The Convention on the Civil Aspects of International Child Abduction was adopted on 24 October 1980 by the Fourteenth Session of the Hague Conference on private international law in Plenary Session, and by unanimous vote of the States which were present.[1] On 25 October 1980, the delegates signed the Final Act of the Fourteenth Session which contained the text of the Convention and a Recommendation containing the model form which is to be used in applications for the return of children who have been wrongfully abducted or retained.
On this occasion, the Hague Conference departed from its usual practice, draft Conventions adopted during the Fourteenth Session being made available for signature by States immediately after the Closing Session. Four States signed the Convention then (Canada, France, Greece and Switzerland), which thus bears the date 25 October 1980.

2 As regards the starting point of the proceedings which resulted in the adoption of the Convention, as well as the matter of existing conventions on the subject or those directly related to it, we shall refer to the introduction to the Report of the Special Commission.[2]

3 The Fourteenth Session of the Conference, which took place between 6 and 25 October 1980, entrusted the task of preparing the Convention to its First Commission, the Chairman of which was Professor A. E. Anton (United Kingdom) and the Vice-Chairman Dean Leal (Canada), who had already been Chairman and Vice-Chairman respectively of the Special Commission. Professor Elisa Pérez-Vera was confirmed in her position as Reporter. Mr Adair Dyer, First Secretary of the Permanent Bureau, who had prepared important documents for the Conference proceedings, was in charge of the scientific work of the secretariat.

4 In the course of thirteen sittings, the First Commission gave a first reading to the Preliminary Draft drawn up by the Special Commission. At the same time, it named the members of a Drafting Committee which drafted the text

[1] Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela and Yugoslavia.
Representatives of the Arab Republic of Egypt, Israel and Italy did not participate in the vote, despite having played an active part in the proceedings of the First Commission. Morocco, the Holy See and the Union of the Soviet Socialist Republics sent observers. In the course of the proceedings, the First Commission also had at its disposal the invaluable assistance of observers from the Council of Europe, the Commonwealth Secretariat and International Social Service.

[2] Report of the Special Commission, Nos 3 and 7 to 15.

gression des travaux, a mis les textes au point.[3] Sept autres séances ont été consacrées à la discussion du texte préparé par le Comité de rédaction,[4] ainsi qu'à celle des clauses visant l'application de la Convention au regard des Etats à systèmes juridiques non unifiés («*Application Clauses*») et de la formule modèle[5] rédigées par des Comités *ad hoc*.[6] Les clauses finales, suggérées par le Bureau Permanent, ont été incorporées dans l'avant-projet établi par le Comité de rédaction.

concurrently with the progress of the main proceedings.[3] Seven other sittings were devoted to a discussion of the text prepared by the Drafting Committee,[4] as well as of clauses relating to the application of the Convention to States with non-unified legal systems ('Application Clauses') and of the model form[5] drafted by *ad hoc* Committees.[6] The final clauses had been suggested by the Permanent Bureau and were incorporated into the preliminary draft Convention drawn up by the Drafting Committee.

II *Objet et plan du présent Rapport*

5 Le Rapport explicatif d'un texte destiné à devenir du droit positif, c'est-à-dire d'un texte qui devra être invoqué et appliqué, doit remplir au moins deux objectifs essentiels. D'une part, le Rapport doit mettre en relief aussi fidèlement que possible les principes qui sont à la base de la Convention et, quand cela s'avère nécessaire, l'évolution des idées qui ont conduit à consacrer de tels principes parmi les options existantes. Il ne s'agit certes pas de faire état d'une manière exhaustive des positions adoptées tout au long du processus d'élaboration de la Convention, mais le point de vue retenu par celle-ci sera parfois plus facile à comprendre s'il est confronté à d'autres idées avancées.

Or, étant donné que l'avant-projet de Convention préparé par la Commission spéciale a obtenu un large appui[7] et que, par conséquent, le texte définitif maintient l'essentiel de la structure et des principes fondamentaux de l'avant-projet, le présent Rapport final reprendra, surtout dans sa première partie, certains passages du Rapport de la Commission spéciale préparé en avril 1980 à l'intention de la Quatorzième session.[8]

6 Ce Rapport final doit remplir aussi un autre objectif: fournir à ceux qui auront à appliquer la Convention un commentaire détaillé de ses dispositions. Ce commentaire étant en principe destiné à éclairer la teneur littérale des dispositions conventionnelles, nous nous préoccuperons beaucoup moins d'en retracer la genèse que d'en préciser le contenu.

7 Des considérations précédentes nous pouvons conclure que les deux objectifs envisagés sont nettement différenciés et que les méthodes mêmes d'analyse utilisées pour atteindre l'un et l'autre ne peuvent pas être identiques. Toutefois, la référence dans les deux cas à un texte unique, celui de la Convention, impliquera certaines redites, qui nous semblent inévitables. En dépit de ce risque et étant donné le double objectif souligné, nous avons divisé le Rapport en deux parties: la première est consacrée à l'étude des principes généraux qui inspirent la Convention; la seconde est destinée à l'examen du texte article par article.

8 Finalement, comme le soulignait en 1977 le professeur von Overbeck,[9] il semble opportun de rappeler que ce Rapport a été établi, à l'issue de la Quatorzième session, à partir des procès-verbaux et des notes du Rapporteur. Il n'a

II *Aim and structure of this Report*

5 The Explanatory Report on a text which is destined to become positive law, that is to say a text which will require to be cited and applied, must fulfil at least two essential aims. On the one hand, it must throw into relief, as accurately as possible, the principles which form the basis of the Convention and, wherever necessary, the development of those ideas which led to such principles being chosen from amongst existing options. It is certainly not necessary to take exhaustive account of the various attitudes adopted throughout the period during which the Convention was being drawn up, but the point of view reflected in the Convention will sometimes be more easily grasped by being set opposite other ideas which were put forward.
Now, given the fact that the preliminary draft Convention prepared by the Special Commission enjoyed widespread support[7] and that the final text essentially preserves the structure and fundamental principles of the Preliminary Draft, this final Report and in particular its first part, repeats certain passages in the Report of the Special Commission prepared in April 1980, for the Fourteenth Session.[8]

6 This final Report must also fulfil another purpose, *viz.* to supply those who have to apply the Convention with a detailed commentary on its provisions. Since this commentary is designed in principle to throw light upon the literal terms of these provisions, it will be concerned much less with tracing their origins than with stating their content accurately.

7 We can conclude from the foregoing considerations that these two objectives must be clearly distinguished and that even the methods of analysis used cannot be the same for each of them. Nevertheless, the need to refer in both cases to the one text, that of the Convention, implies that a certain amount of repetition will be necessary and indeed inevitable. Despite this risk and in view of the emphasis which is placed on a double objective, the Report has been divided into two parts, the first being devoted to a study of the general principles underlying the Convention, the second containing an examination of the text, article by article.

8 Finally, as Professor von Overbeck emphasized in 1977,[9] it would be as well to remember that this Report was prepared at the end of the Fourteenth Session, from the *procès-verbaux* and the Reporter's notes. Thus it has not

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[3] Le Comité de rédaction, sous la présidence de M. Leal en tant que Vice-président de la Première commission, comprenait MM. Savolainen (Finlande), Chatin (France), Jones (Royaume-Uni) et le Rapporteur, M. Dyer et plusieurs des secrétaires rédacteurs lui ont fourni un concours extrêmement précieux.
[4] Doc. trav. Nos 45, 66, 75, 78, 79 et 83.
[5] Doc. trav. No 59, complété par la proposition du Secrétariat contenue dans le Doc. trav. No. 71. Le Sous-comité «*Application Clauses*» a décidé de ne pas changer la teneur des articles élaborés à ce sujet par la Commission spéciale (P.-v. No 12).
[6] Le Sous-comité «Formule-modèle», sous la présidence du professeur Müller-Freienfels (République fédérale d'Allemagne), comprenait MM. Deschenaux (Suisse), Hergen (Etats-Unis), Barbosa (Portugal), Minami (Japon) et Mlle Pripp (Suède). Le Sous-comité «*Application Clauses*», présidé par M. van Boeschoten (Pays-Bas), était formé par MM. Hétu (Canada), Hjorth (Danemark), Creswell (Australie), Salem (Egypte) et Mlle Selby (Etats-Unis).
[7] Voir notamment les *Observations des Gouvernements*, Doc. prél. No. 7.
[8] Doc. prél. No. 6.
[9] Rapport explicatif de la Convention sur la loi applicable aux régimes matrimoniaux, *Actes et documents de la Treizième session*, tome II, p. 329.

[3] The Drafting Committee, under the chairmanship of Mr Leal as Vice-Chairman of the First Commission, included Messrs Savolainen (Finland), Chatin (France), Jones (United Kingdom) and the Reporter, Mr Dyer and several recording secretaries provided the Committee with extremely valuable assistance.
[4] Working Documents Nos 45, 66, 75, 78, 79 and 83.
[5] Working Document No 59, supplemented by the proposal of the Secretariat in Working Document No. 71. The Subcommittee on 'Application Clauses' decided against changing the terms of the articles on this topic which had been prepared by the Special Commission (*Procès-verbal* No 12).
[6] The 'Model Forms' Subcommittee, under the chairmanship of Professor Müller-Freienfels (Federal Republic of Germany) comprised Messrs Deschenaux (Switzerland), Hergen (United States), Barbosa (Portugal), Minami (Japan) and Miss Pripp (Sweden). The Subcommittee on 'Application Clauses', chaired by Mr van Boeschoten (Netherlands), was made up of Messrs Hétu (Canada), Hjorth (Denmark), Creswell (Australia), Salem (Egypt) and Miss Selby (United States).
[7] See in particular the *Observations of Governments*, Prel. Doc. No 7.
[8] Prel. Doc. No 6.
[9] Explanatory Report on the Convention on the Law Applicable to Matrimonial Property Regimes, *Acts and Documents of the Thirteenth Session*, Book II, p. 329.

donc pas été approuvé par la Conférence et il est possible que, malgré les efforts faits par le Rapporteur pour rester objectif, certains passages répondent à une appréciation partiellement subjective.

Première partie – Caractères généraux de la Convention

9 La Convention reflète, dans son ensemble, un compromis entre deux conceptions, partiellement différentes, du but à atteindre. On perçoit, en effet, dans les travaux préparatoires, la tension existant entre le désir de protéger les situations de fait altérées par le déplacement ou le non-retour illicites d'un enfant et le souci de garantir surtout le respect des rapports juridiques pouvant se trouver à la base de telles situations. A cet égard, l'équilibre consacré par la Convention est assez fragile. D'une part, il est clair que la Convention ne vise pas le fond du droit de garde (article 19); mais d'autre part il est également évident que le fait de qualifier d'illicite le déplacement ou le non-retour d'un enfant est conditionné par l'existence d'un droit de garde qui donne un contenu juridique à la situation modifiée par les actions que l'on se propose d'éviter.

I OBJET DE LA CONVENTION

10 Le titre de ce chapitre fait allusion tant au problème auquel répond la Convention, qu'aux objectifs qu'elle a adoptés pour lutter contre le développement des enlèvements. Après avoir abordé ces deux points, nous traiterons d'autres questions connexes qui nuancent sensiblement la portée des objectifs visés; il s'agit en particulier de l'importance accordée à l'intérêt de l'enfant et des exceptions possibles au retour immédiat des enfants déplacés ou retenus illicitement.

A *Délimitation du sujet*

11 En ce qui concerne la délimitation du sujet,[10] nous nous limiterons à rappeler très brièvement que les situations envisagées découlent de l'utilisation de voies de fait pour créer des liens artificiels de compétence judiciaire internationale, en vue d'obtenir la garde d'un enfant. La diversité des circonstances qui peuvent concourir dans un cas d'espèce fait échouer toute tentative d'établir une définition plus précise d'un point de vue juridique. Cependant, deux éléments se font jour de façon inéluctable dans toutes les situations examinées et confirment la caractérisation approximative que l'on vient d'ébaucher.

12 En premier lieu, dans toutes les hypothèses nous nous trouvons confrontés au déplacement d'un enfant hors de son milieu habituel, où il se trouvait confié à une personne physique ou morale qui exerçait sur lui un droit légitime de garde. Bien entendu, il faut assimiler à une telle situation le refus de réintégrer l'enfant dans son milieu, après un séjour à l'étranger consenti par la personne qui exerçait la garde. Dans les deux cas, la conséquence est en effet la même: l'enfant a été soustrait à l'environnement familial et social dans lequel sa vie se déroulait. D'ailleurs, dans ce contexte, peu importe la nature du titre juridique qui était à la base de

[10] Voir notamment *Questionnaire et Rapport sur l'enlèvement international d'un enfant par un de ses parents*, établi par M. Adair Dyer, Doc. prél. No 1, août 1977, *supra*, p. 18-25 (cité par la suite, «Rapport Dyer»), et Rapport sur l'avant-projet de Convention adopté par la Commission spéciale, Doc. prél. No 6, mai 1980, *supra*, p. 172-173.

been approved by the Conference, and it is possible that, despite the Rapporter's efforts to remain objective, certain passages reflect a viewpoint which is in part subjective.

First Part – General characteristics of the Convention

9 The Convention reflects on the whole a compromise between two concepts, different in part, concerning the end to be achieved. In fact one can see in the preliminary proceedings a potential conflict between the desire to protect factual situations altered by the wrongful removal or retention of a child, and that of guaranteeing, in particular, respect for the legal relationships which may underlie such situations. The Convention has struck a rather delicate balance in this regard. On the one hand, it is clear that the Convention is not essentially concerned with the merits of custody rights (article 19), but on the other hand it is equally clear that the characterization of the removal or retention of a child as wrongful is made conditional upon the existence of a right of custody which gives legal content to a situation which was modified by those very actions which it is intended to prevent.

I OBJECT OF THE CONVENTION

10 The title of this chapter alludes as much to the problem addressed by the Convention as to the objectives by which it seeks to counter the increase in abductions. After tackling both of these points, we shall deal with other connected questions which appreciably affect the scope of the Convention's objectives, and in particular the importance which has been placed on the interest of the child and on the possible exceptions to the rule requiring the prompt return of children who have been wrongfully removed or retained.

A *Definition of the Convention's subject-matter*

11 With regard to the definition of the Convention's subject-matter,[10] we need only remind ourselves very briefly that the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child. The variety of different circumstances which can combine in a particular case makes it impossible to arrive at a more precise definition in legal terms. However, two elements are invariably present in all cases which have been examined and confirm the approximate nature of the foregoing characterization.

Firstly, we are confronted in each case with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person. Naturally, a refusal to restore a child to its own environment after a stay abroad to which the person exercising the right of custody had consented must be put in the same category. In both cases, the outcome is in fact the same: the child is taken out of the family and social environment in which its life has developed. What is more, in this context the type of legal title which underlies the exercise of custody rights over the child matters little, since

[10] See in particular the *Questionnaire and Report on international child abduction by one parent*, prepared by Mr Adair Dyer, Prel. Doc. No 1, August 1977, *supra*, pp. 18-25 (hereafter referred to as the 'Dyer Report'), and the Report on the preliminary draft Convention, adopted by the Special Commission, Prel. Doc. No 6, May 1980, *supra*, pp. 172-173.

l'exercice du droit de garde sur la personne de l'enfant: de ce point de vue, l'existence ou l'absence d'une décision relative à la garde ne change en rien les données sociologiques du problème.

13 En second lieu, la personne qui déplace l'enfant (ou qui est responsable du déplacement, quand l'action matérielle est exécutée par un tiers) a l'espoir d'obtenir des autorités du pays où l'enfant a été emmené le droit de garde sur celui-ci. Il s'agit donc de quelqu'un qui appartient au cercle familial de l'enfant, au sens large du terme; en fait, dans la plupart des cas, la personne en question est le père ou la mère.

14 Il est fréquent que la personne qui retient l'enfant essaie d'obtenir qu'une décision judiciaire ou administrative de l'Etat de refuge légalise la situation de fait qu'elle vient de créer; mais si elle n'est pas sûre du sens de la décision, il est aussi possible qu'elle opte pour l'inactivité, laissant ainsi l'initiative à la personne dépossédée. Or, même si cette dernière agit rapidement, c'est-à-dire même si elle évite la consolidation dans le temps de la situation provoquée par le déplacement de l'enfant, l'enleveur se trouvera dans une position avantageuse, car c'est lui qui aura choisi le for qui va juger de l'affaire, un for que, par principe, il considère comme le plus favorable à ses prétentions.

15 En conclusion, nous pouvons affirmer que le problème dont s'occupe la Convention – avec tout ce qu'implique de dramatique le fait qu'il concerne directement la protection de l'enfance dans les relations internationales – prend toute son acuité juridique par la possibilité qu'ont les particuliers d'établir des liens plus ou moins artificiels de compétence judiciaire. En effet, par ce biais, le particulier peut altérer la loi applicable et obtenir une décision judiciaire qui lui soit favorable. Certes, une telle décision, surtout quand elle coexiste avec d'autres décisions de contenu contradictoire rendues par d'autres fors, aura une validité géographiquement restreinte, mais en tout état de cause elle apportera un titre juridique suffisant pour «légaliser» une situation de fait qu'aucun des systèmes juridiques en présence ne souhaitait.

B *Les objectifs de la Convention*

16 Les objectifs de la Convention, qui apparaissent dans l'article premier, pourraient être résumés comme suit: étant donné qu'un facteur caractéristique des situations considérées réside dans le fait que l'enleveur prétend que son action soit légalisée par les autorités compétentes de l'Etat de refuge, un moyen efficace de le dissuader est que ses actions se voient privées de toute conséquence pratique et juridique. Pour y parvenir, la Convention consacre en tout premier lieu, parmi ses objectifs, le rétablissement du *statu quo*, moyennant le «retour immédiat des enfants déplacés ou retenus illicitement dans tout Etat contractant». Les difficultés insurmontables rencontrées pour fixer conventionnellement des critères de compétence directe en la matière[11] ont en effet conduit au choix de cette voie qui, bien que détournée, va, dans la plupart des cas, permettre que la décision finale sur la garde soit prise par les autorités de la résidence habituelle de l'enfant, avant son déplacement.

17 D'ailleurs, bien que l'objectif exprimé au point *b*, «faire respecter effectivement dans les autres Etats contractants les

[11] Une telle option a été rejetée au cours de la première réunion de la Commission spéciale. *Cf. Conclusions des discussions de la Commission spéciale de mars 1979 sur le kidnapping légal*, établies par le Bureau Permanent, Doc. prél. No 5, juin 1979, *supra*, p. 163-164.

whether or not a decision on custody exists in no way alters the sociological realities of the problem.

Secondly, the person who removes the child (or who is responsible for its removal, where the act of removal is undertaken by a third party) hopes to obtain a right of custody from the authorities of the country to which the child has been taken. The problem therefore concerns a person who, broadly speaking, belongs to the family circle of the child; indeed, in the majority of cases, the person concerned is the father or mother.

14 It frequently happens that the person retaining the child tries to obtain a judicial or administrative decision in the State of refuge, which would legalize the factual situation which he has just brought about. However, if he is uncertain about the way in which the decision will go, he is just as likely to opt for inaction, leaving it up to the dispossessed party to take the initiative. Now, even if the latter acts quickly, that is to say manages to avoid the consolidation through lapse of time of the situation brought about by the removal of the child, the abductor will hold the advantage, since it is he who has chosen the forum in which the case is to be decided, a forum which, in principle, he regards as more favourable to his own claims.

15 To conclude, it can firmly be stated that the problem with which the Convention deals – together with all the drama implicit in the fact that it is concerned with the protection of children in international relations – derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial. In fact, resorting to this expedient, an individual can change the applicable law and obtain a judicial decision favourable to him. Admittedly, such a decision, especially one coexisting with others to the opposite effect issued by the other forum, will enjoy only a limited geographical validity, but in any event it bears a legal title sufficient to 'legalize' a factual situation which none of the legal systems involved wished to see brought about.

B *The objectives of the Convention*

16 The Convention's objects, which appear in article 1, can be summarized as follows: since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences. The Convention, in order to bring this about, places at the head of its objectives the restoration of the *status quo*, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'. The insurmountable difficulties encountered in establishing, within the framework of the Convention, directly applicable jurisdictional rules[11] indeed resulted in this route being followed which, although an indirect one, will tend in most cases to allow a final decision on custody to be taken by the authorities of the child's habitual residence prior to its removal.

17 Besides, although the object stated in sub-paragraph *b*, 'to ensure that rights of custody and of access under the law

[11] Such an option was rejected in the course of the first meeting of the Special Commission. *Cf. Conclusions drawn from the discussions of the Special Commission of March 1979 on legal kidnapping*, prepared by the Permanent Bureau, Prel. Doc. No 5, June 1979, *supra*, pp. 163-164.

droits de garde et de visite existant dans un Etat contractant», présente un caractère autonome, sa connexion téléologique avec l'objectif «retour de l'enfant» n'en est pas moins évidente. En réalité, on pourrait estimer qu'il ne s'agit que d'un seul objectif considéré à deux moments différents: tandis que le retour immédiat de l'enfant répond au désir de rétablir une situation que l'enleveur a modifiée unilatéralement par une voie de fait, le respect effectif des droits de garde et de visite se place sur un plan préventif, dans la mesure où ce respect doit faire disparaître l'une des causes les plus fréquentes de déplacements d'enfants.
Or, puisque la Convention ne précise pas les moyens que chaque Etat doit employer pour faire respecter le droit de garde existant dans un autre Etat contractant, il faut conclure qu'exception faite de la protection indirecte, qui implique l'obligation de retourner l'enfant à celui qui en avait la garde, le respect du droit de garde échappe presque entièrement au domaine conventionnel. Par contre, le droit de visite fait l'objet d'une régulation incomplète certes, mais indicative de l'intérêt accordé aux contacts réguliers entre parents et enfants, même quand la garde a été confiée à un seul des parents ou à un tiers.

18 Si on admet le bien-fondé des considérations précédentes, il faut en conclure que toute tentative de hiérarchisation des objectifs de la Convention ne peut avoir qu'une signification symbolique. En effet, il semble presque impossible d'établir une hiérarchisation entre deux objectifs qui prennent leurs racines dans une même préoccupation. Car, en définitive, il revient à peu près au même de faciliter le retour d'un enfant déplacé ou de prendre les mesures nécessaires pour éviter un tel déplacement.
Or, comme nous le verrons par la suite, l'aspect que la Convention a essayé de régler en profondeur est celui du retour des enfants déplacés ou retenus illicitement. La raison nous semble évidente: c'est après la retenue illicite d'un enfant que se produisent les situations les plus douloureuses, celles qui, tout en exigeant des solutions particulièrement urgentes, ne peuvent pas être résolues de façon unilatérale par chaque système juridique concerné. Prises dans leur ensemble, toutes ces circonstances justifient à notre avis le développement que la réglementation du retour de l'enfant reçoit dans la Convention et en même temps accordent, sur le plan des principes, une certaine priorité à l'objectif visé. Ainsi donc, bien qu'en théorie les deux objectifs mentionnés doivent être placés sur un même plan, dans la pratique c'est le désir de garantir le rétablissement de la situation altérée par l'action de l'enleveur qui a prévalu dans la Convention.

19 Dans un dernier effort de clarification des objectifs de la Convention, il convient de souligner qu'ainsi qu'il résulte en particulier des dispositions de son article premier, elle ne cherche pas à régler le problème de l'attribution du droit de garde. Sur ce point, le principe non explicite sur lequel repose la Convention est que la discussion sur le fond de l'affaire, c'est-à-dire sur le droit de garde contesté, si elle se produit, devra être engagée devant les autorités compétentes de l'Etat où l'enfant avait sa résidence habituelle avant son déplacement; et cela aussi bien si le déplacement a eu lieu avant qu'une décision sur la garde ait été rendue — situation dans laquelle le droit de garde violé s'exerçait *ex lege* — que si un tel déplacement s'est produit en violation d'une décision préexistante.

C *Importance accordée à l'intérêt de l'enfant*

20 Avant tout, il est nécessaire de justifier les raisons qui nous amènent à insérer l'examen de ce point dans le contexte des considérations sur l'objet de la Convention. Elles apparaissent clairement si l'on considère, d'une part que

of one Contracting State are effectively respected in the other Contracting States' appears to stand by itself, its teleological connection with the 'return of the child' object is no less evident. In reality, it can be regarded as one single object considered at two different times; whilst the prompt return of the child answers to the desire to re-establish a situation unilaterally and forcibly altered by the abductor, effective respect for rights of custody and of access belongs on the preventive level, in so far as it must lead to the disappearance of one of the most frequent causes of child abductions.
Now, since the Convention does not specify the means to be employed by each State in bringing about respect for rights of custody which exist in another Contracting State, one must conclude that, with the exception of the indirect means of protecting custody rights which is implied by the obligation to return the child to the holder of the right of custody, respect for custody rights falls almost entirely outwith the scope of the Convention. On the other hand, rights of access form the subject of a rule which, although undoubtedly incomplete, nevertheless is indicative of the interest shown in ensuring regular contact between parents and children, even when custody has been entrusted to one of the parents or to a third party.

18 If the preceding considerations are well-founded, it must be concluded that any attempt to establish a hierarchy of objects of the Convention could have only a symbolic significance. In fact, it would seem almost impossible to create a hierarchy as between two objects which spring from the same concern. For at the end of the day, promoting the return of the child or taking the measures necessary to avoid such removal amount to almost the same thing.

Now, as will be seen below, the one matter which the Convention has tried to regulate in any depth is that of the return of children wrongfully removed or retained. The reason for this seems clear: the most distressing situations arise only after the unlawful retention of a child and they are situations which, while requiring particularly urgent solutions, cannot be resolved unilaterally by any one of the legal systems concerned. Taken as a whole, all these circumstances justify, in our opinion, the Convention's development of rules for regulating the return of the child, whilst at the same time they give in principle a certain priority to that object. Thus, although theoretically the two above-mentioned objects have to be placed on the same level, in practice the desire to guarantee the re-establishment of the *status quo* disturbed by the actions of the abductor has prevailed in the Convention.

19 In a final attempt to clarify the objects of the Convention, it would be advisable to underline the fact that, as is shown particularly in the provisions of article 1, the Convention does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal; this applies as much to a removal which occurred prior to any decision on custody being taken — in which case the violated custody rights were exercised *ex lege* — as to a removal in breach of a pre-existing custody decision.

C *Importance attached to the interest of the child*

20 Above all, one has to justify the reasons for including an examination of this matter within the context of a consideration of the Convention's objects. These reasons will appear clearly if one considers, on the one hand, that the

l'intérêt de l'enfant est souvent invoqué à ce sujet, et d'autre part que l'on pourrait argumenter que l'objectif conventionnel touchant au retour de l'enfant devrait toujours être subordonné à la prise en considération de son intérêt.

21 A cet égard, il a été à juste titre mis en relief que «la norme juridique reposant sur «l'intérêt supérieur de l'enfant» est, à première vue, d'une telle imprécision qu'elle ressemble davantage à un paradigme social qu'à une norme juridique concrète. Comment étoffer cette notion pour décider quel est l'intérêt *final* de l'enfant sans faire des suppositions qui ne prennent leur source que dans le contexte moral d'une culture déterminée? En introduisant le mot «final» dans l'équation, on fait aussitôt naître de sérieux problèmes, puisque l'énoncé général de la norme ne permet pas de savoir clairement si «l'intérêt» de l'enfant qu'il faut protéger est celui qui suit immédiatement la décision, ou celui de son adolescence, de son existence de jeune adulte, de son âge mûr ou de sa vieillesse».[12]

22 D'autre part, on ne doit pas oublier que c'est en invoquant «l'intérêt supérieur de l'enfant» que souvent, dans le passé, les juridictions internes ont accordé finalement la garde en litige à la personne qui l'avait déplacé ou retenu illicitement. Il a pu se trouver que cette décision soit la plus juste; nous ne pouvons cependant pas ignorer le fait que le recours, par des autorités internes, à une telle notion implique le risque de traduire des manifestations du particularisme culturel, social, etc., d'une communauté nationale donnée et donc, au fond, de porter des jugements de valeur subjectifs sur l'autre communauté nationale d'où l'enfant vient d'être arraché.

23 Pour les motifs invoqués, parmi d'autres, la partie dispositive de la Convention ne contient aucune allusion explicite à l'intérêt de l'enfant en tant que critère correcteur de l'objectif conventionnel qui vise à assurer le retour immédiat des enfants déplacés ou retenus illicitement. Cependant, il ne faudrait pas déduire de ce silence que la Convention ignore le paradigme social qui proclame la nécessité de prendre en considération l'intérêt des enfants pour régler tous les problèmes les concernant. Bien au contraire, dès le préambule, les Etats signataires déclarent être «profondément convaincus que l'intérêt de l'enfant est d'une importance primordiale pour toute question relative à sa garde»; c'est précisément dans cette conviction qu'ils ont élaboré la Convention, «désirant protéger l'enfant, sur le plan international, contre les effets nuisibles d'un déplacement ou d'un non-retour illicites».

24 Ces deux paragraphes du préambule reflètent assez clairement quelle a été la philosophie de la Convention à cet égard, philosophie que l'on pourrait définir comme suit: la lutte contre la multiplication des enlèvements internationaux d'enfants doit toujours être inspirée par le désir de protéger les enfants, en se faisant l'interprète de leur véritable intérêt. Or, parmi les manifestations les plus objectives de ce qui constitue l'intérêt de l'enfant figure le droit de ne pas être déplacé ou retenu au nom de droits plus ou moins discutables sur sa personne. En ce sens, il est souhaitable de rappeler la Recommandation 874 (1979) de l'Assemblée parlementaire du Conseil de l'Europe dont le premier principe général dit que «les enfants ne doivent plus être considérés comme la propriété de leurs parents, mais être reconnus comme des individus avec leurs droits et leurs besoins propres».[13]

[12] Rapport Dyer, *supra*, p. 22-23.
[13] Assemblée parlementaire du Conseil de l'Europe. 31ème Session ordinaire. *Recommandation relative à une Charte européenne des droits de l'enfant.* Texte adopté le 4 octobre 1979.

interests of the child are often invoked in this regard, and on the other hand, that it might be argued that the Convention's object in securing the return of the child ought always to be subordinated to a consideration of the child's interests.

21 In this regard, one fact has rightly been highlighted, *viz.* that 'the legal standard 'the best interests of the child' is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard. How can one put flesh on its bare bones without delving into the assumptions concerning the *ultimate* interests of a child which are derived from the moral framework of a particular culture? The word 'ultimate' gives rise to immediate problems when it is inserted into the equation since the general statement of the standard does not make it clear whether the 'interests' of the child to be served are those of the immediate aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence or old age'.[12]

22 On the other hand, it must not be forgotten that it is by invoking 'the best interests of the child' that internal jurisdictions have in the past often finally awarded the custody in question to the person who wrongfully removed or retained the child. It can happen that such a decision is the most just, but we cannot ignor the fact that recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched.

23 For these reasons, among others, the dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained. However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them. On the contrary, right from the start the signatory States declare themselves to be 'firmly convinced that the interests of children are of paramount importance in matters relating to their custody'; it is precisely because of this conviction that they drew up the Convention, 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention'.

24 These two paragraphs in the preamble reflect quite clearly the philosophy of the Convention in this regard. It can be defined as follows: the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. Now, the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child. In this regard it would be as well to refer to Recommendation 874(1979) of the Parliamentary Assembly of the Council of Europe, the first general principle of which states that 'children must no longer be regarded as parents' property, but must be recognised as individuals with their own rights and needs'.[13]

[12] Dyer Report, *supra*, pp. 22-23.
[13] Parliamentary Assembly of the Council of Europe. 31st Ordinary Session, *Recommendation on a European Charter on the Rights of the Child.* Text adopted on 4 October 1979.

En effet, comme l'a souligné M. Dyer, dans la littérature consacrée à l'étude de ce problème, «l'opinion qu'on y trouve le plus souvent exprimée est que la véritable victime d'un «enlèvement d'enfant» est l'enfant lui-même. C'est lui qui pâtit de perdre brusquement son équilibre, c'est lui qui subit le traumatisme d'être séparé du parent qu'il avait toujours vu à ses côtés, c'est lui qui ressent les incertitudes et les frustrations qui découlent de la nécessité de s'adapter à une langue étrangère, à des conditions culturelles qui ne lui sont pas familières, à de nouveaux professeurs et à une famille inconnue».[14]

25 Il est donc légitime de soutenir que les deux objectifs de la Convention — l'un préventif, l'autre visant la réintégration immédiate de l'enfant dans son milieu de vie habituel — répondent dans leur ensemble à une conception déterminée de «l'intérêt supérieur de l'enfant». Cependant, même dans l'optique choisie, il fallait admettre que le déplacement d'un enfant peut parfois être justifié par des raisons objectives touchant soit à sa personne, soit à l'environnement qui lui était le plus proche. De sorte que la Convention reconnaît certaines exceptions à l'obligation générale assumée par les Etats d'assurer le retour immédiat des enfants déplacés ou retenus illicitement. Pour la plupart, ces exceptions ne sont que des manifestations concrètes du principe trop imprécis qui proclame que l'intérêt de l'enfant est le critère vecteur en la matière.

26 D'ailleurs, la réglementation du droit de visite répond aussi au souci de fournir aux enfants des rapports familiaux aussi complets que possible, afin de favoriser un développement équilibré de leur personnalité. Pourtant, ici encore les avis ne sont pas unanimes, ce qui met une fois de plus en relief le caractère ambigu du principe de l'intérêt de l'enfant. En effet, à l'encontre du critère admis par la Convention, certaines tendances soutiennent qu'il est préférable pour l'enfant de ne pas avoir de contacts avec ses deux parents quand le couple est séparé *de jure* ou *de facto*. A cet égard, la Conférence a été consciente du fait qu'une telle solution peut parfois s'avérer la plus souhaitable. Tout en sauvegardant la marge d'appréciation des circonstances concrètes inhérente à la fonction judiciaire, la Conférence a néanmoins préféré l'autre option et la Convention fait prévaloir sans équivoque l'idée que le droit de visite est la contrepartie naturelle du droit de garde; contrepartie qui, par conséquent, doit en principe être reconnue à celui des parents qui n'a pas la garde de l'enfant.

D *Exceptions à l'obligation d'assurer le retour immédiat des enfants*

27 Etant donné que le retour de l'enfant est en quelque sorte l'idée de base de la Convention, les exceptions à l'obligation générale de l'assurer constituent un aspect important pour en comprendre avec exactitude la portée. Il ne s'agit évidemment pas d'examiner ici en détail les dispositions qui établissent ces exceptions, mais d'en esquisser le rôle, en insistant particulièrement sur les raisons qui ont déterminé leur inclusion dans la Convention. De ce point de vue, nous pouvons distinguer des exceptions basées sur trois justifications différentes.

28 D'une part, l'article 13*a* reconnaît que les autorités judiciaires ou administratives de l'Etat requis ne sont pas

[14] Rapport Dyer, *supra*, p. 21.

In fact, as Mr Dyer has emphasized, in the literature devoted to a study of this problem, 'the presumption generally stated is that the true victim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives'.[14]

25 It is thus legitimate to assert that the two objects of the Convention — the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment — both correspond to a specific idea of what constitutes the 'best interests of the child'. However, even when viewing from this perspective, it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area.

26 What is more, the rule concerning access rights also reflects the concern to provide children with family relationships which are as comprehensive as possible, so as to encourage the development of a stable personality. However, opinions differ on this, a fact which once again throws into relief the ambiguous nature of this principle of the interests of the child. In fact, there exists a school of thought opposed to the test which has been accepted by the Convention, which maintains that it is better for the child not to have contact with both parents where the couple are separated in law or in fact. As to this, the Conference was aware of the fact that such a solution could sometimes prove to be the most appropriate. Whilst safeguarding the element of judicial discretion in individual cases, the Conference nevertheless chose the other alternative, and the Convention upholds unequivocally the idea that access rights are the natural counterpart of custody rights, a counterpart which must in principle be acknowledged as belonging to the parent who does not have custody of the child.

D *Exceptions to the duty to secure the prompt return of children*

27 Since the return of the child is to some extent the basic principle of the Convention, the exceptions to the general duty to secure it form an important element in understanding the exact extent of this duty. It is not of course necessary to examine in detail the provisions which constitute these exceptions, but merely to sketch their role in outline, while at the same time stressing in particular the reasons for their inclusion in the Convention. From this vantage point can be seen those exceptions which derive their justification from three different principles.

28 On the one hand, article 13*a* accepts that the judicial or administrative authorities of the requested State are not

[14] Dyer Report, *supra*, p. 21.

tenues d'ordonner le retour de l'enfant lorsque le demandeur n'exerçait pas de façon effective, avant le déplacement prétendûment illicite, la garde qu'il invoque maintenant, ou lorsqu'il a donné son accord postérieur à l'action qu'il attaque désormais. Il s'agit par conséquent des situations dans lesquelles, ou bien les conditions préalables au déplacement ne comportaient pas l'un des éléments essentiels des relations que la Convention entend protéger (celui de l'exercice effectif de la garde), ou bien le comportement postérieur du parent dépossédé montre une acceptation de la nouvelle situation ainsi créée, ce qui la rend plus difficilement contestable.

29 D'autre part, les alinéas 1*b* et 2 du même article 13 retiennent des exceptions s'inspirant clairement de la prise en considération de l'intérêt de l'enfant. Or, comme nous l'avons signalé auparavant, la Convention a donné un contenu précis à cette notion. Ainsi, l'intérêt de l'enfant de ne pas être déplacé de sa résidence habituelle, sans garanties suffisantes de stabilité de la nouvelle situation, cède le pas devant l'intérêt primaire de toute personne de ne pas être exposée à un danger physique ou psychique, ou placée dans une situation intolérable.

30 De surcroît, la Convention admet aussi que l'avis de l'enfant sur le point essentiel de son retour ou de son non-retour puisse être décisif, si d'après les autorités compétentes il a atteint un âge et une maturité suffisante. Par ce biais, la Convention donne aux enfants la possibilité de se faire l'interprète de leur propre intérêt. Evidemment, cette disposition peut devenir dangereuse si son application se traduit par des interrogatoires directs de jeunes qui peuvent, certes, avoir une conscience claire de la situation, mais qui peuvent aussi subir des dommages psychiques sérieux s'ils pensent qu'on les a obligés à choisir entre leurs deux parents. Pourtant, une disposition de ce genre était indispensable étant donné que le domaine d'application de la Convention *ratione personae* s'étend aux enfants jusqu'à leur seizième anniversaire; il faut avouer que serait difficilement acceptable le retour d'un enfant, par exemple de quinze ans, contre sa volonté. D'ailleurs, sur ce point précis, les efforts faits pour se mettre d'accord sur un âge minimum à partie duquel l'opinion de l'enfant pourrait être prise en considération ont échoué, tous les chiffres ayant un caractère artificiel, voire arbitraire; il est apparu préférable de laisser l'application de cette clause à la sagesse des autorités compétentes.

31 En troisième lieu, il n'existe pas d'obligation de faire revenir l'enfant quand, aux termes de l'article 20, ceci «ne serait pas permis par les principes fondamentaux de l'Etat requis sur la sauvegarde des droits de l'homme et des libertés fondamentales». Nous nous trouvons ici devant une disposition peu habituelle dans les conventions concernant le droit international privé et dont la portée exacte est difficile à établir. En renvoyant au commentaire de l'article 20 pour tenter d'y parvenir, il nous paraît surtout intéressant ici d'en considérer l'origine. Or cette règle est le produit d'un compromis entre délégations favorables et délégations contraires à l'inclusion dans la Convention d'une clause d'ordre public.
Une telle possibilité a été largement débatue au sein de la Première commission, sous des formules différentes. Finalement, après quatre scrutins négatifs et par une seule voix de différence, la Commission a admis la possibilité de rejeter la demande en retour de l'enfant, avec mention d'une réserve faisant état de l'exception d'ordre public sous une formule restreinte en relation avec le droit de la famille et de l'enfance de l'Etat requis. La réserve prévue était formulée littéralement comme suit: «*Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of the*

bound to order the return of the child if the person requesting its return was not actually exercising, prior to the allegedly unlawful removal, the rights of custody which he now seeks to invoke, or if he had subsequently consented to the act which he now seeks to attack. Consequently, the situations envisaged are those in which either the conditions prevailing prior to the removal of the child do not contain one of the elements essential to those relationships which the Convention seeks to protect (that of the actual exercise of custody rights), or else the subsequent behaviour of the dispossessed parent shows his acceptance of the new situation thus brought about, which makes it more difficult for him to challenge.

29 On the other hand, paragraphs 1*b* and 2 of the said article 13 contain exceptions which clearly derive from a consideration of the interests of the child. Now, as we pointed out above, the Convention invests this notion with definite content. Thus, the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.

30 In addition, the Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and degree of maturity sufficient for its views to be taken into account. In this way, the Convention gives children the possibility of interpreting their own interests. Of course, this provision could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think they are being forced to choose between two parents. However, such a provision is absolutely necessary given the fact that the Convention applies, *ratione personae*, to all children under the age of sixteen; the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will. Moreover, as regards this particular point, all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities.

31 Thirdly, there is no obligation to return a child when, in terms of article 20, its return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms'. Here, we are concerned with a provision which is rather unusual in conventions involving private international law, and the exact scope of which is difficult to define. Although we shall refer to the commentary on article 20 for the purpose of defining such scope, it is particularly interesting to consider its origins here. This rule was the result of a compromise between those delegations which favoured, and those which were opposed to, the inclusion in the Convention of a 'public policy' clause.
The inclusion of such a clause was debated at length by the First Commission, under different formulations. Finally, after four votes against inclusion, the Commission accepted, by a majority of only one, that an application for the return of a child could be refused, by reference to a reservation which took into account the public policy exception by way of a restrictive formula concerning the laws governing the family and children in the requested State. The reservation provided for was formulated exactly as follows: 'Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the

law relating to the family and children in the State addressed».[15] En adoptant ce texte, on ouvrait une brèche grave dans le *consensus* qui avait présidé fondamentalement jusqu'alors aux travaux de la Conférence; c'est pourquoi, conscientes de ce qu'il fallait trouver une solution largement acceptable, toutes les délégations se sont engagées dans cette voie qui constituait le chemin le plus sûr pour garantir la réussite de la Convention.

32 Le point débattu était particulièrement important, car il reflétait en partie deux conceptions partiellement différentes de l'objectif de la Convention en matière de retour de l'enfant. En effet, jusqu'ici le texte élaboré par la Première commission (en accord avec l'avant-projet préparé par la Commission spéciale) avait limité les exceptions possibles au retour de l'enfant à la considération des situations de fait et de la conduite des parties ou à une appréciation spécifique de l'intérêt de l'enfant. Par contre, la réserve qu'on venait d'accepter impliquait qu'on admettait la possibilité de refuser le retour d'un enfant sur la base d'arguments purement juridiques, tirés du droit interne de l'Etat requis. Droit interne qui aurait pu jouer dans le contexte de la disposition transcrite, soit pour «évaluer» le titre invoqué par le parent dépossédé, soit pour apprécier le bien-fondé juridique de l'action de l'enleveur. Or, de telles conséquences altéraient considérablement un édifice conventionnel construit sur l'idée qu'il fallait éviter le détournement, par voies de fait, de la compétence normale des autorités de la résidence habituelle de l'enfant.

33 Dans cette situation, l'adoption par une majorité[16] rassurante de la formule qui figure à l'article 20 de la Convention représente un louable effort de compromis entre les différentes positions, le rôle accordé à la loi interne de l'Etat de refuge ayant considérablement diminué. D'une part, la référence aux principes fondamentaux concernant la sauvegarde des droits de l'homme et des libertés fondamentales porte sur un secteur du droit où il existe de nombreux compromis internationaux. D'autre part, la règle de l'article 20 va également plus loin que les formules traditionnelles de la clause d'ordre public en ce qui concerne le degré d'incompatibilité existant entre le droit invoqué et l'action envisagée; en effet, pour pouvoir refuser le retour de l'enfant en invoquant le motif qui figure dans cette disposition, l'autorité en question doit constater non seulement l'existence d'une contradiction, mais aussi le fait que les principes protecteurs des droits de l'homme interdisent le retour demandé.

34 Pour clore les considérations sur les problèmes traités à cet alinéa, il semble nécessaire de souligner que les exceptions de trois types au retour de l'enfant doivent être appliquées en tant que telles. Cela implique avant tout qu'elles doivent être interprétées restrictivement si l'on veut éviter que la Convention devienne lettre morte. En effet, la Convention repose dans sa totalité sur le rejet unanime du phénomène des déplacements illicites d'enfants et sur la conviction que la meilleure méthode pour les combattre, au niveau international, est de ne pas leur reconnaître des conséquences juridiques. La mise en pratique de cette méthode exige que les Etats signataires de la Convention soient convaincus de ce qu'ils appartiennent, malgré leurs différences, à une même communauté juridique au sein de laquelle les autorités de chaque Etat reconnaissent que les autorités de l'un d'entre eux – celles de la résidence

[15] Voir P.-v. No 9 et Doc. trav. connexes.
[16] Le texte a été adopté par 14 suffrages positifs, 6 négatifs et 4 abstentions, voir P.-v. No 13.

fundamental principles of the law relating to the family and children in the State addressed'.[15] The adoption of this text caused a serious breach in the consensus which basically had prevailed up to this point in the Conference proceedings. That is why all the delegations, aware of the fact that a solution commanding wide acceptance had to be found, embarked upon this road which provided the surest guarantee of the success of the Convention.

32 The matter under debate was particularly important since to some extent it reflected two partly different concepts concerning the Convention's objects as regards the return of the child. Actually, up to now the text drawn up by the First Commission (like the Preliminary Draft drawn up by the Special Commission) had limited the possible exceptions to the rule concerning the return of the child to a consideration of factual situations and of the conduct of the parties or to a specific evaluation of the interests of the child. On the other hand, the reservation just accepted implicitly permitted the possibility of the return of a child being refused on the basis of purely legal arguments drawn from the internal law of the requested State, an internal law which could come into play in the context of the quoted provision either to 'evaluate' the right claimed by the dispossessed parent or to assess whether the action of the abductor was well-founded in law. Now, such consequences would alter considerably the structure of the Convention which is based on the idea that the forcible denial of jurisdiction ordinarily possessed by the authorities of the child's habitual residence should be avoided.

33 In this situation, the adoption by a comforting majority[16] of the formula which appears in article 20 of the Convention represents a laudable attempt to compromise between opposing points of view, the role given to the internal law of the State of refuge having been considerably diminished. On the one hand, the reference to the fundamental principles concerning the protection of human rights and fundamental freedoms relates to an area of law in which there are numerous international agreements. On the other hand, the rule in article 20 goes further than the traditional formulation of 'public policy' clauses as regards the extent of incompatibility between the right claimed and the action envisaged. In fact, the authority concerned, in order to be able to refuse to order the return of the child by invoking the grounds which appear in this provision, must show not only that such a contradiction exists, but also that the protective principles of human rights prohibit the return requested.

34 To conclude our consideration of the problems with which this paragraph deals, it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in

[15] See *P.-v.* No 9 and associated Working Documents.
[16] The text was adopted with 14 votes in favour, 6 against and 4 abstentions, see *P.-v.* No 13.

habituelle de l'enfant – sont en principe les mieux placées pour statuer en toute justice sur les droits de garde et de visite. De sorte qu'une invocation systématique des exceptions mentionnées, substituant ainsi au for de la résidence de l'enfant le for choisi par l'enleveur, fera s'écrouler tout l'édifice conventionnel, en le vidant de l'esprit de confiance mutuelle qui l'a inspiré.

principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

II NATURE DE LA CONVENTION

A *Une convention de coopération entre autorités*

35 En délimitant les buts poursuivis par les Etats contractants, les objectifs d'une convention en déterminent en dernier ressort la nature. Ainsi, la Convention sur les aspects civils de l'enlèvement international d'enfants est avant tout une convention qui cherche à éviter les déplacements internationaux d'enfants en instituant une coopération étroite entre les autorités judiciaires et administratives des Etats contractants. Une telle collaboration porte sur les deux objectifs que nous venons d'examiner, d'une part l'obtention du retour immédiat de l'enfant dans le milieu d'où il a été éloigné, d'autre part le respect effectif des droits de garde et de visite existant dans un des Etats contractants.

36 Cette caractérisation de la Convention peut aussi être effectuée à travers une approche négative. Ainsi, nous pouvons constater avant tout qu'il ne s'agit pas d'une convention sur la loi applicable à la garde des enfants. En effet, les références faites au droit de l'Etat de la résidence habituelle de l'enfant ont une portée restreinte, puisque le droit en question n'est pris en considération que pour établir le caractère illicite du déplacement (par exemple, à l'article 3). En second lieu, la Convention n'est pas non plus un traité sur la reconnaissance et l'exécution des décisions en matière de garde. On a sciemment évité cette option, qui a pourtant suscité de longs débats au sein de la première réunion de la Commission spéciale. Etant donné les conséquences sur le fond de la reconnaissance d'une décision étrangère, cette institution est normalement entourée de garanties et d'exceptions qui peuvent prolonger la procédure. Or, en cas de déplacement d'un enfant, le facteur temps prend une importance décisive. En effet, les troubles psychologiques que l'enfant peut subir du fait d'un tel déplacement pourraient se reproduire si la décision sur son retour n'était adoptée qu'après un certain délai.

37 Une fois acquis que nous nous trouvons devant une convention axée sur l'idée de coopération entre autorités, il faut préciser qu'elle n'essaie de régler que les situations entrant dans son domaine d'application et touchant deux ou plusieurs Etats parties. En effet, l'idée d'une convention «universaliste» (c'est-à-dire dont le domaine s'applique à toute espèce internationale) est difficile à soutenir en dehors des conventions en matière de loi applicable. En ce sens, nous devons rappeler que les systèmes prévus, qu'il s'agisse du retour des enfants ou d'assurer l'exercice effectif du droit de visite, s'appuient largement sur une coopération entre les Autorités centrales reposant sur des droits et des devoirs réciproques. De même, quand des particuliers s'adressent directement aux autorités judiciaires ou administratives d'un Etat contractant en invoquant la Convention, l'application des bénéfices conventionnels répond aussi à une idée de réciprocité qui exclut en principe son extension aux ressortissants des Etats tiers.

Par ailleurs, bien que la Convention n'atteigne la plénitude de ses objectifs qu'entre les Etats contractants, les autorités de chacun de ces Etats ont parfaitement le droit de s'inspirer

II NATURE OF THE CONVENTION

A *A convention of co-operation among authorities*

35 By defining the ends pursued by the Contracting States, a convention's objects in the final analysis determine its nature. Thus, the Convention on the Civil Aspects of International Child Abduction is above all a convention which seeks to prevent the international removal of children by creating a system of close co-operation among the judicial and administrative authorities of the Contracting States. Such collaboration has a bearing on the two objects just examined, *viz.* on the one hand, obtaining the prompt return of the child to the environment from which it was removed, and on the other hand the effective respect for rights of custody and access which exist in one of the Contracting States.

36 This description of the Convention can also be drawn in a negative way. Thus, it can be said at the outset that the Convention is not concerned with the law applicable to the custody of children. In fact, the references to the law of the State of the child's habitual residence are of limited significance, since the law in question is taken into consideration only so as to establish the wrongful nature of the removal (see, for example, article 3). Secondly, the Convention is certainly not a treaty on the recognition and enforcement of decisions on custody. This option, which gave rise to lengthy debates during the first meeting of the Special Commission, was deliberately rejected. Due to the substantive consequences which flow from the recognition of a foreign judgment, such a treaty is ordinarily hedged around by guarantees and exceptions which can prolong the proceedings. Now, where the removal of a child is concerned, the time factor is of decisive importance. In fact, the psychological problems which a child may suffer as a result of its removal could reappear if a decision on its return were to be taken only after some delay.

37 Once it is accepted that we are dealing with a convention which is centred upon the idea of co-operation amongst authorities, it must also be made clear that it is designed to regulate only those situations that come within its scope and which involve two or more Contracting States. Indeed, the idea of a 'universalist' convention (*i.e.* a convention which applies in every international case) is difficult to sustain outwith the realm of conventions on applicable law. In this regard, we must remember that the systems which have been designed either to return children or to secure the actual exercise of access rights, depend largely on co-operation among the Central Authorities, a co-operation which itself rests upon the notion of reciprocal rights and duties. In the same way, when individuals, by invoking the provisions of the Convention, apply directly to the judicial or administrative authorities of a Contracting State, the applicability of the Convention's benefits will itself depend on the concept of reciprocity which in principle excludes its being extended to nationals of third countries.
What is more, although the Convention attains its objectives in full only as among the Contracting States, the authorities in each of those States have the absolute right to be guided

des dispositions conventionnelles pour traiter d'autres situations similaires.

B *Caractère autonome de la Convention*

38 Axée comme elle l'est sur la notion de coopération entre autorités, en vue d'atteindre des objectifs précis, la Convention est autonome par rapport aux conventions existantes en matière de protection des mineurs ou relatives au droit de garde. Ainsi, l'une des premières décisions prises par la Commission spéciale a été d'orienter ses travaux dans le sens d'une convention indépendante, plutôt que d'élaborer un protocole à la *Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs.* Dans cette même optique, elle ne pouvait pas non plus s'en tenir aux modèles proposés par les conventions sur la reconnaissance et l'exécution des décisions en matière de garde, y compris celui de la Convention du Conseil de l'Europe.[17]

39 Cette autonomie ne signifie pas que les dispositions prétendent régler tous les problèmes posés par les enlèvements internationaux d'enfants. Bien au contraire, dans la mesure où les objectifs de la Convention, quoique ambitieux, ont une portée très concrète, le problème de fond du droit de garde se situe hors du domaine d'application de la Convention. Elle est donc appelée à coexister inévitablement avec les règles sur la loi applicable et sur la reconnaissance et l'exécution des décisions étrangères de chaque Etat contractant, indépendamment du fait que leur source soit interne ou conventionnelle.
D'autre part, même dans son domaine propre, la Convention ne prétend pas être appliquée de façon exclusive: elle désire, avant tout, la réalisation des objectifs conventionnels et reconnaît donc explicitement la possibilité d'invoquer, simultanément à la Convention, toute autre règle juridique qui permette d'obtenir le retour d'un enfant déplacé ou retenu illicitement, ou l'organisation d'un droit de visite (article 34).

C *Rapports avec d'autres conventions*

40 La Convention se présente comme un instrument devant apporter une solution d'urgence, en vue d'éviter la consolidation juridique des situations, initialement illicites, provoquées par le déplacement ou le non-retour d'un enfant. Dans la mesure où elle n'essaie pas de trancher sur le fond des droits des parties, sa compatibilité avec d'autres conventions s'impose. Néanmoins, une telle compatibilité ne pouvait être obtenue qu'en assurant l'application prioritaire des dispositions susceptibles de fournir une solution d'urgence et, dans une certaine mesure, provisoire. C'est en effet après le retour de l'enfant à sa résidence habituelle que devront être soulevées, devant les tribunaux compétents, les questions relatives au droit de garde. A ce sujet, l'article 34 déclare que «dans les matières auxquelles elle s'applique, la Convention prévaut sur la *Convention du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs*, entre les Etats parties aux deux Conventions». D'ailleurs, étant donné qu'on a essayé d'éviter que l'on puisse ajourner l'application des dispositions conventionnelles en invoquant des dispositions qui touchent le fond du droit de garde, le principe incorporé à l'article 34 devrait s'étendre à toute

[17] Il s'agit de la *Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et sur le rétablissement de la garde des enfants*, adoptée par le Comité des Ministres du Conseil de l'Europe le 30 novembre 1979 et ouverte à la signature des Etats membres, au Luxembourg, le 20 mai 1980.

by the provisions of the Convention when dealing with other, similar situations.

B *The autonomous nature of the Convention*

38 The Convention, centred as it is upon the notion of co-operation among authorities with a view to attaining its stated objects, is autonomous as regards existing conventions concerning the protection of minors or custody rights. Thus, one of the first decisions taken by the Special Commission was to direct its proceedings towards the drawing up of an independent Convention, rather than the preparation of a protocol to the *Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable to the protection of minors.* Seen from this perspective, the Convention could not possibly be confined within the framework provided by the conventions on the recognition and enforcement of custody decisions, including that of the Council of Europe Convention.[17]

39 This autonomous character does not mean that the provisions purport to regulate all the problems arising out of international child abductions. On the contrary, to the extent that the Convention's aims, although ambitious, are given concrete expression, the basic problem of custody rights is not to be found within the scope of the Convention. The Convention must necessarily coexist with the rules of each Contracting State on applicable law and on the recognition and enforcement of foreign decrees, quite apart from the fact that such rules are derived from internal law or from treaty provisions.
On the other hand, even within its own sphere of application, the Convention does not purport to be applied in an exclusive way. It seeks, above all, to carry into effect the aims of the Convention and so explicitly recognizes the possibility of a party invoking, along with the provisions of the Convention, any other legal rule which may allow him to obtain the return of a child wrongfully removed or retained, or to organize access rights (article 34).

C *Relations with other conventions*

40 The Convention is designed as a means for bringing about speedy solutions so as to prevent the consolidation in law of initially unlawful factual situations, brought about by the removal or retention of a child. In as much as it does not seek to decide upon the merits of the rights of parties, its compatibility with other conventions must be considered. Nonetheless, such compatibility can be achieved only by ensuring that priority is given to those provisions which are likely to bring about a speedy and, to some extent, temporary solution. In fact it is only after the return of the child to its habitual residence that questions of custody rights will arise before the competent tribunals. On this point, article 34 states that 'This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions.' Moreover, since one is trying to avoid delays in the application of the Convention's provisions caused by claims concerning the merits of custody rights, the principle in article 34 ought to be extended to any provision which has a bearing upon custody rights, whatever the reason. On the other hand, as has just been emphasized in the preceding

[17] The *European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children*, adopted by the Committee of Ministers of the Council of Europe on 30 November 1979 and opened for signing by the Member States at Luxemburg on 20 May 1980.

disposition portant sur le droit de garde, quelle qu'en soit la source. Par contre, comme nous venons de le souligner au paragraphe précédent, les parties peuvent faire appel à toute règle qui facilite la réalisation des objectifs conventionnels.

D *Ouverture de la Convention aux Etats non-membres de la Conférence de La Haye*

41 Sur ce point aussi, la Convention s'est manifestée en tant que Convention de coopération, en déterminant son caractère semi-ouvert. En principe, tout Etat pourra adhérer à la Convention, mais son adhésion «n'aura d'effet que dans les rapports entre l'Etat adhérant et les Etats contractants qui auront déclaré accepter cette adhésion» (article 38). En agissant de la sorte, les Etats contractants ont cherché à maintenir l'équilibre nécessaire entre le désir d'universalisme et la conviction qu'un système de coopération n'est efficace que lorsqu'il existe entre les Parties un degré de confiance mutuelle suffisant.

Plus encore, le choix du système de l'acceptation explicite de l'adhésion par chaque Etat membre, afin que celle-ci devienne effective à leur égard,[18] de préférence au système, plus ouvert, qui entend que l'adhésion produit ses effets sauf dans les rapports avec l'Etat membre qui s'y oppose dans un délai fixé,[19] montre l'importance accordée par les Etats à la sélection de ses cocontractants dans la matière qui fait l'objet de la Convention.

III INSTRUMENTS D'APPLICATION DE LA CONVENTION

A *Les Autorités centrales*

42 Une convention de coopération comme celle qui nous occupe peut en principe s'orienter dans deux directions différentes: imposer la coopération directe entre les autorités internes compétentes dans le domaine d'application de la Convention, ou baser son action sur la création d'Autorités centrales dans chaque Etat contractant, en vue de coordonner et de canaliser la coopération souhaitée. L'avant-projet mis au point par la Commission spéciale consacrait assez nettement le choix fait en faveur de la deuxième option et la Convention elle-même continue à être bâtie, dans une large mesure, sur l'intervention et les compétences des Autorités centrales.

43 Néanmoins, l'admission sans équivoque de la possibilité reconnue aux particuliers de s'adresser directement aux autorités judiciaires ou administratives compétentes dans l'application de la Convention (article 29), accroît l'importance du devoir qui est fait à celles-ci de coopérer, à tel point qu'on pourra qualifier de «système mixte» le système suivi par la Convention du fait qu'en marge des obligations des Autorités centrales, il en introduit d'autres qui sont propres aux autorités judiciaires ou administratives.

44 D'ailleurs, ce serait une erreur de prétendre construire une convention pour lutter contre les enlèvements internationaux d'enfants sans tenir compte du rôle important joué par les autorités judiciaires ou administratives internes dans toutes les questions concernant la protection des mineurs.

[18] A l'instar de l'article 39 de la *Convention sur l'obtention des preuves à l'étranger en matière civile ou commerciale, du 18 mars 1970*, voir P.-v. No 13.
[19] Système consacré, parmi d'autres, dans la *Convention tendant à faciliter l'accès international à la justice*, adopté également au cours de la Quatorzième session de la Conférence.

paragraph, the parties may have recourse to any rule which promotes the realization of the Convention's aims.

D *Opening of the Convention to States not Members of the Hague Conference*

41 On this point also, by virtue of the decision that it be of a 'semi-open' type, the Convention is shown to be one of co-operation. In principle, any State can accede to the Convention, but its accession 'will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession' (article 38). The Contracting States, by this means, sought to maintain the requisite balance between a desire for universality and the belief that a system based on co-operation could work only if there existed amongst the Contracting Parties a sufficient degree of mutual confidence.
What is more, the choice of a system based on the express acceptance of accession by each Member State, by which such acceptance becomes effective as amongst themselves,[18] in preference to a more open system by which accession has effect except as regards Member States which raise objections thereto within a certain period of time,[19] demonstrates the importance which the States attached to the selection of their co-signatories in those questions which form the subject-matter of the Convention.

III INSTRUMENTS FOR APPLYING THE CONVENTION

A *The Central Authorities*

42 A convention based on co-operation such as the one which concerns us here can in theory point in two different directions; it can impose direct co-operation among competent internal authorities, in the sphere of the Convention's application, or it can act through the creation of Central Authorities in each Contracting State, so as to co-ordinate and 'channel' the desired co-operation. The Preliminary Draft drawn up by the Special Commission expressed quite clearly the choice made in favour of the second option, and the Convention itself was also built in large measure upon the intervention and powers of Central Authorities.

43 Nevertheless, the unequivocal acceptance of the possibility for individuals to apply directly to the judicial or administrative authorities which have power to apply the provisions of the Convention (article 29), increases the importance of the duty of co-operation laid upon them, so much so that the system adopted by the Convention could be characterized as a 'mixed system', due to the fact that, aside from the duties imposed upon the Central Authorities, it creates other obligations which are peculiar to judicial or administrative authorities.

44 What is more, it would be a mistake to claim to have constructed a convention to counter international child abduction without taking account of the important role played by the internal judicial or administrative authorities in all matters concerning the protection of minors. In this context,

[18] As in article 39 of the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, see *P.-v.* No 13.
[19] The system adopted, among others, by the *Convention on International Access to Justice*, also adopted during the Fourteenth Session of the Conference.

Dans ce contexte, la référence aux autorités administratives doit être comprise comme le simple reflet du fait que, dans certains Etats membres de la Conférence, cette tâche est confiée à des autorités d'une telle nature, tandis que dans la plupart des systèmes juridiques la compétence en la matière appartient aux autorités judiciaires. Somme toute, c'est aux autorités chargées à l'intérieur de chaque Etat de statuer sur la garde et la protection des enfants que la Convention confie le soin de trancher les problèmes posés, qu'il s'agisse du retour d'un enfant déplacé ou retenu illicitement, ou de l'organisation de l'exercice du droit de visite. Ainsi, la Convention fait sienne l'exigence de sécurité juridique qui inspire dans ce domaine tous les droits internes. En effet, quoique les décisions sur le retour des enfants ne préjugent pas du fond du droit de garde (voir article 19), elles vont largement influencer la vie des enfants; l'adoption de telles décisions, la prise d'une semblable responsabilité doivent obligatoirement revenir aux autorités qui sont normalement compétentes selon le droit interne.

45 Cependant, dans ses grandes lignes et dans une large majorité des cas, l'application de la Convention dépendra du fonctionnement des instruments qu'elle-même instituera à cette fin, c'est-à-dire des Autorités centrales. En ce qui concerne leur réglementation par la Convention, la première remarque à faire est que la Conférence a eu conscience des différences profondes existant dans l'organisation interne des Etats membres; c'est la raison pour laquelle la Convention ne précise point quelles doivent être la structure et la capacité d'action des Autorités centrales, deux aspects qui seront nécessairement régis par la loi interne de chaque Etat contractant. L'acceptation de cette prémisse se traduit dans la Convention par la reconnaissance du fait que les tâches assignées en particulier aux Autorités centrales pourront être accomplies soit directement par elles-mêmes, soit avec le concours d'un intermédiaire (article 7). Il est évident, par exemple, que la localisation d'un enfant peut requérir l'intervention de la police; de même, l'adoption de mesures provisoires ou l'introduction de procédures judiciaires sur des rapports privés peuvent tomber hors des compétences susceptibles d'être dévolues aux autorités administratives par certaines lois internes. Néanmoins, dans tous les cas, l'Autorité centrale reste le destinataire des obligations que la Convention lui impose, en tant que «monteur» de la coopération voulue pour lutter contre les déplacements illicites d'enfants. D'autre part, c'est encore pour tenir compte des particularités des différents systèmes juridiques que la Convention admet que l'Autorité centrale pourra exiger que la demande qui lui est adressée soit accompagnée d'une autorisation «par écrit lui donnant le pouvoir d'agir pour le compte du demandeur, ou de désigner un représentant habilité à agir en son nom» (article 28).

46 Par ailleurs, la Convention, suivant une tradition bien établie de la Conférence de La Haye,[20] dispose que tant les Etats fédéraux que les Etats plurilégislatifs ou ayant des organisations territoriales autonomes sont libres de désigner plus d'une Autorité centrale. Pourtant, les problèmes constatés dans l'application pratique des conventions qui prévoient l'existence de plusieurs Autorités centrales sur le territoire d'un seul Etat, ainsi que, tout particulièrement, les caractéristiques spéciales de la matière qui fait l'objet de la présente Convention, ont amené la Conférence, suivant le critère déjà établi par la Commission spéciale, à faire un pas

[20] Par exemple, *cf.* l'article 18, troisième alinéa de la *Convention relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale, du 15 novembre 1965. Id.* les articles 24 et 25 de la *Convention sur l'obtention des preuves à l'étranger en matière civile ou commerciale, du 18 mars 1970.*

references to administrative authorities must be understood as a simple reflection of the fact that, in certain Member States, the task in question is entrusted to such authorities, while in the majority of legal systems jurisdiction belongs to the judicial authorities. *In fine*, it is for the appropriate authorities within each State to decide questions of custody and protection of minors; it is to them that the Convention has entrusted the responsibility of solving the problems which arise, whether they involve the return of a child wrongfully removed or retained or organizing the exercise of access rights. Thus, the Convention adopts the demand for legal certainty which inspires all internal laws in this regard. In fact, although decisions concerning the return of children in no way prejudge the merits of any custody issue (see article 19), they will in large measure influence children's lives; such decisions and such responsibilities necessarily belong ultimately to the authorities which ordinarily have jurisdiction according to internal law.

45 However, the application of the Convention, both in its broad outline and in the great majority of cases, will depend on the working of the instruments which were brought into being for this purpose, *i.e.* the Central Authorities. So far as their regulation by the Convention is concerned, the first point to be made is that the Conference was aware of the profound differences which existed as regards the internal organization of the Contracting States. That is why the Convention does not define the structure and capacity to act of the Central Authorities, both of which are necessarily governed by the internal law of each Contracting State. Acceptance of this premise is shown in the Convention by its recognition of the fact that the tasks specifically assigned to Central Authorities can be performed either by themselves, or with the assistance of intermediaries (article 7). For example, it is clear that discovering a child's whereabouts may require the intervention of the police; similarly, the adoption of provisional measures or the institution of legal proceedings concerning private relationships may fall outwith the scope of those powers which can be devolved upon administrative authorities in terms of some internal laws. Nonetheless, the Central Authority in every case remains the repository of those duties which the Convention imposes upon it, to the extent of its being the 'engine' for the desired co-operation which is designed to counter the wrongful removal of children. On the other hand, it is so as to take account of the peculiarities of different legal systems that the Convention allows a Central Authority to require that applications addressed to it be accompanied by a 'written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act' (article 28).

46 In other respects, the Convention follows a long-established tradition of the Hague Conference,[20] by providing that States with more than one system of law or which have autonomous territorial organizations, as well as Federal States, are free to appoint more than one Central Authority. However, the problems encountered in the practical application of those Conventions which provide for several Central Authorities within the territory of a single State, as well as, in particular, the special characteristics of the subject-matter of this Convention, led the Conference to adopt the text previously established by the Special Commission and

[20] Compare, for example, article 18(3) of the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.* Also, articles 24 and 25 of the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.*

en avant vers une sorte de «hiérarchisation» des Autorités centrales dans ces Etats. En effet, en nous limitant au deuxième aspect mentionné, si la personne qui a déplacé ou retenu un enfant se sert de l'extrême facilité des communications à l'intérieur d'un Etat, le demandeur ou l'Autorité centrale de l'Etat requérant pourraient être contraints de répéter plusieurs fois leur demande en vue d'obtenir le retour de l'enfant; de surcroît, il existe la possibilité que, même en ayant des raisons sérieuses de croire que l'enfant se trouve dans un Etat contractant, on ignore quelle est l'unité territoriale de sa résidence.

47 Pour fournir une solution à ces situations et à d'autres similaires, la Convention prévoit que les Etats qui établissent plus d'une Autorité centrale, désigneront simultanément «l'Autorité centrale à laquelle les demandes peuvent être adressées en vue de leur transmission à l'Autorité centrale compétente au sein de cet Etat» (article 6). La question est importante, du fait que la Convention limite, dans le temps, l'obligation imposée aux autorités judiciaires ou administratives de l'Etat requis, en ce qui concerne le retour immédiat de l'enfant;[21] une erreur dans le choix de l'Autorité centrale requise peut donc avoir des conséquences décisives pour les prétentions des parties. Or, pour éviter qu'un facteur non prévu par la Convention en modifie l'application normale, il faudra que cette sorte de «super Autorité centrale», envisagée à l'article 6, adopte une attitude active. En effet, puisqu'elle devra servir de pont entre l'Autorité centrale de son propre Etat qui est compétente dans chaque cas d'espèce d'une part, et les Autorités centrales des autres Etats contractants d'autre part, elle se verra contrainte de choisir entre procéder à la localisation de l'enfant pour pouvoir transmettre l'affaire à l'Autorité centrale adéquate, ou transmettre une copie de la demande à toutes les Autorités centrales de l'Etat, ce qui provoquera inévitablement une multiplication des services bureaucratiques. Mais il est hors de doute qu'une telle Autorité centrale jouera un rôle fondamental dans l'application de la Convention quant aux rapports qui affectent les Etats susmentionnés.

B *La formule modèle*

48 Suivant en cela la décision prise par la Commission spéciale lors de sa seconde réunion, la Quatorzième session de la Conférence a adopté, en même temps que la Convention, une Recommandation qui incorpore une formule modèle pour les demandes en vue du retour des enfants déplacés ou retenus illicitement. A son sujet, il convient de faire deux remarques. La première concerne la valeur juridique de la Recommandation en question: pour l'établir, il semble souhaitable de recourir au droit général des organisations internationales. Or, dans cette optique, une recommandation est en substance une invitation non contraignante adressée par une organisation internationale à un, plusieurs ou tous les Etats membres. Par conséquent, les Etats ne sont pas tenus *stricto sensu* d'utiliser la formule modèle contenue dans cette Recommandation; on a même soigneusement évité de la présenter comme une annexe à la Convention.

Les motifs en sont évidents. Avant tout, étant donné l'absence d'expérience internationale préalable dans le domaine couvert par la Convention, on peut penser qu'après quelques années l'application pratique des dispositions

[21] *Cf. infra*, commentaire de l'article 12 de la Convention.

take a step towards creating a sort of 'hierarchy' of Central Authorities in those States. In fact, by confining our discussion to the latter point, we can see that if the person responsible for the removal or retention of a child avails himself of the excellent means of communication within a particular State, the applicant or Central Authority of the requesting State could be forced to re-apply several times in order to obtain the return of the child. Moreover, it is still possible that, even if there are valid reasons for believing that the child is in a Contracting State, the territorial unit of the child's residence will be ignored.

47 The Convention supplies a solution to these and other situations by providing that States which establish more than one Central Authority should at the same time designate 'the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State' (article 6). The matter is important, because the Convention imposes a time-limit upon the duty of judicial or administrative authorities in the requested State for the prompt return of the child;[21] a mistaken choice as to the requested Central Authority could therefore have decisive consequences for the claims of the parties. Now, so as to prevent a factor which was not provided for in the Convention modifying the Convention's normal application, this type of 'super-Central Authority' envisaged in article 6 will have to adopt a positive approach. As a matter of fact, if it is to act as a bridge between on the one hand the Central Authority of its own State which has jurisdiction in each particular case, and on the other hand the Central Authorities of the other Contracting States, it will find itself obliged to choose between proceeding to locate a child in order to transmit the matter to the appropriate Central Authority, and transmitting a copy of the application to all the Central Authorities of the State concerned, which would inevitably cause a great increase in administrative duties. However it is undoubtedly the case that such a Central Authority will play a fundamental role in the application of the Convention in regard to relations affecting the aforementioned States.

B *The model form*

48 Following the decision taken by the Special Commission at its second meeting, the Fourteenth Session of the Conference adopted simultaneously with its adoption of the Convention, a Recommendation containing a model form for applications for the return of children wrongfully removed or retained. Two comments are appropriate here. The first concerns the legal force of this Recommendation. In drawing it up, it seemed advisable to have recourse to the general law governing international organizations. Now, viewed from this perspective, a recommendation is in substance a non-obligatory invitation addressed by one international organization to one, several or all Member States. Consequently, States are not strictly required to make use of the model form contained in the Recommendation; indeed, the Commission took care to avoid presenting the form as an annex to the Convention.

The reasons for this are clear. Most importantly, given the lack of prior international experience in this field, it can well be imagined that, after a number of years, the practical application of the Convention's provisions will result in

[21] *Cf. infra*, the commentary on article 12 of the Convention.

conventionnelles amène à conseiller l'introduction de certaines modifications dans la formule adoptée. Or, il semble préférable de ne pas soumettre une éventuelle révision du texte aux formalités qu'exigerait le droit international public en matière de révision des traités internationaux. On peut d'ailleurs soutenir qu'en marge d'une future action concertée de la Conférence sur ce point, l'adaptation de la formule recommandée aux Etats pourra aussi être l'oeuvre des contacts bilatéraux entrepris par les Autorités centrales, en exécution de l'obligation générale visée à l'article 7, alinéa 2, lettre *i*.
D'autre part, une conséquence directe de la décision de ne pas rendre obligatoire l'emploi de la formule modèle est que la Convention contient une énumération des données que doit nécessairement inclure toute demande adressée à une Autorité centrale (article 8).

49 La deuxième remarque porte sur le domaine d'application et sur la teneur de la formule recommandée. En effet, bien que la Convention règle aussi des aspects importants concernant le droit de visite, la formule proposée se limite à offrir une requête modèle en vue du retour de l'enfant. Ceci montre la polarisation de l'intérêt de la Conférence sur la solution des problèmes posés après le déplacement de l'enfant, tout en mettant en relief l'originalité de la voie choisie pour y parvenir. C'est justement parce que cette voie est nouvelle qu'on a cru souhaitable d'insérer une indication concernant son mode d'utilisation.

50 Quant à la teneur de la formule, elle développe très justement les éléments exigés par la Convention; pourtant, nous voudrions attirer l'attention sur deux points mineurs. D'abord, sur la mention «date et lieu du mariage» des parents de l'enfant concerné: dans la mesure où elle n'est pas suivie, entre parenthèses, de l'expression «s'il y a lieu», il semble qu'on donne un traitement exceptionnel et discriminatoire à la situation des enfants naturels. D'ailleurs, l'absence de cette même expression à côté de la référence à la date et au lieu de naissance de l'enfant s'accorde mal avec la précision dont fait preuve sur ce point l'article 8 de la Convention, quand il ajoute en se référant à la date de naissance, «s'il est possible de se la procurer».

51 D'autre part, on constate un manque de concordance entre le texte français et le texte anglais, du point de vue des «renseignements concernant la personne dont il est allégué qu'elle a enlevé ou retenu l'enfant». A cet égard, il semble préférable de suivre le texte anglais, plus complet, surtout en ce qui concerne la mention de la nationalité du prétendu enleveur, un élément qui sera parfois décisif dans la localisation de l'enfant.

IV STRUCTURE ET TERMINOLOGIE

A *La structure de la Convention*

52 Les articles 1, 2, 3 et 5 définissent le domaine d'application matériel de la Convention, en précisant ses objectifs et les conditions requises pour pouvoir considérer que le déplacement ou le non-retour d'un enfant sont illicites. L'article 4 s'attache au domaine d'application personnel de la Convention, tandis que l'article 35 détermine son application dans le temps. Les articles 6 et 7 sont consacrés à la création des Autorités centrales et à leurs obligations. Les articles 8, 27 et 28 se réfèrent à la saisine des Autorités centrales et aux documents qui peuvent accompagner ou compléter une demande qui leur aurait été présentée. Les articles 9 à 12 et 14 à 19 traitent des différentes voies instaurées pour obtenir le retour d'un enfant, ainsi que de la portée juridique d'une décision à cet effet. Les articles 13 et 20 s'occupent des exceptions à l'obligation générale de renvoyer l'enfant. L'article 21 établit les devoirs spécifiques

certain modifications to the present form being thought advisable. Now, it seems better not to subject future revisions of the text to the formalities required by public international law for the revision of international treaties. Besides, it could be said, in connection with any future concerted action by the Conference in this regard, that adaptation of the form which was recommended to States should also be a matter for bilateral negotiations between Central Authorities, in implementation of their general obligation contained in article 7(2)(*i*).

On the other hand, a direct consequence of the decision not to make the use of the model form obligatory is the catalogue of details which every application to a Central Authority must contain (article 8).

49 The second comment bears upon the sphere of application and the terms of the recommended form. Although the Convention also governs important matters concerning access rights, the model form proposed is merely a model application for the return of the child. This demonstrates the concentration of interest within the Conference on the resolution of problems arising out of the removal of a child, whilst at the same time throwing into relief the novelty of the means chosen to resolve them. It is precisely because the means are new that it was thought advisable to include some indication of the way in which they should be used.

50 The actual terms of the form narrate precisely those points required by the Convention itself. We should however like to draw attention to two minor points. Firstly, the phrase 'date and place of marriage' of the parents of the child in question: in as much as it is not followed, in parentheses, by the words 'if any', it would seem to treat natural children in an exceptional and discriminatory fashion. Moreover, the absence of the same phrase alongside the reference to the date and place of birth of the child compares badly with the precision shown by article 8 of the Convention which adds, referring to the date of birth, the words 'where available'.

51 Secondly, there is an inconsistency between the French and English texts regarding the 'information concerning the person alleged to have removed or retained the child'. It would be advisable to follow the English text here, since it is more comprehensive, especially as regards its reference to the nationality of the alleged abductor, a fact which will sometimes prove decisive in efforts to locate the child.

IV STRUCTURE AND TERMINOLOGY

A *The structure of the Convention*

52 Articles 1, 2, 3 and 5 define the Convention's scope with regard to its subject-matter, by specifying its aims and the criteria by which the removal or retention of a child can be regarded as wrongful. Article 4 concerns the persons to whom the Convention applies, while article 35 determines its temporal application. Articles 6 and 7 are devoted to the creation of the Central Authorities and their duties. Articles 8, 27 and 28 are concerned with applications to Central Authorities and the documents which may accompany or supplement an application to them. Articles 9 to 12, and 14 to 19, deal with the various means established for bringing about the return of a child, as well as the legal significance of a decree to that effect. Articles 13 and 20 concern the exceptions to the general rule for the return of the child. Article 21 lays down the specific duties which the States have taken upon themselves with regard to access rights.

assumés par les Etats à l'égard du droit de visite. Les articles 22 à 26 et 30 (ainsi que les articles 27 et 28 susmentionnés) s'occupent de certains aspects techniques concernant la procédure et les frais qui peuvent découler des demandes introduites par l'application de la Convention. Les articles 29 et 36 reflètent le point de vue non exclusif qui a présidé à l'élaboration de la Convention en précisant, d'une part l'action directe possible des particuliers devant les autorités judiciaires ou administratives des Etats contractants, hors du cadre des dispositions conventionnelles, et d'autre part la faculté reconnue aux Etats contractants de déroger conventionnellement aux restrictions auxquelles le retour de l'enfant peut être soumis d'après la présente Convention. Les articles 31 à 34 ont trait aux Etats plurilégislatifs et aux rapports avec d'autres conventions. Finalement, les articles 37 à 45 contiennent les clauses finales.

B *Terminologie utilisée par la Convention*

53 Selon une tradition bien établie de la Conférence de La Haye, la Convention a évité de définir les termes utilisés, sauf ceux contenus à l'article 5 sur les notions de droit de garde et de droit de visite, indispensables pour établir le domaine d'application matériel de la Convention. Ceci sera examiné dans son contexte. Nous voulons simplement considérer ici un aspect qui concerne la terminologie et qui mérite, à notre avis, un bref commentaire. Il s'agit du manque de concordance entre le titre de la Convention et la terminologie utilisée dans son texte. En effet, tandis que le premier emploie l'expression «enlèvement international d'enfants», les dispositions conventionnelles ont recours à des périphrases ou, en tous cas, à des tournures moins évocatrices, telles que «déplacement» ou «non-retour». L'explication est directement en rapport avec la délimitation du domaine de la Convention. Sur ce point, comme nous l'avons souligné ci-dessus (voir Nos 12 à 16), une étude du sujet dont s'occupe la Convention met en relief qu'en ce qui concerne aussi bien les rapports normalement existants entre «enleveur» et «enfant» que les intentions du premier, nous sommes fort loin des délits visés sous les dénominations d'«enlèvement», «*kidnapping*» ou «*secuestro*». Comme on est fort éloignés des problèmes propres au droit pénal, on a donc évité d'utiliser dans le texte de la Convention des appellations pouvant avoir une signification équivoque. Par contre, on a cru souhaitable de retenir le terme d'«enlèvement» dans le titre de la Convention, étant donné son emploi habituel par les «mass-media» et son retentissement dans l'opinion publique. Néanmoins, pour éviter toute équivoque, ce même titre précise, comme le faisait déjà le titre de l'avant-projet, que la Convention n'a pour objet que de régler les «aspects civils» du phénomène visé. Si tout au long de ce Rapport nous employons de temps en temps des expressions telles qu'«enlèvement» ou «enleveur», comme on les trouve d'ailleurs dans la formule modèle, c'est parce qu'elles permettent parfois une rédaction plus aisée; mais il faudra en tout état de cause les entendre avec les nuances que comporte leur application au problème spécifique dont la Convention s'occupe.

Deuxième partie – Commentaire des articles de la Convention

CHAPITRE PREMIER – CHAMP D'APPLICATION DE LA CONVENTION

54 Le chapitre premier définit le domaine d'application de la Convention quant à la matière et aux personnes concernées (domaine d'application *ratione materiae* et *ratione*

Articles 22 to 26 and 30 (like the aforementioned articles 27 and 28) deal with certain technical matters regarding proceedings and the costs which can result from applications submitted pursuant to the provisions of the Convention. Articles 29 and 36 reflect the 'non-exclusive' view which prevailed during the preparation of the Convention in stating, on the one hand, that applications may be submitted directly by individuals to the judicial or administrative authorities of the Contracting States, outwith the framework of the provisions of the Convention, and on the other hand that Contracting States have the acknowledged right to derogate by agreement from the restrictions which the present Convention allows to be imposed upon the return of the child. Articles 31 to 34 refer to States with more than one system of law and to the Convention's relations with other conventions. Lastly, articles 37 to 45 contain the Final Clauses.

B *Terminology used in the Convention*

53 Following a long-established tradition of the Hague Conference, the Convention avoided defining its terms, with the exception of those in article 5 concerning custody and access rights, where it was absolutely necessary to establish the scope of the Convention's subject-matter. These will be examined in their context. At this point we wish merely to consider one aspect of the terminology used which in our opinion merits a brief comment. It has to do with lack of correspondence between the title of the Convention and the terms used in the text. Whilst the former uses the phrase 'international child abduction', the provisions of the Convention avail themselves of circumlocutions or at any event of less evocative turns of phrase, such as 'removal' or 'retention'. The reason for this is quite in keeping with the Convention's limited scope. As was stressed above (see Nos 12 to 16), studies of the topic with which the Convention deals show clearly that, with regard both to the relationship which normally exists between 'abductor' and 'child' and to the intentions of the former, we are far removed from the offences associated with the terms 'kidnapping', '*enlèvement*' or '*secuestro*'. Since one is far removed from problems peculiar to the criminal law, the use in the text of the Convention of possibly ambiguous terms was avoided.

On the other hand, it was felt desirable to keep the term 'abduction' in the title of the Convention, owing to its habitual use by the 'mass media' and its resonance in the public mind. Nonetheless, so as to avoid any ambiguity, the same title, as in the Preliminary Draft, states clearly that the Convention only aims to regulate the 'civil aspects' of this particular phenomenon. If, in the course of this Report, expressions such as 'abduction' or 'abductor' are used from time to time, and one will find them also in the model form, that is because they sometimes permit of easier drafting; but at all events, they will have to be understood to contain nuances which their application to the specific problem with which the Convention deals may call for.

Second Part – Commentary on the specific articles of the Convention

CHAPTER ONE – SCOPE OF THE CONVENTION

54 The first chapter defines the scope of the Convention as regards its subject-matter and the persons concerned (its scope *ratione materiae* and *ratione personae*). However, so as

personae). Cependant, pour avoir une perspective globale du domaine conventionnel, il faut considérer aussi l'article 34 sur les relations avec d'autres conventions, l'article 35 concernant son domaine d'application dans le temps et les articles 31 à 33 qui ont trait à l'application de la Convention dans les Etats plurilégislatifs.

Article premier — Les objectifs de la Convention

a Observations générales

55 Cet article expose en deux paragraphes les objectifs conventionnels que nous avons traités assez largement dans la première partie de ce Rapport. Il est donc évident que l'absence de parallélisme entre le titre et le contenu de la Convention va plus loin que la question purement terminologique.[22] De toute façon, il faut reconnaître que les termes employés dans le titre, malgré leur manque de rigueur juridique, ont un pouvoir évocateur et une force qui attirent l'attention, ce qui est l'essentiel.

56 En ce qui concerne la nature des espèces réglées, une remarque de portée générale s'impose. Quoique la Convention n'inclue aucune disposition proclamant le caractère international des situations envisagées, une telle conclusion découle aussi bien du titre que des divers articles. Or, dans le cas présent, le caractère international provient d'une situation de fait, à savoir de la dispersion des membres d'une famille entre différents pays. Une situation purement interne lors de sa naissance peut donc tomber dans le domaine d'application de la Convention par le fait, par exemple, qu'un des membres de la famille se soit déplacé à l'étranger avec l'enfant, ou du désir d'exercer un droit de visite dans un autre pays où réside la personne qui prétend avoir ce droit. Par contre, la différence de nationalité des personnes concernées n'implique pas nécessairement que nous soyons devant un cas d'espèce international auquel la Convention doive s'appliquer, bien qu'il s'agisse d'un indice clair d'une internationalisation possible, au sens où nous l'avons décrit.

b Lettre a

57 L'objectif d'assurer le retour immédiat des enfants déplacés ou retenus illicitement a été déjà longuement présenté. D'ailleurs, la Quatorzième session n'a changé en rien la teneur littérale de la formule élaborée par la Commission spéciale. Nous ne ferons donc ici que deux brèves considérations d'éclaircissement relatives à son libellé. La première concerne la caractérisation des comportements que l'on voudrait éviter par la réalisation de cet objectif. En résumé comme nous le savons déjà, il s'agit de toute conduite qui altère les rapports familiaux existant avant ou après toute décision judiciaire, en utilisant un enfant, transformé par ce fait en instrument et principale victime de la situation. Dans ce contexte, la référence aux enfants «retenus illicitement» entend couvrir les cas où l'enfant qui se trouvait dans un lieu autre que celui de sa résidence habituelle — avec le consentement de la personne qui exerçait normalement sa garde — n'est pas renvoyé par la personne avec laquelle il séjournait. C'est la situation type qui se produit quand le déplacement de l'enfant est la conséquence d'un exercice abusif du droit de visite.

[22] Voir sur ce point Rapport de la Commission spéciale, No 52.

to have an overall picture of the Convention's scope, one must consider also article 34 which deals with the Convention's relationship with other conventions, article 35 which concerns the Convention's temporal application, and articles 31 to 33 which relate to the application of the Convention in States with more than one legal system.

Article 1 — The aims of the Convention

a General observations

55 This article sets out in two paragraphs the objects of the Convention which were discussed in broad terms in the first part of this Report. It is therefore clear that the lack of correspondence between the title and the specific provisions of the Convention is more than merely a matter of terminology.[22] In any event, it must be realized that the terms used in the title, while lacking legal exactitude, possess an evocative power and force which attract attention, and this is essential.

56 As for the nature of the matters regulated by the Convention, one general comment is required. Although the Convention does not contain any provision which expressly states the international nature of the situations envisaged, such a conclusion derives as much from its title as from its various articles. Now, in the present case, the international nature of the Convention arises out of a factual situation, that is to say the dispersal of members of a family among different countries. A situation which was purely internal to start with can therefore come within the scope of the Convention through, for example, one of the members of the family going abroad with the child, or through a desire to exercise access rights in a country other than that in which the person who claims those rights lives. On the other hand, the fact that the persons concerned hold different nationality does not necessarily mean that the international type of case to which the Convention applies automatically will arise, although it would clearly indicate the possibility of its becoming 'international' in the sense described.

b Sub-paragraph a

57 The aim of ensuring the prompt return of children wrongfully removed or retained has already been dealt with at length. Besides, the Fourteenth Session in no way altered the literal meaning of the wording devised by the Special Commission. Thus only two brief points by way of explanation will be put forward here. The first concerns the characterization of the behaviour which the realization of this objective seeks to prevent. To sum up, as we know, the conduct concerned is that which changes the family relationships which existed before or after any judicial decision, by using a child and thus turning it into an instrument and principal victim of the situation. In this context, the reference to children 'wrongfully retained' is meant to cover those cases where the child, with the consent of the person who normally has custody, is in a place other than its place of habitual residence and is not returned by the person with whom it was staying. This is the typical situation which comes about when the removal of the child results from the wrongful exercise of access rights.

[22] See the Report of the Special Commission, No 52.

58 En second lieu, le texte commenté précise que les enfants dont on essaie d'assurer le retour sont ceux qui ont été déplacés ou retenus «dans tout Etat contractant». Une telle précision a une double signification. D'une part, en ce qui concerne la disposition contenue à l'article 4, elle délimite le domaine d'application *ratione personae* de la Convention aux enfants qui, ayant leur résidence habituelle dans un des Etats contractants, sont déplacés ou retenus sur le territoire d'un autre Etat contractant.

59 Mais ces quelques mots ont aussi une signification toute différente. En effet, par ce biais, l'objectif de la Convention examinée, considéré en soi ou par rapport à la disposition de l'article 2, devient général, c'est-à-dire applicable à tous les enfants qui, dans les conditions décrites, se trouvent dans un Etat contractant. Pourtant, il y aura toujours une différence dans la situation juridique entre les enfants qui avaient leur résidence habituelle, avant le déplacement, dans un autre Etat contractant et les autres enfants. Ainsi, la situation des premiers devra être résolue par application directe des dispositions conventionnelles. Par contre, l'obligation des Etats envers les autres sera plus nuancée, dans la mesure où elle découlerait (abstraction faite de la législation interne) du devoir consacré par l'article 2, qui pourrait être décrit comme celui de prendre les mesures appropriées pour éviter que leurs territoires ne se convertissent en lieux de refuge d'éventuels «enleveurs».

c Lettre b

60 L'objectif conventionnel visé à ce sous-alinéa a été clarifié dans la rédaction qu'il a reçue lors de la Quatorzième session.[23] En ce qui concerne son domaine, il est maintenant manifeste que les situations considérées sont les mêmes que celles auxquelles s'applique la Convention, c'est-à-dire les situations internationales qui mettent en relation deux ou plusieurs Etats contractants. La précision n'est pas superflue, surtout si l'on tient compte du fait que le texte de l'avant-projet permettait d'autres interprétations, notamment la référence à des situations internes.

61 Quant à savoir quelle est la portée qu'on a voulu donner à l'objectif qui y est consacré, il s'impose de faire une distinction entre droit de garde et droit de visite. En ce qui concerne le droit de garde, on peut dire que la Convention n'a pas essayé de le développer de manière autonome. C'est donc dans l'obligation générale exprimée dans l'article 2, ainsi que dans la régulation du retour de l'enfant – basée, comme nous le verrons dans le cadre du commentaire à l'article 3, sur le respect d'un droit de garde effectivement exercé et attribué par le droit de l'Etat de la résidence habituelle – qu'on doit trouver la suite de la disposition qui nous occupe à cet égard. Par contre, le droit de visite a eu un sort plus favorable et les bases sur lesquelles doit se construire son respect effectif apparaissent fixées, au moins dans leurs grandes lignes, dans le contexte de l'article 21.

Article 2 – Obligation générale des Etats contractants

62 En étroite relation avec les objectifs vastes et souples de l'article 1*b*, cet article consacre une obligation générale de comportement des Etats contractants; il s'agit donc d'une obligation qui, à l'encontre des obligations de résultat, normalement inclues dans une convention, n'exige pas de

[23] *Cf.* Doc. trav. No 2 (*Proposal of the United Kingdom delegation*) et P.-v. No 2.

58 Secondly, the text states clearly that the children whose return it is sought to secure are those who have been removed to, or retained in, 'any Contracting State'. This wording is doubly significant. On the one hand, the provision in article 4 limits the scope of the Convention *ratione personae* to those children who, while being habitually resident in one of the Contracting States, are removed to or retained in, the territory of another Contracting State.

59 But these same words also have a quite diferent meaning. In fact, through this formulation this particular object of the Convention, whether considered in its own right or in relation to article 2, becomes indirectly a general one, applicable to all children who, in the circumstances set forth, are in any Contracting State. However, there will always be a difference between the legal position of those children who, prior to their removal, were habitually resident in another Contracting State, and that of other children. The position of the former will have to be resolved by the direct application of the provisions of the Convention. On the other hand, the duty of States towards the other children is less clear (leaving aside provisions of internal law) in so far as it derives from the obligation stated in article 2, which could be described as a duty to take appropriate measures to prevent their territory being turned into a place of refuge for potential 'abductors'.

c Sub-paragraph b

60 The aim of the Convention contained in this sub-paragraph was clarified in the course of drafting at the Fourteenth Session.[23] So far as its scope is concerned, it is now clear that the situations under consideration are the same as those to which the Convention applies, that is to say international situations which involve two or more Contracting States. It should not be thought that precision in this matter is unnecessary, especially when one considers that the text of the Preliminary Draft allowed of other interpretations, and in particular a reference to internal situations.

61 As for knowing the desired meaning of the aim stated therein, it is necessary to draw a distinction between custody rights and access rights. With regard to custody rights, it can be said that the Convention has not attempted to deal with them separately. It is thus within the general obligation stated in article 2, and the regulation governing the return of the child – which is based, as we shall see in the commentary on article 3, upon respect for custody rights actually exercised and attributed under the law of the child's habitual residence – that one must look in order to find the consequences of the provision which concerns us here. On the other hand, access rights are treated more favourably, and the foundations upon which respect for their effective exercise seem fixed, at least in broad outline, within the context of article 21.

Article 2 – General obligation of Contracting States

62 Closely related to the objects stated in broad and flexible fashion in article 1*b* is the fact that this article sets forth a general duty incumbent upon Contracting States. It is thus a duty which, unlike obligations to achieve a result which are normally to be found in conventions, does not require

[23] *Cf.* Working Document No 2 (Proposal of the United Kingdom delegation) and *P.-v.* No 2.

réalisations concrètes, mais plus simplement l'adoption d'une attitude déterminée en vue d'aboutir à de telles réalisations. Dans le cas présent, l'attitude, le comportement demandé aux Etats se traduit par le fait de prendre «toutes les mesures appropriées pour assurer, dans les limites de leur territoire, la réalisation des objectifs de la Convention». La Convention essaie ainsi, tout en sauvegardant le caractère *self-executing* de ses autres articles, d'encourager les Etats contractants à s'inspirer de ces normes pour résoudre les situations similaires à celles dont elle s'occupe, mais ne rentrant pas dans son domaine d'application *ratione personae* ou *ratione temporis*. D'une part, cela doit conduire à une considération attentive des normes conventionnelles quand l'Etat envisagera une modification de sa législation interne en matière de droits de garde ou de visite; d'autre part, l'extension des objectifs de la Convention à des cas non couverts par ses dispositions devrait influencer l'action des tribunaux et se traduire par une diminution du jeu de l'exception d'ordre public au moment de se prononcer sur des relations internationales tombant hors du domaine d'application de la Convention.

63 De plus, dans sa dernière phrase, l'article précise une des mesures envisagées, en soulignant l'importance accordée par la Conférence à l'utilisation de procédures rapides dans les affaires concernant les droits de garde ou de visite. Pourtant, cette disposition n'impose pas aux Etats l'obligation d'adopter dans leur loi interne de nouvelles procédures; la concordance établie entre le texte français et le texte anglais cherche justement à éviter une telle interprétation, que le texte français original rendait possible. Elle se limite donc à demander aux Etats contractants d'utiliser, dans toute question concernant la matière objet de la Convention, les procédures les plus urgentes figurant dans leur propre droit.

Article 3 — Le caractère illicite d'un déplacement ou d'un non-retour

a Observations générales

64 L'ensemble de l'article 3 constitue une disposition clé de la Convention, puisque de son application dépend le déclenchement des mécanismes conventionnels en vue du retour de l'enfant; en effet, la Convention n'impose l'obligation de retourner l'enfant que lorsqu'il y a eu un déplacement ou un non-retour considérés par elle comme illicites. Or, en précisant les conditions que doit réunir une situation pour que son altération unilatérale puisse être qualifiée d'illicite, cet article met indirectement en relief les rapports que la Convention entend protéger; ces rapports sont basés sur un double élément: *primo*, l'existence d'un droit de garde attribué par l'Etat de la résidence habituelle de l'enfant; *secundo*, l'exercice effectif de cette garde, avant le déplacement. Examinons de plus près la teneur des conditions mentionnées.

b L'élément juridique

65 En ce qui concerne l'élément des situations visées qu'on pourrait appeler juridique, ce que la Convention se propose de défendre ce sont les relations qui se trouvent déjà protégées, au moins par l'apparence d'un titre valable sur le droit de garde, dans l'Etat de la résidence habituelle de l'enfant; c'est-à-dire par le droit de l'Etat où ces relations se déroulaient avant le déplacement. L'affirmation antérieure exige certaines précisions sur deux points. Le premier aspect que nous devons considérer a trait au droit dont la violation détermine l'existence d'un déplacement ou d'un non-retour illicites, au sens de la Convention. Il s'agit, comme nous venons de le dire, du droit de garde; en effet, bien qu'au

that actual results be achieved but merely the adoption of an attitude designed to lead to such results. In the present case, the attitude and behaviour required of States is expressed in the requirement to 'take all appropriate measures to secure within their territories the implementation of the objects of the Convention'. The Convention also seeks, while safeguarding the 'self-executing' character of its other articles, to encourage Contracting States to draw inspiration from these rules in resolving problems similar to those with which the Convention deals, but which do not fall within its scope *ratione personae* or *ratione temporis*. On the one hand, this should lead to careful examination of the Convention's rules whenever a State contemplates changing its own internal laws on rights of custody or access; on the other hand, extending the Convention's objects to cases which are not covered by its own provisions should influence courts and be shown in a decreasing use of the public policy exception when questions concerning international relations which are outwith the scope of the Convention fall to be decided.

63 Moreover, the last sentence of the article specified one of the particular means envisaged, while stressing also the importance placed by the Convention on the use of speedy procedures in matters of custody or access rights. However, this provision does not impose an obligation upon States to bring new procedures into their internal law, and the correspondence now existing between the French and English texts rightly seeks to avoid such an interpretation, which the original French text made possible. It is therefore limited to requesting Contracting States, in any question concerning the subject-matter of the Convention, to use the most expeditious procedures available in their own law.

Article 3 — The unlawful nature of a removal or retention

a General observations

64 Article 3 as a whole constitutes one of the key provisions of the Convention, since the setting in motion of the Convention's machinery for the return of the child depends upon its application. In fact, the duty to return a child arises only if its removal or retention is considered wrongful in terms of the Convention. Now, in laying down the conditions which have to be met for any unilateral change in the *status quo* to be regarded as wrongful, this article indirectly brings into clear focus those relationships which the Convention seeks to protect. Those relationships are based upon the existence of two facts, firstly, the existence of rights of custody attributed by the State of the child's habitual residence and, secondly, the actual exercise of such custody prior to the child's removal. Let us examine more closely the import of these conditions.

b The juridical element

65 As for what could be termed the juridical element present in these situations, the Convention is intended to defend those relationships which are already protected, at any rate by virtue of an apparent right to custody in the State of the child's habitual residence, *i.e.* by virtue of the law of the State where the child's relationships developed prior to its removal. The foregoing remark requires further explanation in two respects. The first point to be considered concerns the law, a breach of which determines whether a removal or retention is wrongful, in the Convention sense. As we have just said, this is a matter of custody rights. Although the problems which can arise from a breach of

cours de la Quatorzième session les problèmes pouvant dériver de la violation d'un droit de visite, surtout quand le titulaire de la garde déplace l'enfant à l'étranger, aient été soulevés, l'opinion majoritaire a été qu'on ne peut pas assimiler une telle situation aux déplacements illicites qu'on essaie de prévenir.[24]
Cet exemple, et d'autres similaires où la violation du droit de visite altère profondément l'équilibre de la situation établie par une décision, sont certes la preuve de ce que les décisions sur la garde des enfants devraient toujours être susceptibles de révision. Mais ce problème échappe à l'effort de coordination entrepris par la Conférence de La Haye; on aurait abouti à des résultats contestables si, à travers une égale protection accordée aux droits de garde et de visite, l'application de la Convention avait conduit, au fond, à la substitution des titulaires de l'un par ceux de l'autre.

66 La deuxième question à examiner se réfère au droit choisi pour évaluer la validité initiale du titre invoqué. Nous ne nous arrêterons pas ici sur le concept de la résidence habituelle; il s'agit en effet d'une notion familière à la Conférence de La Haye, où elle est comprise comme une notion de pur fait, qui diffère notamment de celle de domicile. D'ailleurs, le choix du droit de la résidence habituelle en tant que critère déterminant de la légalité de la situation violée par l'enlèvement est logique. En fait, aux arguments qui ont agi en faveur de lui accorder un rôle prééminent en matière de protection des mineurs, comme dans la Convention de La Haye de 1961, vient s'ajouter la propre nature même de la Convention, c'est-à-dire sa portée limitée. En ce sens, il faut faire deux considérations: d'une part, la Convention n'essaie pas de régler définitivement la garde des enfants, ce qui affaiblit considérablement les arguments favorables à la loi nationale; d'autre part, les normes conventionnelles reposent, dans une large mesure, sur l'idée sous-jacente qu'il existe une sorte de compétence naturelle des tribunaux de la résidence habituelle de l'enfant dans un litige relatif à sa garde.
Dans une perspective différente, nous devons aussi attirer l'attention sur le fait que la Convention parle du «droit» de l'Etat de la résidence habituelle, s'écartant ainsi de la tradition bien établie par les Conventions de La Haye sur la loi applicable, élaborées à partir de 1955, qui soumettent la réglementation du sujet dont elles s'occupent à une loi interne déterminée. Certes, dans ces cas, le terme de «loi» doit être compris dans son sens le plus large, celui qui recouvre aussi bien les règles écrites et coutumières – quel qu'en soit le rang – que les précisions apportées par leur interprétation jurisprudentielle. Cependant, l'adjectif «interne» implique l'exclusion de toute référence aux règles de conflit de la loi désignée. Donc, si la Convention a abandonné la formule traditionnelle pour parler du «droit de la résidence habituelle», la différence ne saurait être purement terminologique. En effet, comme le montrent les travaux préparatoires,[25] dès le début, l'intention a été d'élargir davantage l'éventail des dispositions qui doivent être prises en considération dans ce contexte. En fait, il y a même eu, au cours de la Quatorzième session, une proposition tendant à expliciter dans cet article que la référence au droit de la résidence habituelle s'étend à ces normes de droit international privé; si la proposition a été rejetée, c'est parce que la Conférence était convaincue qu'une telle inclusion était superflue et s'avérait implicite du moment que le texte

[24] *Cf.* Doc. trav. No 5 (Proposition de la délégation canadienne) et P.-v. No 3.

[25] *Cf.* le Rapport de la Commission spéciale, No 62, *supra*, p. 90.

access rights, especially where the child is taken abroad by its custodian, were raised during the Fourteenth Session, the majority view was that such situations could not be put in the same category as the wrongful removals which it is sought to prevent.[24]

This example, and others like it where breach of access rights profoundly upsets the equilibrium established by a judicial or administrative decision, certainly demonstrate that decisions concerning the custody of children should always be open to review. This problem however defied all efforts of the Hague Conference to co-ordinate views thereon. A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.

66 The second question which should be examined concerns the law which is chosen to govern the initial validity of the claim. We shall not dwell at this point upon the notion of habitual residence, a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile. Moreover, the choice of the law of habitual residence as the factor which is to determine the lawfulness of the situation flouted by the abduction is logical. In actual fact, to the arguments in favour of its being accorded a pre-eminent role in the protection of minors, as in the Hague Convention of 1961, must be added the very nature of the Convention itself, *viz.* its limited scope. In this regard, two points must be made: on the one hand, the Convention does not seek to govern definitively questions concerning the custody of children, a fact which weakens considerably those arguments favouring the application of national law; on the other hand, the rules of the Convention rest largely upon the underlying idea that there exists a type of jurisdiction which by its nature belongs to the courts of a child's habitual residence in cases involving its custody.
From a different viewpoint, our attention should also be drawn to the fact that the Convention speaks of the 'law' of the State of habitual residence, thus breaking with a long-established tradition of Hague Conventions on applicable law since 1955, which refer to a particular internal law to govern the matters with which they deal. Of course, in such cases, the word 'law' has to be understood in its widest sense, as embracing both written and customary rules of law – whatever their relative importance might be – and the interpretations placed upon them by case-law. However, the adjective 'internal' implies the exclusion of all reference to the conflict of law rules of the particular legal system. Therefore, since the Convention has abandoned its traditional formulation by speaking of 'the law of the habitual residence', this difference cannot be regarded as just a matter of terminology. In fact, as the preliminary proceedings of the Commission demonstrate,[25] it was intended right from the start to expand considerably the range of provisions which have to be considered in this context. Actually, a proposal was made during the Fourteenth Session that this article should make it clear that the reference to the law of the habitual residence extends also to the rules of private international law. The fact that this proposal was rejected was due to the Conference's view that its inclusion was unnecessary and became implicit anyway

[24] *Cf.* Working Document No 5 (Proposal of the Canadian delegation) and *P.-v.* No 3.

[25] *Cf.* the Special Commission Report, No 62, *supra*, p. 90.

n'exclut ni directement ni indirectement les règles en question.[26]

67 Les considérations antérieures nous montrent que l'invocation du droit de la résidence habituelle de l'enfant est aussi large que possible. De même, les sources dont peut découler le droit de garde qu'on essaie de protéger sont toutes celles qui peuvent fonder une réclamation dans le cadre du système juridique en question. A cet égard, l'alinéa 2 de l'article 3 considère certaines – les plus importantes sans doute – de ces sources, mais en soulignant la nature non exhaustive de l'énumération; cet alinéa dispose en effet que «le droit de garde visé en *a* peut notamment résulter . . .», en soulignant de la sorte l'existence possible d'autres titres non considérés dans le texte. Or, comme nous le verrons dans les paragraphes suivants, les sources retenues couvrent un vaste éventail juridique; la précision de leur caractère partiel doit donc être surtout comprise comme favorisant une interprétation souple des concepts employés, qui permette d'appréhender le maximum d'hypothèses possibles.

68 La première des sources à laquelle l'article 3 fait allusion est la loi, quand il dit que la garde peut «résulter d'une attribution de plein droit». Cela nous amène à insister sur l'un des traits caractéristiques de cette Convention, nommément son applicabilité à la protection des droits de garde exercés avant toute décision en la matière. Le point est important, car on ne peut pas ignorer que, dans une perspective statistique, les cas où l'enfant est déplacé avant qu'une décision concernant sa garde n'ait été prononcée sont assez fréquents. D'ailleurs, dans de telles situations, les possibilités existantes, en marge de la Convention, pour le parent dépossédé de récupérer l'enfant sont presque nulles, sauf s'il recourt à son tour à des voies de fait toujours pernicieuses pour l'enfant. A cet égard, en introduisant ces cas dans son domaine d'application, la Convention a progressé de manière significative dans la solution des problèmes réels qui échappaient auparavant, dans une large mesure, aux mécanismes traditionnels du droit international privé.
Quant à savoir quel est, selon la Convention, le système juridique qui peut attribuer le droit de garde qu'on désire protéger, il nous faut en revenir aux considérations développées au paragraphe précédent. Ainsi donc, la garde *ex lege* pourra se baser soit sur la loi interne de l'Etat de la résidence habituelle de l'enfant, soit sur la loi désignée par les règles de conflit de cet Etat. Le jeu de la première option est parfaitement clair; en ce qui concerne la seconde, elle impliquerait, par exemple, que le déplacement par son père français d'un enfant naturel ayant sa résidence habituelle en Espagne où il habitait avec sa mère, tous les deux étant aussi de nationalité française, devrait être considéré comme illicite au sens de la Convention, par application de la loi française désignée comme compétente par la règle de conflit espagnole en matière de garde et indépendamment du fait que l'application de la loi interne espagnole aurait vraisemblablement conduit à une autre solution.

69 La deuxième source du droit de garde, retenue à l'article 3, est l'existence d'une décision judiciaire ou administrative. Etant donné que la Convention n'ajoute aucune précision sur ce point, il faut considérer, d'une part que le mot «décision» est utilisé dans son sens le plus large, de manière à embrasser toute décision ou élément de décision (judiciaire ou administrative) concernant la garde d'un

[26] *Cf.* Doc. trav. No 2 (*Proposal of the United Kingdom delegation*) et P.-v. No 2.

once the text neither directly nor indirectly excluded the rules in question.[26]

67 The foregoing considerations show that the law of the child's habitual residence is invoked in the widest possible sense. Likewise, the sources from which the custody rights which it is sought to protect derive, are all those upon which a claim can be based within the context of the legal system concerned. In this regard, paragraph 2 of article 3 takes into consideration some – no doubt the most important – of those sources, while emphasizing that the list is not exhaustive. This paragraph provides that 'the rights of custody mentioned in sub-paragraph *a* above may arise in particular', thus underlining the fact that other sorts of rights may exist which are not contained within the text itself. Now, as we shall see in the following paragraphs, these sources cover a vast juridical area, and the fact that they are not exhaustively set out must be understood as favouring a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration.

68 The first source referred to in article 3 is law, where it is stated that custody 'may arise . . . by operation of law'. That leads us to stress one of the characteristics of this Convention, namely its application to the protection of custody rights which were exercised prior to any decision thereon. This is important, since one cannot forget that, in terms of statistics, the number of cases in which a child is removed prior to a decision on its custody are quite frequent. Moreover, the possibility of the dispossessed parent being able to recover the child in such circumstances, except within the Convention's framework, is practically non-existent, unless he in his turn resorts to force, a course of action which is always harmful to the child. In this respect, by including such cases within its scope, the Convention has taken a significant step towards resolving the real problems which in the past largely escaped the control of the traditional mechanisms of private international law.

As for knowing the legal system which, according to the Convention, is to attribute the custody rights, which it is desired to protect, it is necessary to go back to the considerations developed in the previous paragraph. Thus, custody *ex lege* can be based either on the internal law of the State of the child's habitual residence, or on the law designated by the conflict rules of that State. The scope of the first option is quite clear; the second implies, for example, that the removal by its French father of a child born out of wedlock which had its habitual residence in Spain where it lived with its mother, both mother and child being of French nationality, should be considered wrongful in the Convention sense, by means of the application of French law designated as applicable by the Spanish conflict rule on questions of custody, quite independently of the fact that application of internal Spanish law would probably have led to a different result.

69 The second source of custody rights contained in article 3 is a judicial or administrative decision. Since the Convention does not expand upon this, it must be deemed, on the one hand, that the word 'decision' is used in its widest sense, and embraces any decision or part of a decision (judicial or administrative) on a child's custody and, on the other hand, that these decisions may have been issued by the courts of

[26] *Cf.* Working Document No 2 (Proposal of the United Kingdom delegation), and *P.-v.* No 2.

enfant; d'autre part que les décisions visées peuvent avoir été rendues aussi bien par les tribunaux de l'Etat de la résidence habituelle de l'enfant que par ceux d'un Etat tiers.[27] Or, dans cette dernière hypothèse, c'est-à-dire lorsque le droit de garde s'exerçait dans l'Etat de la résidence habituelle de l'enfant sur la base d'une décision étrangère, la Convention n'exige pas qu'elle ait été formellement reconnue. En conséquence, il doit suffire aux effets considérés que la décision soit telle au regard du droit de l'Etat de la résidence habituelle, c'est-à-dire, en principe, qu'elle présente les caractéristiques *minima* pour pouvoir déclencher une procédure en vue de son homologation ou de sa reconnaissance;[28] interprétation large qui se trouve d'ailleurs confirmée par la teneur de l'article 14 de la Convention.

70 Finalement, le droit de garde peut découler, d'après l'article 3, «d'un accord en vigueur selon le droit de cet Etat». En principe, les accords envisagés peuvent être de simples transactions privées entre les parties, au sujet de la garde des enfants. La condition d'être «en vigueur» selon le droit de l'Etat de la résidence habituelle, a été introduite au cours de la Quatorzième session en substitution de l'exigence d'avoir «force de loi», qui figurait dans l'avant-projet. La modification répond à un désir de clarification, mais aussi d'assouplissement, autant que possible, des conditions posées à l'acceptation d'un accord en tant que source de la garde protégée par la Convention. Sur le point précis de savoir ce qu'est un accord «en vigueur» selon un droit déterminé, il nous semble que l'on doive inclure sous cette appellation tout accord qui ne soit pas interdit par un tel droit et qui puisse servir de base à une prétention juridique devant les autorités compétentes. Or, pour en revenir au sens large que la notion «droit de l'Etat de la résidence habituelle de l'enfant» a reçu dans cet article 3, le droit en question peut être aussi bien la loi interne de cet Etat que la loi désignée par ses règles de conflit; le choix entre les deux branches de l'option appartient aux autorités de l'Etat concerné, quoique l'esprit de la Convention semble incliner pour celle qui, dans chaque cas d'espèce, légitime la garde effectivement exercée. D'autre part, la Convention ne précise point les conditions de fond ou de forme que ces accords doivent remplir; elles changeront donc selon la teneur du droit impliqué.

71 Tout en ajournant l'étude de la personne qui peut être titulaire d'un droit de garde au commentaire de l'article 4 sur le domaine d'application *ratione personae* de la Convention, il convient d'insister ici sur le fait qu'on s'est proposé de protéger toutes les modalités d'exercice de la garde d'enfants. En effet, aux termes de l'article 3, le droit de garde peut avoir été attribué, seul ou conjointement, à la personne qui demande qu'on en respecte l'exercice. Il ne pouvait en être autrement à une époque où les législations internes introduisent progressivement la modalité de la garde conjointe, considérée comme la mieux adaptée au principe général de la non-discrimination à raison du sexe. D'ailleurs, la garde conjointe n'est pas toujours une garde *ex lege*, dans la mesure où les tribunaux se montrent de plus en plus favorables, si les circonstances le permettent, à partager entre les deux parents les responsabilités inhérentes au droit de garde. Or, dans l'optique adoptée par la Convention, le déplacement d'un enfant par l'un des titulaires de la garde

[27] Cette interprétation s'appuie sur les travaux qui ont conduit à l'adoption d'un texte, similaire à l'actuel, au sein de la Commission spéciale. Voir Rapport de la Commission spéciale, No 64, *supra*, p. 191-192.
[28] Sur l'intérêt de ce que la Convention inclue un tel cas, voir le Doc. trav. No 58, «Document de clarification présenté par la délégation italienne».

the State of the child's habitual residence as well as by the courts of a third country.[27] Now, in the latter case, that is to say when custody rights were exercised in the State of the child's habitual residence on the basis of a foreign decree, the Convention does not require that the decree had been formally recognized. Consequently, in order to have the effect described, it is sufficient that the decision be regarded as such by the State of habitual residence, *i.e.* that it contain in principle certain minimum characteristics which are necessary for setting in motion the means by which it may be confirmed or recognized.[28] This wide interpretation is moreover confirmed by the whole tenor of article 14.

70 Lastly, custody rights may arise according to article 3, 'by reason of an agreement having legal effect under the law of that State'. In principle, the agreements in question may be simple private transactions between the parties concerning the custody of their children. The condition that they have 'legal effect' according to the law of the State of habitual residence was inserted during the Fourteenth Session in place of a requirement that it have the 'force of law', as stated in the Preliminary Draft. The change was made in response to a desire that the conditions imposed upon the acceptance of agreements governing matters of custody which the Convention seeks to protect should be made as clear and as flexible as possible. As regards the definition of an agreement which has 'legal effect' in terms of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities. Now, to go back to the wide interpretation given by article 3 to the notion of 'the law of the State of the child's habitual residence', the law concerned can equally as well be the internal law of that State as the law which is indicated as applicable by its conflict rules. It is for the authorities of the State concerned to choose between the two alternatives, although the spirit of the Convention appears to point to the choice of the one which, in each particular case, would recognize that custody had actually been exercised. On the other hand, the Convention does not state, in substance or form, the conditions which these agreements must fulfil, since these will change according to the terms of the law concerned.

71 Leaving aside a consideration of those persons who can hold rights of custody, until the commentary on article 4 which concerns the scope of the Convention *ratione personae*, it should be stressed now that the intention is to protect *all* the ways in which custody of children can be exercised. Actually, in terms of article 3, custody rights may have been awarded to the person who demands that their exercise be respected, and to that person in his own right or jointly. It cannot be otherwise in an era when types of joint custody, regarded as best suited to the general principle of sexual non-discrimination, are gradually being introduced into internal law. Joint custody is, moreover, not always custody *ex lege*, in as much as courts are increasingly showing themselves to be in favour, where circumstances permit, of dividing the responsibilities inherent in custody rights between both parents. Now, from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful, and

[27] This interpretation is based upon the deliberations of the Special Commission which led to its adopting a similar text to the current one. See Report of the Special Commission, No 64, *supra*, pp. 191-192.
[28] See Working Document No 58, '*Document de clarification présenté par la délégation italienne*', for the desirability of including such a case in the Convention.

conjointe, sans le consentement de l'autre titulaire, est également illicite; ce caractère illicite proviendrait, dans ce cas précis, non pas d'une action contraire à la loi, mais du fait qu'une telle action aurait ignoré les droits de l'autre parent, également protégé par la loi, et interrompu leur exercice normal. La véritable nature de la Convention apparaît plus clairement dans ces situations: elle ne cherche pas à établir à qui appartiendra dans l'avenir la garde de l'enfant, ni s'il s'avérera nécessaire de modifier une décision de garde conjointe rendue sur la base de données qui ont été altérées par la suite; elle essaie plus simplement d'éviter qu'une décision ultérieure à cet égard puisse être influencée par un changement des circonstances introduit unilatéralement par l'une des parties.

this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties.

c L'élément de fait

72 Le deuxième élément qui caractérise les rapports protégés par la Convention est que le droit de garde, qu'on prétend violé par le déplacement, ait été exercé de façon effective par son titulaire. En effet, du moment qu'on a choisi une approche du sujet conventionnel s'écartant de la pure et simple reconnaissance internationale des droits de garde attribués aux parents, la Convention a mis l'accent sur la protection du droit des enfants au respect de leur équilibre vital; c'est-à-dire du droit des enfants à ne pas voir altérées les conditions affectives, sociales, etc., qui entourent leur vie, à moins qu'il n'existe des arguments juridiques garantissant la stabilité d'une nouvelle situation. Cette approche est reflétée dans la limite du domaine d'application de la Convention aux droits de garde effectivement exercés. De plus, une telle conception se trouve justifiée dans le cadre des relations internationales par un argument complémentaire, touchant au fait que, dans ce contexte, il est relativement fréquent qu'il existe des décisions contradictoires peu à même de servir de base à la protection de la stabilité de la vie d'un enfant.

73 En réalité, cette conception a été à peine contestée. Pourtant, plusieurs propositions[29] ont été présentées en vue de supprimer de l'article 3 toute référence à l'exercice effectif de la garde; la raison en était que, par ce biais, on imposait au demandeur le fardeau d'une preuve sur un point qui serait parfois difficile à établir. La situation semblait encore plus compliquée si on tenait compte du fait que l'article 13 consacré aux exceptions possibles à l'obligation de faire retourner l'enfant exige, de «l'enleveur» cette fois, la preuve que la personne dépossédée n'exerçait pas effectivement la garde qu'elle réclame maintenant. Or, c'est justement en rapprochant les deux dispositions que l'on fait apparaître nettement la véritable nature de la condition prévue à l'article 3. En effet, cette condition, en délimitant le domaine d'application de la Convention, n'exige du demandeur qu'une première évidence du fait qu'il exerçait réellement les soins sur la personne de l'enfant; cette circonstance doit être, en général, assez facile à établir. D'ailleurs, le caractère non formel de cette exigence est mis en relief à l'article 8 lorsque, parmi les données que doit contenir la demande introduite auprès des Autorités centrales, il indique simplement sous *c* «les motifs sur lesquels se base le demandeur pour réclamer le retour de l'enfant».
Par contre, l'article 13 de la Convention (12 de l'avant-projet) nous place devant un véritable fardeau de la preuve à la charge de «l'enleveur»; c'est en effet lui qui doit établir,

c The factual element

72 The second element characterizing those relationships protected by the Convention is that the custody rights which it is claimed have been breached by the child's removal were actually exercised by the holder. In fact, as soon as an approach to the subject-matter of the Convention was adopted which deviated from the pure and simple international recognition of custody rights attributed to parents, the Convention put its emphasis on protecting the right of children to have the stability which is so vital to them respected. In other words, the Convention protects the right of children not to have the emotional, social etc. aspects of their lives altered, unless legal arguments exist which would guarantee their stability in a new situation. This approach is reflected in the scope of the Convention, which is limited to custody rights actually exercised. What is more, such a notion is justified within the framework of international relations by a complementary argument which concerns the fact that contradictory decisions arise quite frequently in this particular context, decisions which are basically of little use in protecting the stability of a child's life.

73 Actually, this idea was not opposed to any extent. However, several proposals[29] were put forward for the deletion from article 3 of any reference to the actual exercise of custody rights. The reason for this was that its retention could place on the applicant the burden of proving a point which would sometimes be difficult to establish. The situation became even more complicated when account was taken of the fact that article 13, which concerns the possible exceptions to the obligation to order the return of the child, requires the 'abductor' this time to prove that the dispossessed party had not actually exercised the custody rights he now claims. Now, it is indeed by considering both provisions together that the true nature of the condition set forth in article 3 can be seen clearly. This condition, by defining the scope of the Convention, requires that the applicant provide only some preliminary evidence that he actually took physical care of the child, a fact which normally will be relatively easy to demonstrate. Besides, the informal nature of this requirement is highlighted in article 8 which simply includes, in sub-paragraph *c*, 'the grounds on which the applicant's claim for return of the child is based', amongst the facts which it requires to be contained in applications to the Central Authorities.
On the other hand, article 13 of the Convention (12 in the Preliminary Draft) shows us the real extent of the burden of proof placed upon the 'abductor'; it is for him to show, if he

[29] *Cf.* Doc. trav. No 1 (*Proposal of the United States delegation*) et No 10 (*Proposal of the Finnish delegation*), ainsi que le P.-v. No 3.

[29] *Cf.* Working Documents Nos 1 (Proposal of the United States delegation) and 10 (Proposal of the Finnish delegation), and also *P.-v.* No 3.

pour éviter le retour de l'enfant, que le gardien n'exerçait pas effectivement le droit de garde. Donc, nous pouvons en arriver à la conclusion que l'ensemble de la Convention est construit sur la présomption non explicite que celui qui a le soin de la personne de l'enfant en exerce effectivement la garde; cette idée devra être détruite en vertu de l'inversion du fardeau de la preuve qui est le propre de toute présomption, (par «l'enleveur» s'il veut éviter que l'enfant ne soit renvoyé).

74 Cependant, la Convention inclut expressément dans le domaine qu'elle entend protéger la situation qui se pose quand la garde n'a pas pu devenir effective à cause précisément du déplacement de l'enfant; c'est en ce sens que se prononce le dernier membre de phrase de la lettre *b* de l'article 3. En théorie, l'idée sous-jacente s'accorde parfaitement avec l'esprit qui inspire la Convention; c'est donc d'un point de vue pratique qu'on peut se demander si un tel ajout était nécessaire.[30] Dans cette optique, les hypothèses que cette précision essaie de protéger visent deux situations type possibles, dont l'une rentrerait clairement dans le domaine d'application de la Convention, tandis que l'autre, à défaut de cette norme, exigerait vraisemblablement une interprétation trop forcée de ses dispositions. Il s'agit, d'une part, des cas soulevés lorsqu'une première décision sur la garde est mise en échec par le déplacement de l'enfant; or, dans la mesure où une telle décision suit, dans un délai raisonnable, la rupture de la vie familiale commune, on peut considérer que le titulaire de la garde l'avait exercée au préalable et qu'en conséquence la situation décrite remplit toutes les conditions que fixe le domaine d'application conventionnel. Pourtant, si nous nous plaçons devant une décision sur la garde, rendue par les tribunaux de la résidence habituelle de l'enfant, qui modifie une décision précédente et dont l'exécution est rendue impossible par l'action du ravisseur, il peut se trouver que le nouveau titulaire de la garde ne l'ait pas exercée dans un délai étendu; les difficultés qu'on rencontrerait dans de telles situations, et peut-être dans d'autres non visées dans ces lignes, pour invoquer la Convention sont évidentes. En conclusion, et quoiqu'il faille s'attendre à ce que le jeu de cette disposition ne soit pas fréquent, nous devons conclure que son inclusion dans la Convention peut s'avérer utile.

Article 4 – Domaine d'application ratione personae

75 Cet article ne concerne que le domaine d'application *ratione personae* de la Convention par rapport aux enfants protégés. Pourtant dans un souci de systématisation, nous traiterons aussi dans son contexte les autres aspects du problème, c'est-à-dire les titulaires possibles des droits de garde et de visite et les personnes qui pourraient être considérées comme «enleveurs», aux termes de la Convention.

a Les enfants protégés

76 La Convention s'applique aux enfants âgés de moins de seize ans qui avaient «leur résidence habituelle dans un Etat contractant immédiatement avant l'atteinte aux droits de garde ou de visite». En relation avec l'exigence concernant la résidence habituelle, il faut revenir aux considérations émises sur la nature de la Convention, qui aboutissent à la conclusion qu'une convention de coopération entre

[30] *Cf.* Doc. trav. No 2 (*Proposal of the United Kingdom delegation*) et les débats sur ce point aux P.-v. Nos 3 et 13.

wishes to prevent the return of the child, that the guardian had not actually exercised his rights of custody. Thus, we may conclude that the Convention, taken as a whole, is built upon the tacit presumption that the person who has care of the child actually exercises custody over it. This idea has to be overcome by discharging the burden of proof which has shifted, as is normal with any presumption (*i.e.* discharged by the 'abductor' if he wishes to prevent the return of the child).

74 However, there is expressly included amongst the matters which the Convention is intended to protect the situation which arises when actual custody cannot be exercised precisely because of the removal of the child; that is the situation envisaged in the last alternative set out in article 3*b*. Theoretically, the underlying idea is perfectly in keeping with the spirit of the Convention, and it is therefore from a practical point of view that it may be wondered whether such a provision needed to be added.[30] From this viewpoint, the hypothetical situations which this provision is designed to protect are of two types, one of which falls clearly within the scope of the Convention, while the other, failing this rule, would probably require too strained an interpretation of its provisions. On the one hand, there are cases where an initial decision on custody is rendered worthless by the removal of the child. In so far as such a description follows the disruption of normal family life after a reasonable lapse of time, the holder of the rights could be regarded as having exercised them from the outset, so that the situation described fulfils all the conditions laid down within the scope of the Convention. However, if a decision on custody by the courts of the child's habitual residence is considered, which modifies a prior decision and cannot be enforced because of the action of the abductor, it could be that the new holder of the right to custody has not exercised it within the extended time-limit. The difficulties which would be encountered in seeking to apply the Convention to such situations and perhaps to others not herein mentioned, are obvious. To conclude, although this provision must not be expected to come into play very often, it has to be said finally that its inclusion in the Convention might prove to be useful.

Article 4 – Convention's scope ratione personae

75 This article concerns only the Convention's scope *ratione personae* as regards the children who are to be protected. However, for the sake of completeness, we shall also deal with the other aspects of the problem in their proper context, that is to say those potential holders of custody and access rights and those who could be regarded as 'abductors', within the terms of the Convention.

a The children protected

76 The Convention applies to children of less than sixteen years of age, who were 'habitually resident in a Contracting State immediately before any breach of custody or access rights'. As regards the requirement that they be habitually resident, reference must again be made to those considerations previously expressed about the nature of the Convention, which lead to the conclusion that a convention

[30] *Cf.* Working Document No 2 (Proposal of the United Kingdom delegation) and the debate on this point in *P.-v.* Nos 3 and 13.

autorités ne peut atteindre toute son efficacité que si les rapports visés se produisent entre Etats contractants.

77 L'âge limite pour l'application de la Convention soulève deux questions importantes. La première, la question de l'âge *stricto sensu*, a été à peine débattue. La Convention retient l'âge de seize ans, consacrant ainsi une notion d'enfant plus restrictive que celle admise par d'autres Conventions de La Haye.[31] La raison découle des objectifs conventionnels eux-mêmes; en effet, une personne de plus de seize ans a en général une volonté propre qui pourra difficilement être ignorée, soit par l'un ou l'autre de ses parents, soit par une autorité judiciaire ou administrative.

Quant à la détermination du moment où cet âge interdit l'application de la Convention, celle-ci, parmi les diverses options possibles, retient la plus limitative; en conséquence, aucune action ou décision basée sur les dispositions conventionnelles ne peut être adoptée à l'égard d'un enfant après son seizième anniversaire.

78 Le deuxième problème a trait à la situation des enfants âgés de moins de seize ans qui ont le droit de fixer leur lieu de résidence. Compte tenu du fait que ce droit fait en général partie du droit de garde, une proposition a été faite dans le sens de la non-application de la Convention dans de tels cas.[32] Cependant, cette proposition a été rejetée sur la base de divers arguments, parmi lesquels on peut citer: 1) la difficulté de choisir le système juridique qui devrait consacrer l'existence d'une telle possibilité, étant donné qu'il existe au moins trois possibilités qui sont, respectivement, la loi nationale, la loi de la résidence habituelle avant le déplacement et la loi de l'Etat de refuge; 2) la limitation excessive que cette proposition apporterait au domaine d'application de la Convention, par rapport notamment au droit de visite; 3) le fait que la faculté de décider du lieu de résidence d'un enfant n'est qu'un élément possible du droit de garde qui n'en épuise pas le contenu.
D'autre part, la décision prise à cet égard ne peut pas être isolée de la disposition de l'article 13, alinéa 2, qui donne la possibilité aux autorités compétentes de tenir compte de l'opinion de l'enfant sur son retour, dès qu'il atteint un âge et une maturité suffisants; en effet, cette norme permettra aux autorités judiciaires ou administratives, quand il sera question du retour d'un mineur ayant capacité de décider sur son lieu de résidence, de considérer que l'opinion de l'enfant est toujours déterminante. On peut arriver ainsi à l'application automatique d'une disposition facultative de la Convention, mais une telle conséquence semble préférable à la réduction globale du domaine d'application de la Convention.

b Les titulaires des droits de garde et de visite

79 Les problèmes soulevés à cet égard par l'un et l'autre des droits visés sont nettement différents. D'abord, en ce qui concerne le droit de visite, il est évident que par la nature même des choses, ses titulaires seront toujours des personnes physiques, dont la détermination dépendra de la loi appliquée à l'organisation de ce droit. En principe, ces personnes appartiendront à la proche famille de l'enfant, et il s'agira normalement soit du père, soit de la mère.

based on co-operation among authorities can only become fully operational after the relationships envisaged come into existence as among Contracting States.

77 The age limit for application of the Convention raises two important questions. Firstly, the matter of age in the strict sense gave rise to virtually no dispute. The Convention kept the age at sixteen, and therefore held to a concept of 'the child' which is more restrictive than that accepted by other Hague Conventions.[31] The reason for this derives from the objects of the Convention themselves; indeed, a person of more than sixteen years of age generally has a mind of his own which cannot easily be ignored either by one or both of his parents, or by a judicial or administrative authority.
As for deciding upon the point at which this age should exclude the Convention's application, the most restrictive of the various options available was retained by the Convention. Consequently, no action or decision based upon the Convention's provisions can be taken with regard to a child after its sixteenth birthday.

78 The second problem deals with the situation of children under sixteen years of age who have the right to choose their own place of residence. Considering that this right to choose one's residence generally forms part of the right to custody, a proposal was put forward to the effect that the Convention should not apply in such cases.[32] However, this proposal was rejected on various grounds, *inter alia* the following: (1) the difficulty of choosing the legal system which should determine whether such a possibility exists, since there are at least three different laws which could be applicable, namely, national law, the law of habitual residence prior to the child's removal, and the law of the State of refuge; (2) the excessive restriction which this proposal would place upon the scope of the Convention, particularly with regard to access rights; (3) the fact that the right to decide a child's place of residence is only one possible element of the right to custody which does not itself deprive it of all content.
On the other hand, the decision taken in this regard cannot be isolated from the provision in article 13, second paragraph, which allows the competent authorities to have regard to the opinion of the child as to its return, once it has reached an appropriate age and degree of maturity. Indeed, this rule leaves it open to judicial or administrative authorities, whenever they are faced with the possibility of returning a minor legally entitled to decide on his place of residence, to take the view that the opinion of the child should always be the decisive factor. The point could therefore be reached where an optional provision of the Convention becomes automatically applicable, but such a result seems preferable to an overall reduction in the Convention's scope.

b The holders of custody and access rights

79 The problems raised by both of these rights in this regard are quite different. Firstly, as regards access rights, it is obvious, by the very nature of things, that they will always be held by individuals, whose identity will depend on the law which applies to the organizing of these rights. These persons will as a rule be close relatives of the child, and normally will be either its father or mother.

[31] Par exemple: *Convention sur la loi applicable aux obligations alimentaires envers les enfants, du 24 octobre 1956* (article premier); *Convention concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants, du 15 avril 1958* (article premier); *Convention concernant la compétence des autorités et la loi applicable en matière de protection des mineurs, du 5 octobre 1961* (article 12); *Convention concernant la compétence des autorités, la loi applicable et la reconnaissance des décisions en matière d'adoption, du 15 novembre 1965* (article premier).
[32] *Cf.* Doc. trav. No 4 (Proposition de la délégation belge) et P.-v. No 4.

[31] For example: *Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children* (article 1); *Convention of 15 April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children* (article 1); *Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors* (article 12); *Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decisions Relating to Adoptions* (article 1).
[32] *Cf.* Working Document No 4 (*Proposition de la délégation belge*) and *P.-v.* No 4.

80 Par contre, des personnes morales peuvent aussi être titulaires d'un droit de garde, au sens de la Convention. A cet égard, l'article 3 considère la possibilité de l'attribution du droit de garde à «une institution ou tout autre organisme», en utilisant sciemment une expression vague et large. En effet, au cours de la Quatorzième session, l'inclusion dans le domaine conventionnel des hypothèses où la personne de l'enfant est confiée à une institution a été acceptée sans débats. Or, étant donné qu'il y a des organismes autres que les institutions qui ont à leur charge les soins de certains enfants, on a élargi l'expression utilisée pour y faire rentrer aussi bien les organismes ayant une personnalité juridique que ceux qui sont liés à l'organisation étatique et dépourvus d'une personnalité indépendante.

c Les éventuels «enleveurs»

81 La Convention ne contient aucune disposition expresse à ce propos. Néanmoins, de l'ensemble du texte, nous pouvons déduire deux remarques qui éclairent cet aspect relatif au domaine d'application *ratione personae* de la Convention. La première concerne les personnes physiques qui peuvent être responsables du déplacement ou du non-retour d'un enfant. Sur ce sujet, la Convention maintient le point de vue adopté par la Commission spéciale de ne pas attribuer de telles actions exclusivement à des parents.[33] L'idée de famille étant plus ou moins large selon les différentes conceptions culturelles, il est préférable de s'en tenir à une vue large qui permette, par exemple, de qualifier d'enlèvement d'enfant, au sens de la Convention, les déplacements faits par un grand-père ou un père adoptif.

82 La deuxième remarque a trait à la possibilité de ce qu'une «institution ou tout autre organisme» agisse comme «enleveur». A cet égard, il est difficilement imaginable qu'un organisme quelconque puisse déplacer, par la force ou par la ruse, un enfant d'un pays étranger vers son propre pays. D'autre part, si un enfant a été confié, par une décision judiciaire ou administrative (c'est-à-dire, au cas d'un placement forcé de l'enfant), à un tel organisme dans le pays de sa résidence habituelle, le parent qui prétend obtenir la jouissance effective d'un droit de garde sur celui-ci aura peu de chance de pouvoir invoquer la Convention. En effet, du fait que les organismes visés exercent en principe leurs compétences, abstraction faite de l'éventuelle reconnaissance de l'autorité parentale,[34] une telle prétention ne rentrerait pas dans le domaine conventionnel, puisque la garde au sens de la Convention appartiendrait à l'organisme en question.

Article 5 — De certaines expressions utilisées dans la Convention

83 Suivant une tradition bien établie de la Conférence de La Haye, la Convention ne définit pas les concepts juridiques dont elle se sert. Pourtant, dans cet article, elle précise le sens dans lequel sont utilisées les notions de droit de garde et de droit de visite, étant donné qu'une interprétation incorrecte de leur portée risquerait de compromettre les objectifs conventionnels.

84 En ce qui concerne le droit de garde, la Convention se limite à souligner qu'il comprend «le droit portant sur les soins de la personne de l'enfant», en marge des mécanismes

[33] Une approche plus restrictive se trouvait initialement dans le Rapport Dyer, cité *supra*, intitulé *Rapport sur l'enlèvement international d'un enfant par un de ses parents.*
[34] Voir sur ce point, Cour internationale de Justice, Arrêt du 28 novembre 1958, Affaire relative à l'application de la Convention de 1902 pour régler la tutelle des mineurs, *Recueil des arrêts* 1958, p. 55 et suiv.

80 On the other hand, legal persons can also, in terms of the Convention, hold rights of custody. Article 3 envisages the possibility of custody rights being attributed to 'an institution or any other body', and is expressed in deliberately vague and wide terms. In fact, during the Fourteenth Session, the inclusion within the scope of the Convention of situations in which the child is entrusted to an institution was not challenged. Now, since there are bodies other than institutions which have children in their care, the term used was extended so as to apply equally to those bodies with legal personality and to those which, as an arm of the State, lack separate personality.

c The potential 'abductors'

81 The Convention contains no express provision on this matter. Nevertheless, two comments may be drawn from the text as a whole, which shed light upon this question in relation to the Convention's scope *ratione personae*. The first concerns the physical persons who may be responsible for the removal or retention of a child. On this, the Convention upholds the point of view adopted by the Special Commission by not attributing such acts exclusively to one of the parents.[33] Since the idea of 'family' was more or less wide, depending on the different cultural conceptions which surround it, it was felt better to hold a wide view which would, for example, allow removals by a grandfather or adoptive father to be characterized as child abduction, in accordance with the Convention's use of that term.

82 The second comment relates to the possibility of an 'institution or any other body' acting as an 'abductor'. In this regard, it is difficult to imagine how any body whatever could remove, either by force or by deception, a child from a foreign country to its own land. On the other hand, if a child were entrusted, by virtue of a judicial or administrative decision (*i.e.* compulsory placement of the child) to such a body in the country of its habitual residence, the parent who sought to obtain the actual enjoyment of custody rights would stand little chance of being able to invoke the provisions of the Convention. In fact, by virtue of the fact that such bodies would as a rule exercise jurisdiction, except as regards the possible recognition of parental authority,[34] such a claim would not come within the scope of the Convention, since custody, in the sense understood by the Convention, would belong to the body in question.

Article 5 — Certain terms used in the Convention

83 The Convention, following a long-established tradition of the Hague Conference, does not define the legal concepts used by it. However, in this article, it does make clear the sense in which the notions of custody and access rights are used, since an incorrect interpretation of their meaning would risk compromising the Convention's objects.

84 As regards custody rights, the Convention merely emphasizes the fact that it includes in the term 'rights relating to the care of the person of the child', leaving aside the

[33] A more restrictive approach was to be found initially in the Dyer Report, referred to above, entitled *Report on international child abduction by one parent.*
[34] See the Judgment of the International Court of Justice, dated 28 November 1958, on the case concerning the application of the Convention of 1902 for regulating the guardianship of minors, *ICJ Reports* 1958, p. 55 *et seq.*

possibles de protection de ses biens. Il s'agit donc d'une notion plus restrictive que celle de «protection des mineurs»,[35] malgré les tentatives faites au cours de la Quatorzième session pour introduire l'idée de «protection», en vue surtout de couvrir les cas des enfants confiés à des institutions ou organismes. Mais, tous les efforts faits pour préciser la notion de droit de garde par rapport à ces situations ayant échoué, il faut s'en tenir au concept générique mentionné ci-dessus. La Convention essaie de le préciser en mettant en relief, comme indice des «soins» dont il s'agit, le droit de décider du lieu de résidence de l'enfant. Cependant, lorsque l'enfant, quoique mineur du point de vue juridique, a la faculté de fixer lui-même son lieu de résidence, le contenu du droit de garde sera déterminé en fonction des autres droits portant sur sa personne.
D'autre part, bien que dans cet article rien ne soit dit sur la possibilité que la garde soit exercée par son titulaire seul ou conjointement, il est évident que cette possibilité est envisagée. En effet, une règle classique du droit des traités exige que l'interprétation de ses termes soit effectuée dans son contexte et en tenant compte de l'objet et du but du traité;[36] or, la teneur de l'article 3 ne laisse pas de doute sur l'inclusion de la garde conjointe parmi les situations que la Convention entend protéger. Quant à savoir quand existe une garde conjointe, c'est une question qui doit être déterminée dans chaque cas d'espèce à la lumière du droit de la résidence habituelle de l'enfant.

85 Quant au droit de visite, la lettre *b* de cet article se limite à signaler qu'il comprend «le droit d'emmener l'enfant pour une période limitée dans un lieu autre que celui de sa résidence habituelle». L'intention de la Convention n'est évidemment pas d'exclure toutes les autres modalités du droit de visite; plus simplement, elle a voulu souligner que cette notion s'étend aussi au droit dit d'hébergement, manifestation du droit de visite que la personne qui a la garde de l'enfant redoute spécialement. De plus, étant donné que cette norme explicative ne qualifie point ce «lieu autre» où l'enfant peut être emmené, il faut conclure que le droit de visite, selon la Convention, inclut également le droit de visite transfrontière.

86 Une proposition a été faite en vue d'inclure dans cet article une définition des autorités judiciaires ou administratives visées tout au long des normes conventionnelles.[37] Les difficultés rencontrées tant pour la localisation d'un point de vue systématique que pour trouver une rédaction large qui englobe toutes les hypothèses possibles ont conseillé sa non-inclusion. Or il est clair qu'il s'agit, comme nous l'avons déjà souligné,[38] des autorités compétentes pour décider soit de la garde, soit de la protection des enfants, d'après la loi interne de chaque Etat contractant. D'ailleurs, c'est justement en raison des différences entre ces lois que l'on parle toujours des autorités «judiciaires ou administratives», en vue de recouvrir toutes les autorités ayant compétence en la matière, sans égard à la qualification juridique qu'elles reçoivent dans chaque Etat.

CHAPITRE II — AUTORITÉS CENTRALES

Article 6 — Création des Autorités centrales

87 Le rôle joué par les Autorités centrales, pièces clés dans

[35] Voir par exemple la *Convention concernant la compétence des autorités et la loi applicable en matière de protection des mineurs, du 5 octobre 1961.*
[36] En ce sens, l'article 31, alinéa premier, de la Convention de Vienne sur le droit des traités du 23 mai 1969.
[37] Voir Doc. trav. No 7 (*Proposal of the United States delegation*) et P.-v. Nos 4 et 14.
[38] Voir *supra* No 45.

possible ways of protecting the child's property. It is therefore a more limited concept than that of 'protection of minors',[35] despite attempts made during the Fourteenth Session to introduce the idea of 'protection' so as to include in particular those cases where children are entrusted to institutions or bodies. But since all efforts to define custody rights in regard to those particular situations failed, one has to rest content with the general description given above. The Convention seeks to be more precise by emphasizing, as an example of the 'care' referred to, the right to determine the child's place of residence. However, if the child, although still a minor at law, has the right itself to determine its own place of residence, the substance of the custody rights will have to be determined in the context of other rights concerning the person of the child.
On the other hand, although nothing is said in this article about the possibility of custody rights being exercised singly or jointly, such a possibility is clearly envisaged. In fact, a classic rule of treaty law requires that a treaty's terms be interpreted in their context and by taking into account the objective and end sought by the treaty,[36] and the whole tenor of article 3 leaves no room for doubt that the Convention seeks to protect joint custody as well. As for knowing when joint custody exists, that is a question which must be decided in each particular case, and in the light of the law of the child's habitual residence.

85 As regards access rights, sub-paragraph *b* of this article merely points out that they include 'the right to take a child for a limited period of time to a place other than the child's habitual residence'. Clearly, therefore, it is not intended that the Convention exclude all other ways of exercising access rights. Quite simply, it seeks to emphasize that access rights extend also to what is called 'residential access', that aspect of access rights about which the person who has custody of the child is particularly apprehensive. Moreover, since this explanatory provision in no way qualifies this 'other place' to which the child may be taken, one must conclude that access rights, in terms of the Convention, also include the right of access across national frontiers.

86 A proposal was made to include in this article a definition of the judicial or administrative authorities mentioned throughout the Convention's rules.[37] The difficulties encountered as much in reaching a systematic viewpoint on this as in devising a definition wide enough to encompass all possible contingencies made for its exclusion. Now, as was mentioned earlier,[38] it is clear that these are the authorities who have the power, according to the internal law of each Contracting State, to determine questions concerning a child's custody or protection. Besides, it is precisely because of differences amongst these laws that reference is always made to 'judicial or administrative' authorities, so as to embrace all authorities which have jurisdiction in the matter, without regard to their legal characterization in each State.

CHAPTER II — CENTRAL AUTHORITIES

Article 6 — Creation of Central Authorities

87 The role played by the Central Authorities, crucial

[35] See, for example, the *Convention of 5 October 1961 concerning the powers of authorities and the applicable law in respect of the protection of minors.*
[36] See article 31(1) of the Vienna Convention of 23 May 1969 on the law of treaties.
[37] See Working Document No 7 (Proposal of the United States delegation) and *P.-v.* Nos 4 and 14.
[38] See *supra*, No 45.

l'application de la Convention, a déjà été longuement présenté.[39]
En ce qui concerne les Etats susceptibles de désigner plus d'une Autorité centrale, c'est l'idée que le critère déterminant à cet effet devait être l'existence de plusieurs organisations territoriales en matière de protection des mineurs qui a prévalu. En conséquence, on a ajouté aux hypothèses des Etats fédéraux et plurilégislatifs le cas des Etats «ayant des organisations territoriales autonomes», expression qui doit être interprétée dans un sens large.

Article 7 — Obligations des Autorités centrales

88 Cet article résume le rôle des Autorités centrales dans la mise en oeuvre du système instauré par la Convention. L'article est structuré en deux alinéas, dont le premier, rédigé en termes généraux, établit une obligation globale de coopération, tandis que le second énumère, de la lettre *a* à la lettre *i*, quelques-unes des principales fonctions que les Autorités centrales doivent remplir. Tous deux sont le résultat du compromis entre, d'une part les délégations qui désiraient des Autorités centrales fortes avec des compétences d'action et d'initiative amples et d'autre part les délégations qui envisageaient lesdites Autorités comme de simples mécanismes administratifs pour faciliter l'action des parties. Or, puisque ces diverses attitudes reflétaient la plupart des profondes différences existant entre les systèmes représentés à la Conférence, la solution à retenir devait être souple, de manière à permettre à chaque Autorité centrale d'agir selon le droit dans lequel elle est appelée à s'insérer. Donc, bien que la Convention précise les principales obligations confiées à la charge des Autorités centrales, elle laisse à chaque Etat contractant la détermination des mesures appropriées pour les exécuter. D'ailleurs, c'est dans ce sens qu'il faut interpréter la phrase qui introduit le second alinéa, et qui spécifie que les Autorités centrales doivent remplir les fonctions énumérées «soit directement, soit avec le concours de tout intermédiaire»; c'est à chaque Autorité centrale de choisir entre l'une ou l'autre option en fonction de son propre droit interne et dans l'esprit du devoir général de coopération que lui impose le premier alinéa.

89 Comme nous venons de le dire, la norme insérée dans le *premier alinéa* énonce l'obligation générale de coopérer des Autorités centrales, en vue d'assurer l'accomplissement des objectifs de la Convention. Une telle coopération doit se développer à deux niveaux: les Autorités centrales doivent d'abord coopérer entre elles; mais, de surcroît, elles doivent promouvoir la collaboration entre les autorités compétentes pour les matières visées dans leurs Etats respectifs. La réalisation effective de cette promotion dépendra dans une large mesure de la capacité d'action que chaque droit interne accorde aux Autorités centrales.

90 Les fonctions détaillées au *deuxième alinéa* essaient de suivre, dans leurs grandes lignes, les différents stades de l'intervention des Autorités centrales dans un cas type de déplacements d'enfants. Néanmoins, il est évident que cette énumération n'est pas exhaustive; par exemple, puisque l'intervention des Autorités centrales exige qu'elles aient été saisies au préalable, soit directement par le demandeur, soit par l'Autorité centrale, d'un autre Etat contractant, dans la seconde hypothèse, l'Autorité centrale initialement saisie de

[39] Voir *supra* Nos 43 à 48.

factors as they are in the application of the Convention, has already been dealt with at length.[39]
As for those States which may appoint more than one Central Authority, the idea which prevailed was that the determining factor should be the existence of several territorial organizations for the protection of minors. Thus there was added to those cases of Federal States and States with more than one system of law that of States 'having autonomous territorial organizations', a term which is to be interpreted broadly.

Article 7 — Obligations of Central Authorities

88 This article summarizes the role played by Central Authorities in bringing into play the system established by the Convention. The article is structured in two paragraphs, the first of which, drafted in general terms, sets out an overall duty of co-operation, while the second lists, from sub-paragraphs *a* to *i*, some of the principal functions which the Central Authorities have to discharge. Both result from a compromise between, on the one hand, those delegations which wanted strong Central Authorities with wide-ranging powers of action and initiative, and on the other hand those which saw these Authorities as straightforward administrative mechanisms for promoting action by the parties. Now, since these diverse attitudes reflected most of the deep differences which existed amongst the systems represented at the Conference, the ultimate solution had to be flexible, and such as would allow each Central Authority to act according to the law within which it has to operate. Therefore, although the Convention clearly sets out the principal obligations laid upon the Central Authorities, it lets each Contracting State decide upon the appropriate means for discharging them. And it is in this sense that the sentence occurring at the beginning of the second paragraph must be understood, which states that the Central Authorities are to discharge their listed functions 'either directly, or through any intermediary'. It is for each Central Authority to choose one or the other options, while working within the context of its own internal law and within the spirit of the general duty of co-operation imposed upon it by the first paragraph.

89 As we have just said, the rule in the *first paragraph* sets out the general duty of Central Authorities to co-operate, so as to ensure the Convention's objects are achieved. Such co-operation has to develop on two levels: the Central Authorities must firstly co-operate with each other; however, in addition, they must promote co-operation among the authorities competent for the matters dealt with within their respective States. Whether this co-operation is promoted effectively will depend to a large extent on the freedom of action which each internal law confers upon the Central Authorities.

90 The functions listed in the *second paragraph* seek to trace, in broad outline, the different stages of intervention by Central Authorities in the typical case of child removal. Nonetheless, it is clear that this list is not exhaustive. For example, since the intervention of Central Authorities necessarily depends on their having been initially seized of the matter, either directly by the applicant or by the Central Authority of a Contracting State, then in the latter case the Central Authority initially seized will have to send the

[39] See *supra*, Nos 43 to 48.

l'affaire devra transmettre la demande à l'Autorité centrale de l'Etat où l'on suppose que l'enfant se trouve. Or, cette obligation n'est pas précisée à l'article 7, mais plus tard, dans le contexte de l'article 9. D'autre part, il est évident aussi que les Autorités centrales ne sont pas tenues de remplir, dans chaque cas d'espèce, toutes les obligations énumérées dans cet article; en effet, ce sont les circonstances du cas précis qui vont déterminer les démarches à faire par les Autorités centrales: par exemple, on ne peut pas soutenir qu'une Autorité centrale quelconque soit tenue de «localiser» l'enfant quand le demandeur sait avec exactitude où se trouve celui-ci.

91 En plus de la localisation de l'enfant, chaque fois que cela s'avère nécessaire (lettre *a*), l'Autorité centrale doit prendre ou faire prendre toute mesure provisoire qui semble utile pour prévenir de «nouveaux dangers pour l'enfant ou des préjudices pour les parties concernées» (lettre *b*). La rédaction de ce sous-alinéa met à nouveau en relief un fait souligné auparavant: la capacité d'agir des Autorités centrales peut varier d'un Etat à un autre. Quant au fond, les mesures provisoires qui ont été envisagées se centrent tout particulièrement sur l'idée d'éviter un nouveau déplacement de l'enfant.

92 La lettre *c* consacre le devoir des Autorités centrales d'essayer de trouver une solution extrajudiciaire à l'affaire. En effet, d'après l'expérience évoquée par certains délégués, le nombre de cas qu'il est possible de résoudre sans avoir besoin de recourir aux tribunaux est considérable. Mais, encore une fois, c'est l'Autorité centrale qui, dans ces étapes précédant une éventuelle procédure judiciaire ou administrative, dirige l'évolution du problème; donc c'est à elle de décider à quel moment les tentatives faites, soit pour assurer la «remise volontaire» de l'enfant, soit pour faciliter une «solution amiable», ont échouées.

93 La lettre *d* porte sur les échanges d'informations relatives à la situation sociale de l'enfant. L'obligation à cet effet est subordonnée au critère des Autorités centrales impliquées dans chaque cas d'espèce. En effet, l'introduction du membre de phrase «si cela s'avère utile» montre que l'on n'a pas voulu imposer une obligation rigide sur ce point: la possibilité qu'il n'existe pas d'informations à fournir, ainsi que la peur qu'elles puissent être employées dans le cadre d'une tactique dilatoire des parties, sont quelques-uns des arguments qui ont conseillé cette attitude. D'autre part, on a rejeté une proposition rendant possible que certaines informations soient transmises à condition qu'elles restent confidentielles.[40]

94 L'obligation faite aux Autorités centrales de fournir des informations sur le contenu du droit dans leur Etat pour l'application de la Convention apparaît à la lettre *e*. Ce devoir couvre notamment deux aspects: d'une part dans le cas où le déplacement s'est produit avant qu'il n'y ait eu une décision sur la garde de l'enfant, l'Autorité centrale de l'Etat de la résidence habituelle de l'enfant pourra produire une attestation sur le contenu du droit de cet Etat, en vue de l'application de la Convention; d'autre part, l'Autorité centrale devra renseigner les particuliers sur le fonctionnement de la Convention et des Autorités centrales, ainsi que sur les procédures possibles à suivre. Par contre, la possibilité d'aller plus loin, c'est-à-dire d'obliger les Autorités centrales à donner des conseils juridiques sur des cas concrets, n'est pas envisagée dans cette norme.

[40] Voir Doc. trav. No 9 (*Proposal of the United Kingdom delegation*) et P.-v. No 5.

application to the Central Authority of the State in which the child is thought to be. Now, this obligation is not spelled out in article 7, but later, in the context of article 9. On the other hand, it is also clear that the Central Authorities are not obliged to fulfil, in every specific case, all the duties listed in this article. In fact, the circumstances of each particular case will dictate the steps which are to be taken by the Central Authorities; for example, it cannot be maintained that every Central Authority must discover the whereabouts of a child when the applicant knows full well where it is.

91 In addition to finding the whereabouts of the child, where necessary (sub-paragraph *a*), the Central Authority must take or cause to be taken any provisional measures which could help prevent 'further harm to the child or prejudice to interested parties' (sub-paragraph *b*). The drafting of this sub-paragraph clearly brings out once again a fact which was emphasized above, namely, that the ability of Central Authorities to act will vary from one State to another. Basically, the provisional measures envisaged are designed in particular to avoid another removal of the child.

92 Sub-paragraph *c* sets out the duty of Central Authorities to try to find an extrajudicial solution. In actual fact, in the light of experience as spoken to by some delegates, a considerable number of cases can be settled without any need to have recourse to the courts. But, once again, it is the Central Authorities which, in those stages preceding the possible judicial or administrative proceedings, will direct the development of the problem; it is therefore for them to decide when the attempts to secure the 'voluntary return' of the child or to bring about an 'amicable resolution', have failed.

93 Sub-paragraph *d* relates to the exchange of information about the social background of the child. This duty is made subject to the criteria adopted by the Central Authorities involved in a particular case. Indeed, the insertion of the phrase 'where desirable' demonstrates that there is no wish to impose an inflexible obligation here: the possibility of there being no information to provide, as well as the fear that reference to this provision might be used by the parties as a delaying tactic, are some of the arguments which prompted this approach. On the other hand, a proposal which would have made the transmission of certain information conditional upon its remaining confidential, was rejected.[40]

94 The obligation laid upon Central Authorities to provide information on the content of the law in their own States for the application of the Convention appears in sub-paragraph *e*. This duty applies in particular to two situations. Firstly, where the removal occurs prior to any decision as to the custody of the child, the Central Authority of the State of the child's habitual residence is to produce, for the purposes of the Convention's application, a certificate on the relevant law of that State. Secondly, the Central Authority must inform the individuals about how the Convention works and about the Central Authorities, as well as about the procedures available. On the other hand, the possibility of going further, by obliging the Central Authorities to give legal advice in individual cases, is not envisaged by this rule.

[40] See Working Document No 9 (Proposal of the United Kingdom delegation) and *P.-v.* No 5.

95 Quand il est nécessaire, pour obtenir le retour de l'enfant, de faire intervenir les autorités judiciaires ou administratives de l'Etat où il se trouve, l'Autorité centrale doit introduire elle-même – si cela est possible selon son droit interne – ou favoriser l'ouverture d'une procédure; obligation qui s'étend aussi aux procédures qui s'avèrent nécessaires pour permettre l'organisation ou l'exercice effectif du droit de visite (lettre *f*).

96 Dans les cas où l'Autorité centrale ne peut pas saisir directement les autorités compétentes dans son propre Etat, elle doit accorder ou faciliter au demandeur l'obtention de l'assistance judiciaire, aux termes de l'article 25 (lettre *g*). Il convient de préciser très brièvement que l'expression «le cas échéant» dans ce sous-alinéa fait référence à la carence de ressources économiques du demandeur, sur la base des critères établis par la loi de l'Etat où cette assistance est sollicitée; elle ne fait donc pas allusion à des considérations abstraites sur la convenance ou non de l'octroyer.

97 Au terme du processus suivi par ce paragraphe, la lettre *h* inclut, parmi les obligations des Autorités centrales la mise en oeuvre des mesures administratives nécessaires et opportunes dans chaque cas d'espèce, pour assurer le retour sans danger de l'enfant.

98 En dernier lieu, la lettre *i* énonce une obligation des Autorités centrales qui ne concerne pas directement les particuliers mais la Convention elle-même: il s'agit du devoir de «se tenir mutuellement informées sur le fonctionnement de la Convention et, autant que possible, de lever les obstacles éventuellement rencontrés lors de son application». Cette obligation devra jouer à deux niveaux complémentaires: d'une part, sur le plan des relations bilatérales entre Etats parties à la Convention; d'autre part, au niveau multilatéral, en participant le cas échéant aux commissions réunies à cet effet par le Bureau Permanent de la Conférence de La Haye.

95 When it is necessary, in order to obtain the child's return, for the judicial or administrative authorities of the State in which it is located to intervene, the Central Authority must itself initiate proceedings (if that can be done under its internal law) or facilitate the institution of proceedings. This duty also extends to proceedings which prove to be necessary for organizing or securing the effective exercise of rights of access (sub-paragraph *f*).

96 Where the Central Authority is not able to apply directly to the competent authorities in its own State, it must provide or facilitate the provision of legal aid and advice for the applicant, in terms of article 25 (sub-paragraph *g*). It is appropriate to point out here very briefly that the phrase 'where the circumstances so require' in this sub-paragraph refers to the applicant's lack of economic resources, as determined by the criteria laid down by the law of the State in which such assistance is sought, and that it does not therefore refer to abstract considerations as to the convenience or otherwise of granting legal aid.

97 Following the method adopted by this paragraph, sub-paragraph *h* includes among the Central Authorities' obligations the bringing into play in each case of such administrative arrangements as may be necessary and appropriate to secure the safe return of the child.

98 Finally, sub-paragraph *i* sets forth an obligation on the part of Central Authorities which does not directly concern individuals but only the Convention itself. It is the duty 'to keep each other informed with respect to the operation of the Convention, and, as far as possible, to eliminate any obstacles to its application'. This obligation is to operate on two complementary levels, firstly at the level of bilateral relations between States which are Party to the Convention, and secondly on a multilateral level, through participating when required in commissions called for this purpose by the Permanent Bureau of the Hague Conference.

CHAPITRE III – RETOUR DE L'ENFANT

Article 8 – La saisine des Autorités centrales

99 D'après le *premier alinéa*, une demande en vue d'obtenir le retour d'un enfant peut être adressée à toute Autorité centrale qui, dès lors, sera tenue par toutes les obligations conventionnelles. Cela signifie que le demandeur est libre de saisir l'Autorité centrale qu'il estime la plus adéquate; néanmoins, pour des raisons d'efficacité, une mention expresse de l'Autorité centrale de la résidence habituelle de l'enfant est faite dans le texte – mention qui ne doit pourtant pas être interprétée comme signifiant que les demandes adressées aux autres Autorités centrales devraient être exceptionnelles.

100 Etant donné que l'utilisation de la formule modèle est simplement recommandée, il était indispensable d'inclure dans le texte de la Convention les éléments que doit contenir une demande introduite devant une Autorité centrale pour être recevable, ainsi que les documents facultatifs qui peuvent accompagner ou compléter une telle demande. Les éléments que doit contenir toute demande adressée à une Autorité centrale, dans ce contexte, sont énumérés au *deuxième alinéa* de l'article 8. Il s'agit notamment des données qui permettent l'identification de l'enfant et des parties concernées, ainsi que de celles qui peuvent aider à localiser l'enfant (lettres *a*, *b* et *d*). En ce qui concerne l'information sur la date de naissance de l'enfant, la Convention signale qu'elle sera apportée seulement «s'il est possible de se la procurer». Par cette précision, on a entendu favoriser l'action du demandeur qui ignore une telle circonstance; il

CHAPTER III – RETURN OF THE CHILD

Article 8 – Applications to Central Authorities

99 In terms of the *first paragraph*, an application for the return of a child can be addressed to any Central Authority which, from that point, will be bound by all the obligations laid down by the Convention. This demonstrates that the applicant is free to apply to the Central Authority which in his opinion is the most appropriate. However, for reasons of efficiency, the Central Authority of the child's habitual residence is expressly mentioned in the text, but this must not be understood as signifying that applications directed to other Central Authorities are to be regarded as exceptional.

100 Since use of the model form is merely recommended, it was necessary to include in the text of the Convention the elements which any application submitted to a Central Authority must contain in order to be admissible, as well as the optional documents which may accompany or supplement such an application. The elements which every application to a Central Authority must contain, in this context, are those listed in the *second paragraph* of article 8. In particular, they are facts which allow the child and interested parties to be identified, such as those which may be able to help in locating the child (sub-paragraphs *a*, *b*, and *d*). As regards information on the child's date of birth, the Convention makes it clear that this should be supplied only 'where available'. This provision is intended to favour action by an applicant who is ignorant of such a fact but who will, however, always have to supply precise information on the

devra pourtant toujours fournir des indices exacts sur l'âge de l'enfant, étant donné que le contenu de l'article 4 de la Convention peut déterminer le rejet de sa demande aux termes de l'article 27.
De plus, il faut que la demande contienne «les motifs sur lesquels se base le demandeur pour réclamer le retour de l'enfant» (lettre *c*). Ceci est une exigence logique, qui permettra d'ailleurs l'application de l'article 27 concernant la faculté qu'ont les Autorités centrales de rejeter les demandes manifestement non fondées. Les motifs invoqués doivent, en principe, se référer aux deux éléments, juridique et de fait, retenus à l'article 3. Or, puisque l'élément juridique peut notamment s'appuyer sur le contenu du droit de la résidence habituelle de l'enfant, sur une décision ou sur un accord, on aurait pu songer à exiger un soutien documentaire à ce stade initial. Pourtant, la Convention a choisi une voie différente et place cette preuve parmi les documents qui, d'une manière facultative, peuvent accompagner ou compléter la demande. La raison en est que l'obtention des documents en question sera parfois difficile; de plus, elle peut exiger un temps précieux pour une localisation rapide de l'enfant. D'ailleurs, chaque fois que l'Autorité centrale réussit à obtenir la remise volontaire de l'enfant ou une solution amiable de l'affaire, ils peuvent apparaître comme accessoires.

101 En ce sens, les deux premières lettres du *troisième alinéa* concernant la documentation facultative qui peut accompagner, ou compléter à un moment ultérieur, la demande, se réfèrent aux documents qui sont à la base de la réclamation en retour de l'enfant. A cet effet, il faut souligner d'abord que l'exigence que les copies de toute décision ou tout accord soient authentifiées ne s'oppose pas à la disposition de l'article 23, d'après laquelle «aucune légalisation ni formalité similaire ne sera requise dans le contexte de la Convention». Il s'agit simplement de vérifier des copies ou des documents privés à l'origine pour en garantir la concordance avec les originaux et en assurer, par ce biais, la libre circulation.
En second lieu, la preuve du contenu du droit de l'Etat de la résidence habituelle de l'enfant peut être établie soit par une attestation, soit par une déclaration avec affirmation, c'est-à-dire moyennant des documents incorporant des déclarations solennelles qui engagent la responsabilité de leurs auteurs. Quant à savoir qui peut produire lesdites déclarations, la Convention a choisi une formule large, qui doit faciliter la tâche du demandeur (lettre *f*). Ainsi, en plus des Autorités centrales et des autres autorités compétentes de l'Etat de la résidence habituelle de l'enfant, elles peuvent émaner de toute personne qualifiée — par exemple, d'un notaire, d'un avocat ou d'institutions scientifiques.
D'autre part, il convient de souligner que dans une phase ultérieure, c'est-à-dire quand les autorités judiciaires ou administratives de l'Etat de refuge sont appelées à intervenir, celles-ci peuvent demander, selon l'article 15, la production de certains des documents considérés comme facultatifs au moment de la saisine des Autorités centrales.
Finalement, la Convention admet la possibilité que la demande soit accompagnée ou complétée par «tout autre document utile» (lettre *g*). En principe, étant donné que la demande est introduite par le gardien dépossédé, c'est lui qui pourra apporter ces documents complémentaires. Ce qui n'empêche pas que, si la demande est transmise à une autre Autorité centrale, l'Autorité centrale initialement saisie puisse accompagner la demande notamment des informations relatives à la situation sociale de l'enfant — si elle en dispose et les considère utiles —, en vertu de la fonction que lui attribue l'article 7, alinéa 2*d*.

age of the child, since the provisions of article 4 may result in his application being rejected, in terms of article 27.

Moreover, the application must contain 'the grounds on which the applicant's claim for return of the child is based' (sub-paragraph *c*). This requirement is logical, in that it allows the application of article 27 concerning the right of Central Authorities to reject applications which are clearly not well-founded. The grounds must in principle refer to the two elements, legal and factual, contained in article 3. Now, since the legal element in particular may depend on the provisions of the law of the child's habitual residence, or upon a decision or agreement, it might have been expected that documentary support would be required at this initial stage. However, the Convention chose to follow a different route and placed this evidence amongst those documents which may, optionally, accompany or supplement the application. The reason for this is that obtaining the documents in question is sometimes difficult and, what is more, could take up precious time better spent in speedily discovering the whereabouts of the child. Moreover, whenever a Central Authority succeeds in bringing about the voluntary return of the child or an amicable resolution of the affair, such requirements may seem merely accessory.

101 Understood thus, the first two sub-paragraphs of the *third paragraph*, dealing with the optional provision of documents which may accompany or supplement applications, are seen to refer to documents which are fundamental to a claim for the return of the child. It must be emphasized firstly that the requirement that copies of any decision or agreement be authenticated in no way contradicts the provision in article 23 that 'no legalization or similar formality may be required in the context of this Convention'. It is simply a matter of verifying what were originally copies or private documents so as to guarantee that they correspond to the originals and thus to secure their free circulation.
Secondly, proof of the substantive law of the State of the child's habitual residence may be established by either certificates or affidavits, that is to say documents which include solemn statements for which those who make them assume responsibility. As regards those persons who may adduce such statements, the Convention chose to define them widely, a fact which must make the task of the applicant easier (sub-paragraph *f*). Thus, they may emanate from any qualified person — for example, an attorney, solicitor, or barrister or research institution — as well as from the Central Authorities and the other competent authorities of the State of the child's habitual residence.
On the other hand, it should be stressed that at a later stage, when the judicial or administrative authorities of the State of refuge have been called upon to intervene, they may, in terms of article 15, request the production of certain documents which were considered to be optional at the time of application to the Central Authorities.
Lastly, the Convention acknowledges that the application may be accompanied or supplemented by 'any other relevant document' (sub-paragraph *g*). In theory, since it is the dispossessed guardian of the child who brings the application, it is for him to provide these supplementary documents. This does not preclude the Central Authority to which the application was originally made, where the application is sent to another Central Authority, from accompanying the application by, *inter alia*, information concerning the social background of the child (if it has such information at its disposal and considers it to be useful), by virtue of the task laid upon it by article 7, paragraph 2*d*.

Article 9 — Transmission de la demande à l'Autorité centrale de l'Etat où se trouve l'enfant

102 Une conséquence directe de la liberté dont jouit le demandeur de s'adresser à l'Autorité centrale de son choix est l'obligation qui pèse sur celle-ci de transmettre la demande à l'Autorité centrale de l'Etat où elle a des raisons de penser que l'enfant se trouve; obligation qui va aussi se présenter quand l'Autorité centrale qui connaît d'une affaire par une autre Autorité centrale arrivera à la conclusion que l'enfant se trouve dans un pays différent. Il s'agit là d'une fonction qui vient compléter le cadre esquissé à l'article 7, puisqu'elle est en rapport direct avec l'obligation de coopérer entre Autorités centrales qu'établit le premier alinéa dudit article.
Or, si le sens de l'article 9 est clair, sa rédaction n'en est pas très heureuse. «L'Autorité centrale requérante» à laquelle cet article se réfère existe seulement lorsque la demande introduite conformément à l'article 8 a été transmise à une *autre* Autorité centrale aux termes de l'article 9 lui-même. En conséquence, l'obligation d'informer une «Autorité centrale requérante» n'existe que lorsque la demande a été transmise à une troisième Autorité centrale, l'enfant ne se trouvant pas dans l'Etat de la deuxième Autorité centrale saisie. Par contre, l'obligation de transmettre une demande en vertu de cet article incombe à *toute* Autorité centrale, indépendamment du fait qu'elle soit première saisie ou saisie par l'intermédiaire d'une autre Autorité centrale, en raison du fait que cette disposition doit être interprétée comme s'appliquant aux deux hypothèses qu'elle a l'intention de couvrir.

Article 10 — La remise volontaire de l'enfant

103 La fonction des Autorités centrales visée à l'article 7, alinéa 2*c* de «prendre toutes les mesures appropriées pour assurer la remise volontaire de l'enfant», trouve à cet article un traitement préférentiel qui met en relief l'intérêt accordé au recours à cette voie. Dans le texte de la Convention, on a supprimé le membre de phrase qui introduisait, dans l'avant-projet, cette disposition et qui situait dans le temps («avant l'ouverture de toute procédure judiciaire ou administrative») l'obligation qu'elle incorpore. La raison en était la difficulté éprouvée par certains systèmes juridiques pour accepter qu'une autorité publique, telle que l'Autorité centrale, puisse agir avant l'introduction d'une demande auprès des autorités compétentes; la teneur de la disposition conventionnelle n'empêche pas que les Autorités centrales des autres Etats agissent de la sorte. D'autre part, il ne sera jamais question d'une obligation rigide, dans un double sens: d'une part, les efforts pour la remise volontaire de l'enfant peuvent se poursuivre après la saisine des autorités judiciaires ou administratives s'ils ont commencé avant; d'autre part, dans la mesure où l'initiative en vue du retour de l'enfant ne se transfert pas à ces autorités, c'est l'Autorité centrale qui doit décider si les tentatives en vue de tel objectif ont échoué.

D'ailleurs, il est entendu que les démarches visées dans cet article ne doivent pas préjuger de l'action des Autorités centrales pour empêcher un nouveau déplacement de l'enfant, selon l'article 7, alinéa 2*b*.

Article 11 — L'utilisation des procédures d'urgence par les autorités judiciaires ou administratives

104 L'importance du facteur temps dans toute la matière apparaît de nouveau dans cet article. Si l'article 2 de la Convention impose aux Etats contractants l'obligation d'utiliser des procédures d'urgence le *premier alinéa* de cet article reproduit cette obligation à l'égard des autorités de

Article 9 — Transmission of the application to the Central Authority of the State where the child is located

102 A direct consequence of the applicant's right to apply to the Central Authority of his choice is the duty imposed on the latter to transmit the application to the Central Authority of the State in which it has reason to believe the child is located; this duty arises also when the Central Authority which is informed of a case by another Central Authority reaches the conclusion that the child is in fact located in a different country. This is a task which supplements the framework of duties outlined in article 7, since it relates directly to the duty of co-operation amongst Central Authorities established by the first paragraph of that article.

Now, although the meaning of article 9 may be clear, it has not been very artfully drafted. The 'requesting Central Authority' to which this article refers exists only where the application submitted in accordance with article 8 has been transmitted to *another* Central Authority in terms of article 9 itself. Consequently, the duty to inform a 'requesting Central Authority' exists only when the application has been transmitted to a third Central Authority, the child not being located in the State of the second Central Authority to which the application was sent. But on the other hand, the duty to transmit an application in terms of this article devolves upon *any* Central Authority, independently of the fact that it was seized of the matter either directly or through the intervention of another Central Authority, since this provision must be understood as applying to both of the cases it is meant to cover.

Article 10 — Voluntary return of the child

103 The duty of Central Authorities, stated in article 7(2)(*c*), to 'take all appropriate measures to secure the voluntary return of the child', is given preferential treatment in this article, which highlights the interest of the Convention in seeing parties have recourse to this way of proceeding. The phrase 'before the institution of any legal or administrative proceedings' which preceded this provision in the Preliminary Draft, and restricted the duty included within it to a particular point in time, was deleted from the text of the Convention. The reason for this deletion is the difficulty experienced by some legal systems in accepting that a public authority, such as a Central Authority, could act before an application had been brought before the competent authorities; however, the whole tenor of the provision shows that the Central Authorities of other States are not precluded from acting in that way. On the other hand, it is in no way an inflexible obligation, for two reasons: firstly, efforts to secure the voluntary return of the child which were begun prior to the referral of the matter to the judicial or administrative authorities may be pursued thereafter, and secondly, in so far as the initiative for the return of the child has not been transferred to those authorities, it is for the Central Authority to decide whether the attempts to achieve this objective have failed.
Moreover, the measures envisaged in this article are not intended to prejudice the efforts of Central Authorities to prevent further removals of the child, pursuant to article 7(2)(*b*).

Article 11 — The use of expeditious procedures by judicial or administrative authorities

104 The importance throughout the Convention of the time factor appears again in this article. Whereas article 2 of the Convention imposes upon Contracting States the duty to use expeditious procedures, the *first paragraph* of this article restates the obligation, this time with regard to the authori-

l'Etat où l'enfant a été emmené et qui doivent statuer sur la remise de celui-ci. L'obligation considérée a un double aspect: d'une part, l'utilisation des procédures les plus rapides connues par leur système juridique; d'autre part le traitement prioritaire, dans toute la mesure du possible, des demandes visées.

105 Dans son désir de pousser les autorités internes à accorder une priorité maximum aux problèmes soulevés par les déplacements internationaux d'enfants, le *deuxième alinéa* établit un délai non contraignant de six semaines, après lequel le demandeur ou l'Autorité centrale de l'Etat requis peuvent solliciter une déclaration sur les motifs du retard. De plus quand l'Autorité centrale de l'Etat requis aura reçu la réponse, elle aura à nouveau une obligation de renseignement, soit envers l'Autorité centrale de l'Etat requérant, soit envers le demandeur, si c'est lui qui l'a directement saisie. En somme, l'importance de cette disposition ne peut pas être mesurée par rapport à l'exigibilité des obligations qu'elle consacre, mais par le fait même qu'elle attire l'attention des autorités compétentes sur le caractère décisif du facteur temps dans les situations concernées et qu'elle fixe le délai maximum que devrait prendre l'adoption d'une décision à cet égard.

Articles 12 et 18 — Obligation de retourner l'enfant

106 Ces deux articles peuvent être examinés ensemble car, malgré leur nature différente, ils présentent un certain caractère complémentaire.
L'article 12 constitue une pièce essentielle de la Convention, étant donné que c'est lui qui précise les situations dans lesquelles les autorités judiciaires ou administratives de l'Etat où se trouve l'enfant sont tenues d'ordonner son retour. C'est pourquoi il convient de souligner, une fois encore, que la remise non volontaire d'un enfant s'appuie, d'après la Convention, sur une décision adoptée par les autorités compétentes à cet égard dans l'Etat requis; en conséquence, l'obligation de retour dont traite cet article s'impose auxdites autorités. A cet effet, l'article distingue deux hypothèses: la première concerne le devoir des autorités lorsqu'elles ont été saisies dans le délai d'un an après le déplacement ou le non-retour illicites d'un enfant; la seconde a trait aux conditions qui entourent ce devoir quand l'introduction de la demande est postérieure au délai susmentionné.

107 Dans le premier alinéa, l'article apporte une solution unique au problème soulevé par la détermination de la période pendant laquelle les autorités en question doivent ordonner le retour immédiat de l'enfant. Le problème est important car, dans la mesure où le retour de l'enfant est envisagé dans son intérêt, il est certain que lorsque l'enfant est intégré dans un nouveau milieu, son retour ne devrait se produire qu'après un examen du fond du droit de garde — ce qui nous situe en dehors de l'objectif conventionnel. Or, les difficultés que rencontre toute tentative de traduire le critère de l'intégration de l'enfant sous forme d'une norme objective ont conduit à la fixation d'un délai, qui est peut-être arbitraire, mais qui constitue la «moins mauvaise» réponse aux soucis exprimés sur ce point.

108 Dans l'approche adoptée, il a fallu affronter une pluralité de questions: *primo*, le moment à partir duquel commence le délai; *secundo*, l'extension du délai; *tertio*, le moment d'expiration du délai. En ce qui concerne le premier point, c'est-à-dire la détermination du moment où commence à courir le délai, l'article se réfère au déplacement ou non-retour illicites; la concrétisation de la date décisive en cas de non-retour devant être entendue comme celle à laquelle l'enfant aurait dû être remis au gardien, ou à laquelle le titulaire de la garde a refusé son consentement à

ties of the State to which the child has been taken and which are to decide upon its return. There is a double aspect to this duty: firstly, the use of the most speedy procedures known to their legal system; secondly, that applications are, so far as possible, to be granted priority treatment.

105 The *second paragraph*, so as to prompt internal authorities to accord maximum priority to dealing with the problems arising out of the international removal of children, lays down a non-obligatory time-limit of six weeks, after which the applicant or Central Authority of the requested State may request a statement of reasons for the delay. Moreover, after the Central Authority of the requested State receives the reply, it is once more under a duty to inform, a duty owed either to the Central Authority of the requesting State or to the applicant who has applied to it directly. In short, the provision's importance cannot be measured in terms of the requirements of the obligations imposed by it, but by the very fact that it draws the attention of the competent authorities to the decisive nature of the time factor in such situations and that it determines the maximum period of time within which a decision on this matter should be taken.

Articles 12 and 18 — Duty to return the child

106 These two articles can be examined together since they complement each other to a certain extent, despite their different character.
Article 12 forms an essential part of the Convention, specifying as it does those situations in which the judicial or administrative authorities of the State where the child is located are obliged to order its return. That is why it is appropriate to emphasize once again the fact that the compulsory return of the child depends, in terms of the Convention, on a decision having been taken by the competent authorities of the requested State. Consequently, the obligation to return a child with which this article deals is laid upon these authorities. To this end, the article highlights two cases; firstly, the duty of authorities where proceedings have begun within one year of the wrongful removal or retention of a child and, secondly, the conditions which attach to this duty where an application is submitted after the aforementioned time-limit.

107 In the first paragraph, the article brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith. The problem is an important one since, in so far as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it — something which is outside the scope of the Convention. Now, the difficulties encountered in any attempt to state this test of 'integration of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard.

108 Several questions had to be faced as a result of this approach: firstly, the date from which the time-limit was to begin to run; secondly, extension of the time-limit; thirdly, the date of expiry of the time-limit. As regards the first point, *i.e.* how to determine the date on which the time-limit should begin to run, the article refers to the wrongful removal or retention. The fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to

un prolongement du séjour de l'enfant dans un autre lieu que celui de sa résidence habituelle. En second lieu, la consécration d'un délai unique d'un an, abstraction faite des difficultés rencontrées dans la localisation de l'enfant, constitue une amélioration substantielle du système prévu dans l'article 11 de l'avant-projet élaboré par la Commission spéciale. En effet, par ce biais on a clarifié l'application de la Convention, en éliminant les difficultés inhérentes à la preuve des éventuels problèmes suscités par la localisation de l'enfant. Troisièmement, en ce qui concerne le *terminus ad quem*, l'article retient le moment de l'introduction de la demande, au lieu de la date de la décision, le retard possible dans l'action des autorités compétentes ne devant pas nuire aux intérêts des parties protégées par la Convention.

En résumé, chaque fois que les circonstances que nous venons d'examiner se trouvent réunies dans un cas d'espèce, les autorités judiciaires ou administratives doivent ordonner le retour immédiat de l'enfant, sauf si elles constatent l'existence d'une des exceptions prévues par la Convention elle-même.

109 Le deuxième alinéa répond à la nécessité, ressentie tout au long des travaux préparatoires,[41] d'assouplir les conséquences de l'adoption d'un délai rigide passé lequel la Convention ne pourrait pas être invoquée. La solution finalement retenue[42] étend nettement le domaine d'application de la Convention en consacrant, pour une période indéfinie, une véritable obligation de retourner l'enfant. De toute façon, on ne peut pas ignorer qu'une telle obligation disparaît si on arrive à établir que «l'enfant s'est intégré dans son nouveau milieu». La disposition ne précise point qui doit prouver cette circonstance; pourtant, il semble logique de penser qu'une telle tâche incombe à l'enleveur ou à la personne qui s'oppose au retour de l'enfant, tout en sauvegardant l'éventuel pouvoir d'appréciation des autorités internes à cet égard. En tout cas, la preuve ou la constatation du nouvel enracinement de l'enfant ouvre la porte à la possibilité d'une procédure plus longue que celle visée au premier alinéa. En définitive, tant pour ces raisons que du fait que le retour se produira toujours, par la nature même des choses, beaucoup plus tard qu'un an après l'enlèvement, la Convention ne parle pas dans ce contexte de retour «immédiat», mais simplement de retour.

110 Un problème commun aux deux situations examinées est la détermination du *lieu* où il faut retourner l'enfant. A cet égard, la Convention n'a pas retenu une proposition tendant à préciser que le retour se ferait toujours vers l'Etat de la résidence habituelle de l'enfant avant son déplacement. Certes, une des raisons sous-jacentes à l'idée de retourner l'enfant est le souci d'éviter que la compétence «naturelle» des tribunaux de l'Etat de sa résidence ne soit bafouée par une voie de fait; néanmoins, l'inclusion d'une telle précision dans le texte de la Convention en aurait rendu l'application inutilement rigide. En effet, nous ne devons pas ignorer que ce qu'on entend protéger en luttant contre les enlèvements internationaux d'enfants, c'est le droit de ceux-ci à ne pas être écartés d'un certain milieu qui, parfois, sera fondamentalement familial. Or, si le demandeur n'habite plus l'Etat de la résidence habituelle antérieure au déplacement, le retour de l'enfant dans cet Etat poserait des problèmes pratiques difficiles à résoudre. Le silence de la Convention sur ce point doit donc être interprété comme permettant aux autorités de l'Etat de refuge de renvoyer

[41] Voir Rapport de la Commission spéciale No 92.
[42] Voir Doc. trav. No 25 (Proposition de la délégation de la République fédérale d'Allemagne), et P.-v. Nos 7 et 10.

an extension of the child's stay in a place other than that of its habitual residence. Secondly, the establishment of a single time-limit of one year (putting on one side the difficulties encountered in establishing the child's whereabouts) is a substantial improvement on the system envisaged in article 11 of the Preliminary Draft drawn up by the Special Commission. In fact, the application of the Convention was thus clarified, since the inherent difficulty in having to prove the existence of those problems which can surround the locating of the child was eliminated. Thirdly, as regards the *terminus ad quem*, the article has retained the date on which proceedings were commenced, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interests of parties protected by the Convention.
To sum up, whenever the circumstances just examined are found to be present in a specific case, the judicial or administrative authorities must order the return of the child forthwith, unless they aver the existence of one of the exceptions provided for in the Convention itself.

109 The second paragraph answered to the need, felt strongly throughout the preliminary proceedings,[41] to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted[42] plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an obligation disappears whenever it can be shown that 'the child is now settled in its new environment'. The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard. In any case, the proof or verification of a child's establishment in a new environment opens up the possibility of longer proceedings than those envisaged in the first paragraph. Finally, and as much for these reasons as for the fact that the return will, in the very nature of things, always occur much later than one year after the abduction, the Convention does not speak in this context of return 'forthwith' but merely of return.

110 One problem common to both of these situations was determining the *place* to which the child had to be returned. The Convention did not accept a proposal to the effect that the return of the child should always be to the State of its habitual residence before its removal. Admittedly, one of the underlying reasons for requiring the return of the child was the desire to prevent the 'natural' jurisdiction of the courts of the State of the child's residence being evaded with impunity, by force. However, including such a provision in the Convention would have made its application so inflexible as to be useless. In fact, we must not forget that it is the right of children not to be removed from a particular environment which sometimes is a basically family one, which the fight against international child abductions seeks to protect. Now, when the applicant no longer lives in what was the State of the child's habitual residence prior to its removal, the return of the child to that State might cause practical problems which would be difficult to resolve. The Convention's silence on this matter must therefore be understood as allowing the authorities of the State of refuge

[41] See Report of the Special Commission, No 92.
[42] See Working Document No 25 (Proposal of the delegation of the Federal Republic of Germany) and *P.-v.* Nos 7 and 10.

l'enfant directement au demandeur, sans égard au lieu de la résidence actuelle de celui-ci.

111 Le troisième alinéa de l'article 12 introduit une idée tout à fait logique, inspirée par des soucis d'économie procédurale, en vertu de laquelle les autorités qui connaissent d'une affaire peuvent suspendre la procédure ou rejeter la demande, lorsqu'elles ont des raisons de croire que l'enfant a été emmené dans un autre Etat. Les moyens par lesquels elles peuvent arriver à une telle conviction ne sont pas envisagés dans l'article; ils dépendront par conséquent du droit interne de l'Etat concerné.

112 Finalement, *l'article 18* signale que rien dans ce chapitre ne limite le pouvoir de l'autorité judiciaire ou administrative saisie d'ordonner le retour de l'enfant à tout moment. Rédigée sur la base de l'article 15 de l'avant-projet, cette disposition, qui n'impose aucune obligation, souligne la nature non exhaustive, complémentaire, de la Convention. En effet, elle autorise les autorités compétentes à ordonner le retour de l'enfant en invoquant d'autres dispositions plus favorables à ce but. Ceci peut surtout se produire dans les situations envisagées au deuxième alinéa de l'article 12, c'est-à-dire quand, du fait que l'autorité a été saisie après que se soit écoulé plus d'un an depuis le déplacement, le retour peut être refusé si l'enfant s'est intégré dans son nouveau milieu social et familial.

Articles 13 et 20 — Exceptions possibles au retour de l'enfant

113 Dans la première partie de ce Rapport nous avons commenté longuement la justification, l'origine et la portée des exceptions consacrées dans les articles examinés.[43] Nous nous limiterons ici à faire quelques considérations sur sa teneur littérale. En termes généraux, il convient d'insister sur le fait que les exceptions visées dans les deux articles en question ne sont pas d'application automatique, en ce sens qu'elles ne déterminent pas inévitablement le non-retour de l'enfant; par contre, la nature même de ces exceptions est de donner aux juges la possibilité — non pas de leur imposer l'obligation — de refuser le retour dans certaines circonstances.

114 En ce qui concerne *l'article 13*, le paragraphe introductif du premier alinéa met en relief que le fardeau de la preuve des circonstances énoncées aux sous-alinéas *a* et *b* est à la charge de celui qui s'oppose au retour de l'enfant, c'est-à-dire à une personne, institution ou organisme qui peut parfois ne pas coïncider avec l'enleveur. La solution retenue se limite certes à préciser une maxime générale de droit, selon laquelle celui qui invoque un fait (ou un droit) doit le prouver; mais en adoptant cette optique, la Convention a entendu équilibrer la position de la personne dépossédée par rapport à l'enleveur qui, en principe, a pu choisir le for de sa convenance.

115 Les exceptions retenues à la lettre *a* sont établies en raison du fait que la conduite du prétendu gardien permet de douter de l'existence d'un déplacement ou d'un non-retour illicites, au sens de la Convention. D'une part, il s'agit des situations où celui qui avait le soin de la personne de l'enfant n'exerçait pas effectivement le droit de garde à l'époque du déplacement ou du non-retour. La Convention

[43] Voir *supra* Nos 28 à 35.

to return the child directly to the applicant, regardless of the latter's present place of residence.

111 The third paragraph of article 12 introduces a perfectly logical provision, inspired by considerations of procedural economy, by virtue of which the authorities which are acquainted with a case can stay the proceedings or dismiss the application, where they have reason to believe that the child has been taken to another State. The reasons by which they may come to such a conclusion are not stated in the article, and will therefore depend on the internal law of the State in question.

112 Finally, *article 18* indicates that nothing in this chapter limits the power of a judicial or administrative authority to order the return of the child at any time. This provision, which was drafted on the basis of article 15 of the Preliminary Draft, and which imposes no duty, underlines the non-exhaustive and complementary nature of the Convention. In fact, it authorizes the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end. This may happen particularly in the situations envisaged in the second paragraph of article 12, *i.e.* where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment.

Articles 13 and 20 — Possible exceptions to the return of the child

113 In the first part of this Report we commented at length upon the reasons for, the origins and scope of, the exceptions contained in the articles concerned.[43] We shall restrict ourselves at this point to making some observations on their literal meaning. In general, it is appropriate to emphasize that the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion — and does not impose upon them a duty — to refuse to return a child in certain circumstances.

114 With regard to *article 13*, the introductory part of the first paragraph highlights the fact that the burden of proving the facts stated in sub-paragraphs *a* and *b* is imposed on the person who opposes the return of the child, be he a physical person, an institution or an organization, that person not necessarily being the abductor. The solution adopted is indeed limited to stating the general legal maxim that he who avers a fact (or a right) must prove it, but in making this choice, the Convention intended to put the dispossessed person in as good a position as the abductor who in theory has chosen what is for him the most convenient forum.

115 The exceptions contained in *a* arise out of the fact that the conduct of the person claiming to be the guardian of the child raises doubts as to whether a wrongful removal or retention, in terms of the Convention, has taken place. On the one hand, there are situations in which the person who had the care of the child did not actually exercise custody rights at the time of the removal or retention. The Conven-

[43] See *supra*, Nos 28 to 35.

n'inclut pas une définition de ce qu'il faut entendre par «exercice effectif» de la garde, mais cette disposition se réfère de façon expresse au soin de la personne de l'enfant; donc, si l'on en compare le texte avec celui de la définition du droit de garde contenue à l'article 5, on peut conclure qu'il y a garde effective quand le gardien s'occupe des soins de la personne de l'enfant, même si, pour des raisons plausibles (maladie, séjour d'études, etc.), dans chaque cas concret, enfant et gardien n'habitent pas ensemble. Il s'ensuit que la détermination du caractère effectif ou non d'une garde doit être établi par le juge d'après les circonstances qui entourent chaque cas d'espèce.

D'ailleurs en mettant en relation ce paragraphe avec la définition du déplacement ou du non-retour illicites de l'article 3, il faut conclure que la preuve que la garde n'était pas effective ne constitue pas une exception à l'obligation de retourner l'enfant lorsque le gardien dépossédé n'exerçait pas de façon effective son droit à cause précisément de l'action de l'enleveur. En effet, la délimitation des situations protégées, contenue à l'article 3, préside toute la Convention et on ne peut interpréter aucun de ses articles en contradiction avec cette délimitation.

D'autre part, la conduite du gardien peut aussi altérer la qualification de l'action du ravisseur, au cas où il aurait consenti ou acquiescé postérieurement au déplacement qu'il combat maintenant. Cette précision a donné la possibilité de supprimer toute référence à l'exercice de «bonne foi» du droit de garde, en évitant simultanément que la Convention puisse être utilisée comme instrument d'un «marchandage» possible entre les parties.

116 Les exceptions consacrées à la lettre *b* concernent des situations dans lesquelles l'enlèvement international d'un enfant s'est vraiment produit, mais où le retour de l'enfant serait contraire à son intérêt, tel qu'il est apprécié dans ce sous-alinéa. Chacun des termes employés dans cette disposition reflète un délicat compromis atteint au cours des travaux de la Commission spéciale et qui s'est maintenu inchangé; en conséquence, on ne peut pas déduire, *a contrario*, des interprétations extensives du rejet, au cours de la Quatorzième session, des propositions tendant à inclure une allusion expresse à l'impossibilité d'invoquer cette exception lorsque le retour de l'enfant pourrait nuire à ses perspectives économiques ou éducatives.[44]

117 Il n'y a rien à ajouter aux commentaires déjà faits sur le deuxième alinéa de cet article (notamment, *supra* No 31).

Quant au troisième alinéa, il contient une disposition de nature très différente; il s'agit, en effet, d'une disposition procédurale qui vise, d'une part, à équilibrer la charge de la preuve imposée à la personne qui s'oppose au retour de l'enfant et d'autre part, à renforcer l'utilité des informations fournies par les autorités de l'Etat de la résidence habituelle de l'enfant. De telles informations, qui peuvent émaner soit de l'Autorité centrale, soit de toute autre autorité compétente, peuvent en particulier être précieuses pour permettre aux autorités requises de constater l'existence des circonstances à la base des exceptions visées aux deux premiers alinéas de cet article.

118 La possibilité reconnue à *l'article 20* de ne pas retourner un enfant quand ce retour «ne serait pas permis par les principes fondamentaux de l'Etat requis sur la sauvegarde des droits de l'homme et des libertés fondamentales», a été placée significativement dans le dernier

[44] Voir Doc. trav. No 12 (*Proposal of the United States delegation*) et No 42 (Proposition de la délégation hellénique), ainsi que le P.-v. No 8.

tion includes no definition of 'actual exercise' of custody, but this provision expressly refers to the care of the child. Thus, if the text of this provision is compared with that of article 5 which contains a definition of custody rights, it can be seen that custody is exercised effectively when the custodian is concerned with the care of the child's person, even if, for perfectly valid reasons (illness, education, etc.) in a particular case, the child and its guardian do not live together. It follows from this that the question of whether custody is actually exercised or not must be determined by the individual judge, according to the circumstances of each particular case.

Moreover, by relating this paragraph to the definition of wrongful removal or retention in article 3, one must conclude that proof that custody was not actually exercised does not form an exception to the duty to return the child if the dispossessed guardian was unable actually to exercise his rights precisely because of the action of the abductor. In fact, the categorization of protected situations, contained in article 3, governs the whole Convention, and cannot be contradicted by a contrary interpretation of any of the other articles.

On the other hand, the guardian's conduct can also alter the characterization of the abductor's action, in cases where he has agreed to, or thereafter acquiesced in, the removal which he now seeks to challenge. This fact allowed the deletion of any reference to the exercise of custody rights 'in good faith', and at the same time prevented the Convention from being used as a vehicle for possible 'bargaining' between the parties.

116 The exceptions contained in *b* deal with situations where international child abduction has indeed occurred, but where the return of the child would be contrary to its interests, as that phrase is understood in this sub-paragraph. Each of the terms used in this provision is the result of a fragile compromise reached during the deliberations of the Special Commission and has been kept unaltered. Thus it cannot be inferred, *a contrario*, from the rejection during the Fourteenth Session of proposals favouring the inclusion of an express provision stating that this exception could not be invoked if the return of the child might harm its economic or educational prospects,[44] that the exceptions are to receive a wide interpretation.

117 Nothing requires to be added to the preceding commentary on the second paragraph of this article (notably in No 31, *supra*.

The third paragraph contains a very different provision which is in fact procedural in nature and seeks on the one hand to compensate for the burden of proof placed on the person who opposes the return of the child, and on the other hand to increase the usefulness of information supplied by the authorities of the State of the child's habitual residence. Such information, emanating from either the Central Authority or any other competent authority, may be particularly valuable in allowing the requested authorities to determine the existence of those circumstances which underlie the exceptions contained in the first two paragraphs of this article.

118 It is significant that the possibility, acknowledged in *article 20*, that the child may not be returned when its return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms' has been placed in the

[44] See Working Documents Nos 12 (Proposal of the United States delegation) and 42 (*Proposition de la délégation hellénique*), and also *P.-v.* No 8.

article du chapitre; on a voulu souligner de la sorte le caractère nettement exceptionnel que doit toujours revêtir son application. Quant à savoir quel est le contenu de cette disposition, nous nous limiterons à faire deux remarques: en premier lieu, même si sa teneur littérale rappelle fortement la terminologie des textes internationaux en matière de protection des droits de l'homme, cette norme ne vise pas les développements atteints sur le plan international; par contre, elle ne concerne que les principes admis dans le droit de l'Etat requis, soit par voie de droit international général ou conventionnel, soit par voie législative interne. En conséquence, pour pouvoir refuser un retour sur la base de cet article, il sera nécessaire que les principes fondamentaux en la matière acceptés par l'Etat requis ne le permettent pas; il ne suffit pas que le retour soit incompatible, ou même manifestement incompatible avec ces principes. En second lieu, l'invocation de tels principes ne devra en aucun cas être plus fréquente ni plus facilement admise qu'elle ne le serait pour régler des situations purement internes. Le contraire serait discriminatoire en soi, c'est-à-dire opposé à l'un des principes fondamentaux les plus généralement reconnus dans les droits internes. Or, l'étude de la jurisprudence des différents pays montre que l'application par le juge ordinaire de la législation concernant les droits de l'homme et les libertés fondamentales se fait avec une prudence qu'il faut s'attendre à voir maintenue à l'égard des situations internationales que vise la Convention.

Article 14 — Assouplissement de la preuve du droit étranger

119 Du moment que la Convention fait dépendre le caractère illicite d'un déplacement d'enfants du fait qu'il se soit produit en violation de l'exercice effectif d'un droit de garde attribué par le droit de la résidence habituelle de l'enfant, il est évident que les autorités de l'Etat requis devront prendre ce droit en considération pour décider du retour de l'enfant. En ce sens, la disposition incluse dans l'article 13 de l'avant-projet,[45] d'après laquelle ces autorités «tiendront compte» du droit de la résidence habituelle de l'enfant pouvait être considérée comme superflue. Cependant, une telle disposition, d'une part, soulignait bien qu'il ne s'agissait pas d'appliquer un droit, mais de l'utiliser comme instrument dans l'appréciation de la conduite des parties; d'autre part, dans la mesure où elle était applicable aux décisions qui pouvaient être à la base du droit de garde violé, elle faisait apparaître la Convention comme une sorte de *lex specialis*, d'après laquelle les décisions visées auraient eu dans l'Etat requis un effet indirect qui ne pouvait pas être conditionné par l'obtention d'un exequatur ou de toute autre modalité de reconnaissance des décisions étrangères.

Puisque le premier aspect découlait nécessairement d'autres dispositions conventionnelles, la teneur actuelle de l'article 14 s'occupe seulement du second. L'article se présente donc comme une disposition facultative concernant la preuve du droit de la résidence habituelle de l'enfant, en vertu de laquelle l'autorité saisie «peut tenir compte directement du droit et des décisions judiciaires ou administratives reconnues formellement ou non dans l'Etat de la résidence habituelle de l'enfant, sans avoir recours aux procédures

[45] Voir Rapport de la Commission spéciale, Nos 102-103.

last article of the chapter: it was thus intended to emphasize the always clearly exceptional nature of this provision's application. As for the substance of this provision, two comments only are required. Firstly, even if its literal meaning is strongly reminiscent of the terminology used in international texts concerning the protection of human rights, this particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently, so as to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject-matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles. Secondly, such principles must not be invoked any more frequently, nor must their invocation be more readily admissible than they would be in their application to purely internal matters. Otherwise, the provision would be discriminatory in itself, and opposed to one of the most widely recognized fundamental principles in internal laws. A study of the case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the Convention has in view.

Article 14 — Relaxation of the requirements of proof of foreign law

119 Since the wrongful nature of a child's removal is made to depend, in terms of the Convention, on its having occurred as the result of a breach of the actual exercise of custody rights conferred by the law of the child's habitual residence, it is clear that the authorities of the requested State will have to take this law into consideration when deciding whether the child should be returned. In this sense, the provision in article 13 of the preliminary draft Convention,[45] that the authorities 'shall have regard to' the law of the child's habitual residence, could be regarded as superfluous. However, such a provision would on the one hand underline the fact that there is no question of applying that law, but merely of using it as a means of evaluating the conduct of the parties, while on the other hand, in so far as it applied to decisions which could underlie the custody rights that had been breached, it would make the Convention appear to be a sort of *lex specialis*, according to which those decisions would receive effect indirectly in the requested State, an effect which would not be made conditional on the obtaining of an *exequatur* or any other method of recognition of foreign judgments.

Since the first aspect of article 14 necessarily derives from other provisions of the Convention, the actual purport of article 14 is concerned only with the second. The article therefore appears as an optional provision for proving the law of the child's residence and according to which the authority concerned 'may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of habitual residence of the child, without recourse to the specific procedures for the

[45] See Report of the Special Commission. Nos 102-103.

spécifiques sur la preuve de ce droit ou pour la reconnaissance des décisions étrangères qui seraient autrement applicables». Il n'est pas nécessaire d'insister sur l'importance pratique que cette norme peut avoir pour aboutir aux décisions rapides qui sont à la base du mécanisme conventionnel.

Article 15 — Possibilité de demander une décision ou une attestation des autorités de la résidence habituelle de l'enfant

120 Cet article répond aux difficultés que les autorités compétentes de l'Etat requis peuvent éprouver à statuer sur la demande en retour de l'enfant sans être certaines de l'application au cas d'espèce du droit de la résidence habituelle de celui-ci. Si tel est le cas, les autorités en question peuvent demander «la production par le demandeur d'une décision ou d'une attestation émanant des autorités de l'Etat de la résidence habituelle de l'enfant». A ce propos, nous ferons seulement deux remarques. La première concerne la nature non contraignante de la pétition, en ce sens que le retour de l'enfant ne peut pas être conditionné par son accomplissement; une telle conclusion s'impose en effet au vu tant de la teneur littérale de l'article (qui parle de «demander» et non pas d'«exiger») que de la possibilité, reconnue par la même disposition, du fait que l'obtention des documents sollicités ne soit pas possible dans l'Etat de la résidence de l'enfant. Or, sur ce dernier point, l'obligation que l'article impose aux Autorités centrales d'assister le demandeur pour obtenir la décision ou attestation doit faciliter sa tâche, étant donné que l'Autorité centrale peut produire une attestation concernant son droit en matière de garde, selon l'article 8*f*. En second lieu, le contenu de la décision ou attestation doit porter sur le caractère illicite, au sens de la Convention, du déplacement ou du non-retour; cela signifie, à notre avis, que l'une ou l'autre devra se prononcer sur les deux éléments retenus à l'article 3, et donc constater que le déplacement a interrompu une garde effective et légitime *prima facie*, d'après le droit de la résidence habituelle de l'enfant.

Article 16 — Prohibition de statuer sur le fond du droit de garde

121 En vue de faciliter la réalisation de l'objectif conventionnel relatif au retour de l'enfant, cet article essaie d'éviter qu'une décision sur le fond du droit de garde ne soit prise dans l'Etat de refuge. Dans ce but, il interdit aux autorités compétentes de cet Etat de statuer sur ce point, si elles sont informées que l'enfant concerné a été déplacé ou retenu illicitement, selon la Convention. Cette prohibition disparaîtra: lorsqu'il sera établi qu'il n'y a pas lieu de renvoyer l'enfant, d'après la Convention; ou lorsqu'une période raisonnable ne se sera pas écoulée sans qu'une demande en application de la Convention ait été introduite. Les deux circonstances qui peuvent mettre fin au devoir consacré dans cet article sont très différentes, tant par leur justification que par leurs conséquences. En effet, il est absolument logique de prévoir que l'obligation cesse dès qu'on constate que les conditions pour un retour de l'enfant ne sont pas réunies, soit parce que les parties sont arrivées à une solution amiable, soit parce qu'il y a lieu d'apprécier une des exceptions prévues aux articles 13 et 20; de surcroît, dans de tels cas, la décision sur le fond du droit de garde réglera l'affaire de façon définitive.

Par contre, étant donné que «l'information» sur laquelle on peut justifier une prohibition de statuer doit procéder, soit de l'introduction d'une demande en retour de l'enfant,

proof of that law or for the recognition of foreign decisions which would otherwise be applicable'. There is no need to stress the practical importance this rule may have in leading to the speedy decisions which are fundamental to the working of the Convention.

Article 15 — The possibility of requesting a decision or other determination from the authorities of the child's habitual residence

120 This article answers to the difficulties which the competent authorities of the requested State might experience in reaching a decision on an application for the return of a child through being uncertain of how the law of the child's habitual residence will apply in a particular case. Where this is so, the authorities concerned can request 'that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination'. Only two comments will be made here. The first concerns the voluntary nature of the request, in the sense that the return of the child cannot be made conditional upon such decision or other determination being provided. This conclusion arises in fact as much from the actual terms of the article (which speaks of 'requesting' and not 'requiring') as from the fact acknowledged in the same provision, that it may be impossible to obtain the requested documents in the State of the child's residence. Now, with regard to this last point, the duty which the article places upon Central Authorities to help the applicant obtain the decision or determination must make his task easier, since the Central Authority can provide a certificate concerning its relevant law in terms of article 8(3)(*f*). Secondly, the contents of the decision or certificate must have a bearing upon the wrongful nature, in the Convention sense, of the removal or retention. This means, in our opinion, that one or the other will have to contain a decision on the two elements in article 3, and thus establish that the removal was in breach of custody rights which, *prima facie*, were being exercised legitimately and in actual fact, in terms of the law of the child's habitual residence.

Article 16 — Prohibition against deciding upon the merits of custody rights

121 This article, so as to promote the realization of the Convention's objects regarding the return of the child, seeks to prevent a decision on the merits of the right to custody being taken in the State of refuge. To this end, the competent authorities in this State are forbidden to adjudicate on the matter when they have been informed that the child in question has been, in terms of the Convention, wrongfully removed or retained. This prohibition will disappear when it is shown that, according to the Convention, it is not appropriate to return the child, or where a reasonable period of time has elapsed without an application under the Convention having been lodged. The two sets of circumstances which can put an end to the duty contained in the article are very different, both in the reasons behind them and in their consequences. In fact, it is perfectly logical to provide that this obligation will cease as soon as it is established that the conditions for a child's return have not been met, either because the parties have come to an amicable arrangement or because it is appropriate to consider on the exceptions provided for in articles 13 and 20. Moreover, in such cases, the decision on the merits of the custody rights will finally dispose of the case.
On the other hand, since the 'notice' which may justify the prohibition against deciding upon the merits of the case must derive either from an application for the return of the

directement par le demandeur, soit d'une communication officielle de l'Autorité centrale du même Etat, il est difficile d'imaginer que les cas où l'information n'est pas suivie d'une demande ne seraient pas compris dans la première hypothèse. D'ailleurs, si de telles situations existent, l'ambiguïté de l'expression «période raisonnable» peut conduire à l'adoption d'une décision avant l'expiration de la période d'un an, retenue à l'article 12, alinéa premier; or, dans un tel cas, la décision adoptée coexisterait avec l'obligation de retourner l'enfant, d'après la Convention, posant ainsi un problème dont traite l'article 17.

Article 17 — Existence d'une décision relative à la garde dans l'Etat requis

122 La genèse de cet article montre clairement l'objectif qu'il poursuit: la Première commission a initialement adopté une disposition qui donnait priorité absolue à l'application de la Convention, en faisant prévaloir l'obligation de retourner l'enfant sur toute autre décision relative à la garde, rendue ou susceptible d'être reconnue dans l'Etat requis. En même temps, elle a accepté la possibilité d'une réserve qui aurait permis de refuser ce retour, quand il se serait avéré incompatible avec une décision existant dans l'Etat de refuge, antérieure à «l'enlèvement».[46] Le texte actuel est donc le produit d'un compromis en vue d'éliminer une réserve dans la Convention, sans en diminuer le degré d'acceptabilité par les Etats.[47] En ce sens, on a remanié la disposition originale en soulignant que ne fera pas obstacle au retour de l'enfant la *seule* existence d'une décision, et en donnant la possibilité au juge de prendre en considération les motifs de cette décision pour décider sur la demande de retour.

123 La solution incorporée dans l'article s'accorde parfaitement au but conventionnel de décourager les éventuels enleveurs qui ne pourront protéger leur action ni par une décision «morte», antérieure au déplacement, mais jamais exécutée, ni par une décision obtenue postérieurement et qui sera, dans la plupart des cas, entâchée de fraude. Par conséquent, l'autorité compétente de l'Etat requis devra considérer la demande de retour comme la preuve de ce qu'un élément nouveau est intervenu, qui l'oblige à remettre en question une décision non effective, ou adoptée sur la base de critères abusifs de compétence, ou encore ne respectant pas les droits de défense de toutes les parties concernées. D'ailleurs, étant donné que la décision sur le retour de l'enfant ne concerne pas le fond du droit de garde, les motifs de la décision qui pourront être pris en considération se limitent à ce qui concerne «l'application de la Convention». Quant à la situation provoquée par une décision rendue par les autorités de l'Etat de la résidence habituelle de l'enfant avant son «enlèvement», accordant la garde à l'«enleveur», elle serait normalement résolue par l'application de l'article 3 de la Convention, puisque l'existence du droit de garde réclamé doit être apprécié selon le droit dudit Etat.

Article 19 — Portée des décisions sur le retour de l'enfant

124 Cette disposition exprime l'idée qui se trouve à la base même de toute la Convention; en fait, nous nous en sommes

[46] Doc. trav. No 53, paragraphe 2 (*Proposal of the United Kingdom delegation*), No 32, article XG (*Proposal of the Netherlands delegation*) et No 19 (*Proposal of the Japanese delegation*), ainsi que P.-v. No 12.
[47] Voir Doc. trav. No 77 (Proposition du Président, appuyée par le Rapporteur et les délégations de la République fédérale d'Allemagne, de l'Australie, du Canada, de l'Espagne, de la Finlande, de la France, de l'Irlande, du Royaume-Uni et de la Suisse) et le P.-v. No 17.

child which is submitted directly by the applicant, or from an official communication from the Central Authority of the same State, it is difficult to see how cases in which the notice is not followed by an application would not be contained within the first hypothesis. Moreover, if such situations do exist, the ambiguity in the phrase 'reasonable time' could lead to decisions being taken before the period of one year, contained in article 12, first paragraph, has expired; in such a case, this decision would coexist alongside the duty to return the child, in accordance with the Convention, thus giving rise to a problem which is dealt with in article 17.

Article 17 — The existence of a decision on custody in the requested State

122 The origins of this article clearly demonstrate the end pursued. The First Commission initially adopted a provision which gave absolute priority to the application of the Convention, by making the duty to return the child prevail over any other decision on custody, which had been issued or was likely to be issued in the requested State. At the same time, it accepted the possibility of a reservation allowing the return of the child to be refused, when its return was shown to be incompatible with a decision existing in the State of refuge, prior to the 'abduction'.[46] The current text is therefore the result of a compromise which was reached in order to eliminate a reservation in the Convention, without at the same time reducing the extent of its acceptability to the States.[47] In this way, the original provision was recast by emphasizing that the sole fact that a decision existed would not of itself prevent the return of the child, and by allowing judges to take into consideration the reasons for this decision in coming to a decision themselves on the application for the child's return.

123 The solution contained in this article accords perfectly with the object of the Convention, which is to discourage potential abductors, who will not be able to defend their action by means either of a 'dead' decision taken prior to the removal but never put into effect, or of a decision obtained subsequently, which will, in the majority of cases, be vitiated by fraud. Consequently, the competent authority of the requested State will have to regard the application for the child's return as proof of the fact that a new factor has been introduced which obliges it to reconsider a decision which has not been put into effect, or which was taken on the basis of exorbitant grounds of jurisdiction, or else failed to have regard to the right of all the parties concerned to state their case. Moreover, since the decision on the return of the child is not concerned with the merits of custody rights, the reasons for the decision which may be taken into consideration are limited to those which concern 'the application of the Convention'. A situation brought about by a decision issued by the authorities of the State of a child's habitual residence prior to its 'abduction' and which granted custody to the 'abductor', would normally be resolved by applying article 3 of the Convention, since the existence of a claimed right to custody must be understood in accordance with the law of that State.

Article 19 — Scope of the decisions on the return of the child

124 This provision expresses an idea which underlies the whole of the Convention; as a matter of fact, in this Report

[46] Working Documents Nos 53, paragraph 2 (Proposal of the United Kingdom delegation), 32, article XG (Proposal of the Netherlands delegation), and 19 (Proposal of the Japanese delegation), as well as *P.-v.* No 12.
[47] See Working Document No 77 (Proposal of the Chairman, supported by the Rapporteur and the delegations of Australia, Canada, Finland, France, the Federal Republic of Germany, Ireland, Spain, Switzerland and the United Kingdom) and *P.-v.* No 17.

déjà occupé à plusieurs reprises dans ce Rapport, en ce qui concerne tant sa justification que son commentaire. Cet article se limite à préciser la portée du retour de l'enfant que la Convention essaie de garantir; un retour qui, pour pouvoir être «immédiat» ou «rapide», ne doit pas préjuger du fond du droit de garde et qui cherche précisément à éviter qu'une décision ultérieure sur ce droit puisse être influencée par un changement des circonstances, introduit unilatéralement par une des parties.

we have already been concerned on several occasions as much with the reasons for it as with commenting upon it. This article is restricted to stating the scope of decisions taken regarding the return of the child which the Convention seeks to guarantee, a return which, so as to be 'forthwith' or 'speedy', must not prejudge the merits of custody rights; this provision seeks to prevent a later decision on these rights being influenced by a change of circumstances brought about by the unilateral action of one of the parties.

CHAPITRE IV — DROIT DE VISITE

Article 21

125 Avant tout, il s'impose de reconnaître que la Convention n'essaie pas d'établir une réglementation exhaustive du droit de visite, ce qui aurait sans doute débordé les objectifs conventionnels. En effet, même si l'attention prêtée au droit de visite répond à la conviction qu'il doit être le corollaire normal du droit de garde, au niveau des buts de la Convention il suffisait d'assurer la coopération des Autorités centrales en ce qui concerne, soit son organisation, soit la protection de son exercice effectif. Par ailleurs le temps particulièrement court que lui a consacré la Première commission est peut-être le meilleur indicatif du haut degré de consensus atteint à son égard.

126 Comme nous venons de l'indiquer, l'article repose dans son ensemble sur la coopération entre Autorités centrales. Une proposition visant à introduire, dans un nouvel alinéa, la seule compétence en matière de droit de visite tant des autorités que de la loi de l'Etat de la résidence habituelle de l'enfant a été rejetée à une large majorité.[48] L'organisation et la protection de l'exercice effectif du droit de visite sont donc toujours envisagées par la Convention comme une fonction essentielle des Autorités centrales. En ce sens, le premier alinéa consacre deux points importants: d'un côté la liberté des particuliers pour saisir l'Autorité centrale de leur choix; de l'autre côté, l'objet de la demande adressée à l'Autorité centrale peut être, soit l'organisation d'un droit de visite, c'est-à-dire son établissement, soit la protection de l'exercice d'un droit de visite déjà déterminé. Or, surtout quand la demande vise l'organisation du droit prétendu, ou lorsque son exercice se heurte à l'opposition du titulaire de la garde, le recours à des procédures légales s'imposera très fréquemment; à cet effet, le troisième alinéa de l'article envisage la possibilité pour les Autorités centrales d'entamer ou de favoriser de telles procédures, soit directement, soit par des intermédiaires.

127 Les problèmes abordés au deuxième alinéa sont de nature très différente. Il s'agit d'assurer l'exercice paisible du droit de visite sans qu'il mette en danger le droit de garde. Dans ce sens, cette disposition contient des éléments importants pour atteindre ce but. Au centre même de la solution esquissée, il faut situer, une fois encore, la coopération entre Autorités centrales, une coopération qui vise tant à faciliter l'exercice du droit de visite qu'à garantir l'accomplissement de toute condition à laquelle un tel exercice serait soumis.

[48] Voir Doc. trav. No 31 (*Proposal of the Danish delegation*) et P.-v. No 13.

CHAPTER IV — RIGHTS OF ACCESS

Article 21

125 Above all, it must be recognized that the Convention does not seek to regulate access rights in an exhaustive manner; this would undoubtedly go beyond the scope of the Convention's objectives. Indeed, even if the attention which has been paid to access rights results from the belief that they are the normal corollary of custody rights, it sufficed at the Convention level merely to secure co-operation among Central Authorities as regards either their organization or the protection of their actual exercise. In other respects, the best indication of the high level of agreement reached regarding access rights is the particularly short amount of time devoted to them by the First Commission.

126 As we have just pointed out, the article as a whole rests upon co-operation among Central Authorities. A proposal which sought to insert a provision in a new paragraph that both the authorities and the law of the State of the child's habitual residence should have exclusive jurisdiction in questions of access rights, was rejected by a large majority.[48] The organizing and securing of the actual exercise of access rights was thus always seen by the Convention as an essential function of the Central Authorities. Understood thus, the first paragraph contains two important points: in the first place, the freedom of individuals to apply to the Central Authority of their choice, and secondly the fact that the purpose of the application to the Central Authority can be either the organization of access rights, *i.e.* their establishment, or the protection of the exercise of previously determined access rights. Now, recourse to legal proceedings will arise very frequently, especially when the application seeks to organize rights which are merely claimed or when their exercise runs up against opposition from the holder of the rights of custody. With this in view, the article's third paragraph envisages the possibility of Central Authorities initiating or assisting in such proceedings, either directly, or through intermediaries.

127 The nature of the problems tackled in the second paragraph is very different. Here it is a question of securing the peaceful enjoyment of access rights without endangering custody rights. This provision therefore contains important elements for the attainment of this end. Once again, co-operation among Central Authorities is placed, of necessity, in the very centre of the picture, and it is a co-operation designed as much to promote the exercise of access rights as to guarantee the fulfilment of any conditions to which their exercise may be subject.

[48] See Working Document No 31 (Proposal of the Danish delegation) and *P.-v.* No 13.

Parmi les moyens concrets d'assurer l'exercice du droit de visite, l'article 21 en retient seulement un, lorsqu'il signale que l'Autorité centrale doit essayer que «soient levés, dans toute la mesure du possible, les obstacles de nature à s'y opposer»; obstacles qui, notamment, peuvent être légaux ou dérivés d'éventuelles responsabilités de type pénal. Le reste est laissé à la coopération entre Autorités centrales, considérée comme la meilleure méthode pour obtenir que les conditions imposées à l'exercice du droit de visite soient respectées. En effet, ce respect constitue, pour le titulaire de la garde, la seule garantie qu'un tel exercice ne serait pas nuisible à ses propres droits.

128 Sur la question de savoir comment les Autorités centrales vont organiser cette coopération en vue d'assurer le caractère «innocent» de l'exercice d'un droit de visite, la Convention ne donne pas d'exemples, car ils auraient pu être interprétés restrictivement. On peut donc mentionner, à titre purement indicatif, comme le faisait le Rapport de l'avant-projet,[49] qu'il convient d'éviter que l'enfant figure sur le passeport du titulaire du droit de visite et, en cas de visite «transfrontière», qu'il serait judicieux que celui-ci prenne l'engagement, devant l'Autorité centrale de l'Etat de la résidence habituelle de l'enfant, de le renvoyer à une date précise en indiquant le ou les endroits où il a l'intention d'habiter avec l'enfant. Une copie d'un tel compromis serait, par la suite, transmise tant à l'Autorité centrale de la résidence habituelle du titulaire du droit de visite, qu'à celle de l'Etat où il a déclaré qu'il séjournerait avec l'enfant. Cela permettrait de connaître à tout moment la localisation de l'enfant et de déclencher la procédure pour assurer son retour, dès l'expiration du délai fixé. Evidemment, aucune des mesures avancées ne peut, à elle seule, assurer l'exercice correct du droit de visite; de toute façon nous ne croyons pas que ce Rapport puisse aller plus loin: les mesures concrètes que pourront prendre les Autorités centrales impliquées dépendront des circonstances de chaque cas d'espèce et de la capacité d'agir reconnue à chaque Autorité centrale.

CHAPITRE V — DISPOSITIONS GÉNÉRALES

129 Ce chapitre contient une série de dispositions hétérogènes en raison de la matière dont elles s'occupent, mais qu'il fallait traiter en dehors des chapitres précédents. Il s'agit, d'une part de certaines dispositions procédurales communes aux procès visant tant le retour de l'enfant que l'organisation du droit de visite; d'autre part de la réglementation des problèmes posés par l'application de la Convention dans les Etats plurilégislatifs, ainsi que de ses relations avec d'autres conventions et de son domaine d'application *ratione temporis*.

Article 22 — «Cautio judicatum solvi»

130 Suivant une tendance marquée en faveur de la suppression conventionnelle des mesures procédurales discriminatoires envers les étrangers, cet article déclare qu'aucune caution, qu'aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé dans le contexte de la

[49] Voir Rapport de la Commission spéciale, No 110.

Of all the specific ways of securing the execise of access rights, article 21 contains only one, where it points out that the Central Authority must try 'to remove, as far as possible, all obstacles to the exercise of such rights', obstacles which may be legal ones or may originate in possible criminal liability. The rest is left up to the co-operation among Central Authorities, which is regarded as the best means of ensuring respect for the conditions imposed upon the exercise of access rights. In fact, such respect is the only means of guaranteeing to the custodian that their exercise will not harm his own rights.

128 The Convention gives no examples of how Central Authorities are to organize this co-operation so as to secure the 'innocent' exercise of access rights, since such examples could have been interpreted restrictively. Mention could however be made purely indicatively as in the Report of the preliminary draft Convention,[49] of the fact that it would be advisable that the child's name not appear on the passport of the holder of the right of access, whilst in 'transfrontier' access cases it would be sensible for the holder of the access rights to give an undertaking to the Central Authority of the child's habitual residence to return the child on a particular date and to indicate also the places where he intends to stay with the child. A copy of such an undertaking would then be sent to the Central Authority of the habitual residence of the holder of the access rights, as well as to the Central Authority of the State in which he has stated his intention of staying with the child. This would enable the authorities to know the whereabouts of the child at any time and to set in motion proceedings for bringing about its return, as soon as the stated time-limit has expired. Of course, none of the measures could by itself ensure that access rights are exercised properly, but in any event we believe that this Report can go no further: the specific measures which the Central Authorities concerned are able to take will depend on the circumstances of each case and on the capacity to act enjoyed by each Central Authority.

CHAPTER V — GENERAL PROVISIONS

129 This chapter contains a series of provisions which differ according to the topics with which they deal, and which had to be dealt with outside the framework of the foregoing chapters. On the one hand, there are certain procedural provisions common both to the proceedings for the return of the child and to the organization of access rights, and on the other hand there are provisions for regulating the problems arising out of the Convention's application in States with more than one system of law, as well as those which concern its relationship with other conventions and its scope *ratione temporis*.

Article 22 — 'Cautio judicatum solvi'

130 Following a marked tendency to favour the deletion from the Convention of procedural measures which discriminated against foreigners, this article declares that no security, bond or deposit, however described, shall be required within the context of the Convention. Two short

[49] See Report of the Special Commission, No 110.

Convention. Le texte mérite deux brefs commentaires. Le premier concerne le domaine d'application *ratione personae* de la prohibition consacrée; sur ce point, la solution retenue est largement généreuse, comme l'exigeait une convention construite sur l'idée sous-jacente de la protection des enfant.[50] En second lieu, la caution ou dépôt dont sont exonérés les étrangers sont ceux qui, dans chaque système juridique et sous différentes dénominations, visent à garantir qu'ils respecteront le contenu des décisions en ce qui concerne le paiement des frais et dépens découlant d'un procès. Dans un souci de cohérence, l'article précise que la règle joue seulement par rapport aux «procédures judiciaires ou administratives visées par la Convention», en évitant une formule plus large qui aurait pu être interprétée comme s'appliquant, par exemple aux procès visant directement la détermination du fond du droit de garde. D'autre part, il se déduit clairement de ce qui précède qu'elle n'interdit pas d'autres cautions ou dépôts possibles exigés, notamment les cautions imposées en vue de garantir l'exercice correct d'un droit de visite.

Article 23 — Exemption de légalisation

131 Cet article reproduit à la lettre le texte de l'article parallèle de l'avant-projet, qui se limitait à exprimer dans une disposition séparée une idée contenue dans toutes les Conventions de La Haye, impliquant la transmission de documents entre Etats contractants. Il se déduit de sa rédaction ouverte qu'il n'interdit pas seulement les «légalisations diplomatiques», mais toute autre exigence de ce genre; cependant, reste en dehors de cette disposition l'exigence possible d'authentification des copies ou documents privés, selon la loi interne des autorités concernées.

Article 24 — Traduction des documents

132 En ce qui concerne les langues à utiliser dans les relations entre Autorités centrales, la Convention a maintenu la solution retenue dans l'avant-projet, en vertu de laquelle les documents seront envoyés dans leur langue d'origine et accompagnés d'une traduction dans une des langues officielles de l'Etat requis ou, lorsque cette traduction s'avère difficilement réalisable, d'une traduction en français ou en anglais.[51] Sur ce point, d'ailleurs, la Convention admet la possibilité de formuler une réserve aux termes de l'article 42, en vertu de laquelle un Etat contractant pourra s'opposer à l'utilisation d'une des langues de substitution; la réserve ne pourra évidemment pas exclure l'utilisation des deux langues. Finalement, il faut souligner, d'une part que le système établi prétend être un système de facilité *minimum*, qui peut être amélioré par d'autres conventions excluant entre les Etats parties toute exigence de traduction; d'autre part qu'il n'a trait qu'aux communications entre Autorités centrales. En conséquence de quoi, les demandes et autres documents adressés aux autorités judiciaires ou administratives internes devront respecter les règles imposées par la loi de chaque Etat en matière de traduction.

[50] Voir la construction plus restrictive incorporée à l'article 14 de la *Convention tendant à faciliter l'accès international à la justice*, Convention adoptée aussi au cours de la Quatorzième session de la Conférence.
[51] Une solution partiellement différente est consacrée à l'article 7 de la *Convention tendant à faciliter l'accès international à la justice*, citée *supra*.

comments are in order here. The first concerns the scope of the stated prohibition *ratione personae*; on this point, an extremely liberal solution was arrived at, such as was required by a convention built upon the basic idea of protecting children.[50] Secondly, the security, bond or deposit from which foreigners are exempt are those which, in any legal system and howsoever described, are meant to guarantee respect for decisions on the payment of costs and expenses arising out of legal proceedings. The article, in its concern for coherence, states that the rule will apply only to those 'judicial or administrative proceedings falling within the scope of the Convention', and avoids a wider formulation which could have been interpreted as applicable, for example, to proceedings raised directly for a decision on the merits of custody rights. On the other hand, it can clearly be inferred from the preceding observations that it does not prevent other types of security, bond or deposit being required, particularly those which are imposed so as to guarantee the proper exercise of access rights.

Article 23 — Exemption from legalization

131 This article repeats word for word the text of the equivalent article in the preliminary draft Convention, which merely set forth in a separate provision an idea which is to be found in all Hague Conventions, involving the transmission of documents among Contracting States. The fact that it has been drafted in wide terms means that not only 'diplomatic legalization', but also any other similar sort of requirement, is forbidden. However, any requirement of the internal law of the authorities in question that copies or private documents be authenticated remains outside the scope of this provision.

Article 24 — Translation of documents

132 As regards the languages which are to be used as among Central Authorities, the Convention upheld the approach in the Preliminary Draft, by which documents are to be sent in their original language, accompanied by a translation into one of the official languages of the requested State or, where that is not feasible, a translation into French or English.[51] In this matter, the Convention also allows a reservation to be made in terms of article 42, under which a Contracting State can object to the use of one or other of the substitute languages, but this reservation cannot of course exclude the use of both. Finally, it must be emphasized firstly that the scheme which has been chosen offers only a *minimal* facility and may be improved upon by other conventions which exclude any requirement of translation as among States which are Party to them, and secondly that it governs only communications among Central Authorities. Consequently, applications and other documents sent to internal judicial or administrative authorities will have to conform to the rules regarding translation laid down by the law of each State.

[50] See the more restrictive construction which was incorporated in article 14 of the *Convention on International Access to Justice*, also adopted during the Fourteenth Session of the Conference.
[51] A somewhat different approach is found in article 7 of the *Convention on International Access to Justice*, referred to *supra*.

Article 25 -- Assistance judiciaire et juridique

133 La disposition sur ce point élargit le domaine de l'assistance judiciaire dans une double perspective: d'un côté, par l'inclusion parmi les éventuels bénéficiaires, en plus des nationaux des Etats parties, des personnes qui auraient dans ces Etats leur résidence habituelle; de l'autre, par l'extension de l'assistance visée à la consultation juridique, un aspect qui n'est pas toujours couvert par les divers systèmes étatiques d'assistance judiciaire.[52]

Article 26 -- Frais découlant de l'application de la Convention

134 Le principe exprimé au premier alinéa, d'après lequel chaque Autorité centrale assumera ses propres frais en appliquant la Convention, n'a pas rencontré d'opposition. Il implique avant tout qu'une Autorité centrale ne peut pas réclamer ces frais à une autre Autorité centrale. Quant à savoir quels sont les frais visés, il faut convenir qu'ils dépendront des services réels offerts par chaque Autorité centrale, en accord avec les possibilités d'action que lui reconnaît la loi interne de l'Etat concerné.

135 Par contre, le second alinéa a trait à l'un des points les plus controversés au cours de la Quatorzième session et qui a finalement été résolu par l'acceptation de la réserve figurant au troisième alinéa de ce même article. En effet, on n'a pu mettre fin à la controverse entre les délégations qui voulaient assurer au demandeur la gratuité totale dans l'application de la Convention (en incluant l'exonération des frais et dépens non couverts par le système d'assistance judiciaire et juridique, qui pourraient découler d'un procès ou éventuellement, des frais entraînés par la participation d'un avocat), et les délégations favorables à la solution contraire retenue dans l'avant-projet,[53] que par l'inclusion d'une réserve en faveur des secondes. La raison en est que, étant donné que les différents critères prenaient leurs racines dans la structure des systèmes juridiques impliqués, toute tentative de faire prévaloir, en termes absolus, une position sur l'autre, aurait conduit à l'exclusion *a priori* de la Convention d'un certain nombre d'Etats; or, personne ne souhaitait un tel résultat.[54] Par contre, l'accord a été total en ce qui concerne la norme incluse dans la dernière phrase du deuxième alinéa, qui autorise les Autorités centrales à «demander le paiement des dépenses causées ou qui seraient causées par les opérations liées au retour de l'enfant«.

136 Le quatrième alinéa incorpore une disposition de nature tout à fait différente, en vertu de laquelle les autorités compétentes internes peuvent mettre à la charge de «l'enleveur» ou de celui qui empêche l'exercice du droit de visite, le paiement de certains frais engagés par le demandeur ou en son nom, notamment «des frais de voyage, des frais de représentation judiciaire du demandeur et de retour de l'enfant, ainsi que tous les coûts et dépenses faits pour localiser l'enfant». Mais étant donné qu'il s'agit d'une norme simplement facultative, qui respecte le pouvoir d'appréciation concrète des tribunaux dans chaque cas d'espèce, sa portée semble être surtout symbolique, celle d'un éventuel élément de dissuasion d'une conduite contraire aux objectifs conventionnels.

[52] Voir, dans un sens similaire, les articles 1 et 2 de la *Convention tendant à faciliter l'accès international à la justice*, cité *supra*.
[53] Article 22, alinéa 2*a* de l'avant-projet élaboré par la Commission spéciale.
[54] Voir Doc. trav. Nos 51 et 61 (Propositions de la délégation belge) et Nos 57 et 67 (Propositions des délégations des Etats-Unis, du Canada et des Pays-Bas), ainsi que les P.-v. Nos 11 et 14.

Article 25 — Legal aid and advice

133 The relevant provision here enlarges the scope of legal aid in two respects. Firstly, it includes among the possible beneficiaries persons habitually resident in a Contracting State as well as that State's own nationals. Secondly, the legal aid available is extended to cover legal advice as well, which is not invariably included in the various systems of legal aid operated by States.[52]

Article 26 -- Costs arising out of the Convention's application

134 The principle enunciated in the first paragraph, under which each Central Authority bears its own costs in applying the Convention, met no opposition. Quite simply, it means that a Central Authority cannot claim costs from another Central Authority. It must however be admitted that the costs envisaged will depend on the actual services provided by each Central Authority, according to the freedom of action conferred upon it by the internal law of the State concerned.

135 On the other hand, the second paragraph refers to one of the most controversial matters dealt with by the Fourteenth Session, a matter which in the end had to be resolved by accepting the reservation in the third paragraph of the same article. In fact, the argument between those delegations which wanted the applicant to be exempt from all costs arising out of the application of the Convention (including exemption from all costs and expenses not covered by the legal aid and advice system such as those which arise out of legal proceedings or, where applicable, the participation of counsel or legal advisers), and those which favoured the opposite solution adopted by the preliminary draft Convention,[53] was resolved only by including a reservation favouring the latter's point of view. The reason for this was that, since different criteria for the granting of legal aid were rooted in the very structure of the legal systems concerned, any attempt to make one approach prevail absolutely over the others would have led to the automatic exclusion of certain States from the Convention, a result which no one wanted.[54] However, there was total agreement as regards the rule contained in the last sentence of the second paragraph, authorizing the Central Authorities to 'require the payment of the expenses incurred or to be incurred in implementing the return of the child'.

136 The fourth paragraph contains a quite different type of provision, by which the competent internal authorities may direct the 'abductor' or the person who prevented the exercise of access rights, to pay necessary expenses incurred by or on behalf of the applicant, including 'travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child'. But since this rule is only an optional provision, which recognizes the discretion which may be exercised by the courts in each case, its scope would seem to be particularly symbolic, a possible deterrent to behaviour which is contrary to the objects of the Convention.

[52] See, in similar vein, articles 1 and 2 of the *Convention on International Access to Justice*, referred to *supra*.
[53] Article 22(2)(*a*) of the Preliminary Draft prepared by the Special Commission.
[54] See Working Documents Nos 51 and 61 (*Propositions de la délégation belge*) and Nos 57 and 67 (Proposals of the Canadian, Netherlands and United States delegations) and also *P.-v.* Nos 11 and 14.

Article 27 — Possibilité de rejeter une demande

137 Le bon sens indique qu'on ne peut pas obliger les Autorités centrales à accepter les demandes qui se situent hors du domaine d'application de la Convention ou qui sont manifestement sans fondement. Dans ces cas-là, la seule obligation des Autorités centrales est d'informer «immédiatement de leurs motifs le demandeur ou, le cas échéant, l'Autorité centrale qui leur a transmis la demande». Cela signifie que le rejet d'une demande peut être fait tant de l'Autorité centrale directement saisie par le demandeur que d'une Autorité centrale saisie originairement par une autre Autorité centrale.

Article 28 — Procuration exigée par l'Autorité centrale

138 La disposition contenue dans cet article n'est qu'une autre manifestation du point de vue adopté par la Convention en ce qui concerne l'organisation et les compétences des Autorités centrales. Puisqu'on veut éviter que les Etats aient à changer leur droit pour pouvoir l'accepter, la Convention prend en considération le fait que, selon le droit des divers Etats membres de la Conférence, l'Autorité centrale pourra avoir besoin d'une autorisation du demandeur. De fait, la «formule modèle» introduit, comme exemple des pièces produites éventuellement (note au No IX), une référence à la «procuration conférée à l'Autorité centrale», procuration qui devra donc être jointe, chaque fois qu'une Autorité centrale l'exigera, aux éléments envisagés à l'article 8 et aux demandes introduites en application de l'article 21.

Article 29 — Saisine directe des autorités internes compétentes

139 La Convention n'essaie pas d'établir un système exclusif entre les Etats contractants pour obtenir le retour des enfants. Elle se présente au contraire comme un instrument complémentaire se proposant d'aider les personnes dont le droit de garde ou de visite a été violé. Par conséquent, ces personnes ont le choix entre recourir aux Autorités centrales — c'est-à-dire utiliser les mécanismes propres à la Convention — ou bien choisir la voie d'une action directe devant les autorités compétentes en matière de garde et de visite de l'Etat où se trouve l'enfant. Dans la seconde hypothèse, donc quand les personnes concernées optent pour saisir directement les autorités en question, elles peuvent encore faire un deuxième choix et introduire leur demande «par application ou non des dispositions de la Convention». Dans le dernier cas, évidemment, les autorités ne seront pas tenues d'appliquer les dispositions conventionnelles, à moins que l'Etat ne les ait converties en règles internes, suivant en cela l'article 2 de la Convention.

Article 30 — Recevabilité des documents

140 Par cette disposition, la Convention a entendu résoudre le problème existant dans certains Etats membres de la Conférence en ce qui concerne la recevabilité des documents. Il s'agit donc simplement de faciliter l'admission par les autorités judiciaires ou administratives des Etats contractants des demandes introduites directement ou par l'intermédiaire d'une Autorité centrale, ainsi que des documents pouvant être annexés ou fournis par les Autorités centrales. En effet, on ne doit pas interpréter cet article comme incorporant une règle sur la valeur de preuve qu'il faut accorder à ces documents; ce problème tombe absolument hors du domaine conventionnel.[55]

[55] Voir article 26 de l'avant-projet, Doc. trav. No 49 (*Proposal of the United States delegation*) et P.-v. No 11.

Article 27 — Possible rejection of an application

137 Common sense would indicate that Central Authorities cannot be obliged to accept applications which belong outside the scope of the Convention or are manifestly without foundation. In such cases, the only duty of Central Authorities is to 'inform forthwith the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons'. This means that an application may be rejected by the Central Authority to which the applicant applied directly as well as by a Central Authority which was initially brought into the case by another Central Authority.

Article 28 — Authorization required by the Central Authority

138 The provision in this article is merely another example of the Convention's attitude to the organization and powers of Central Authorities. Since the aim is to avoid requiring States to change their own law in order to be able to accept the Convention, the Convention takes into consideration the fact that, in terms of the law of various Member States of the Conference the Central Authority would have the power to require some authorization from the applicant. As a matter of fact, the 'model form', as an example of the documents which might be attached to an application (see note to No IX), brings in a reference to 'the authorization empowering the Central Authority to act on behalf of the applicant', an authorization which, every time it is required by a Central Authority, will have to accompany those matters listed in article 8 and the applications submitted under article 21.

Article 29 — Direct application to competent internal authorities

139 The Convention does not seek to establish a system for the return of children which is exclusively for the benefit of the Contracting States. It is put forward rather as an additional means for helping persons whose custody or access rights have been breached. Consequently, those persons can either have recourse to the Central Authorities — in other words, use the means provided in the Convention — or else pursue a direct action before the competent authorities in matters of custody and access in the State where the child is located. In the latter case, whenever the persons concerned opt to apply directly to the relevant authorities, a second choice is open to them in that they can submit their application 'whether or not under the provisions of this Convention'. In the latter case the authorities are not of course obliged to apply the provisions of the Convention, unless the State has incorporated them into its internal law, in terms of article 2 of the Convention.

Article 30 — Admissibility of documents

140 This provision was intended to resolve the problem which existed in some Member States regarding the admissibility of documents. It merely seeks to facilitate admission before the judicial or administrative authorities of Contracting States of applications submitted either directly or through the intervention of a Central Authority, as well as documents which may be attached or supplied by the Central Authorities. In fact, this article must not be understood to contain a rule on the evidential value which is to be placed on these documents, since that problem falls quite outwith the scope of the Convention.[55]

[55] See article 26 of the preliminary draft Convention, Working Document No 49 (Proposal of the United States delegation) and *P.-v.* No 11.

Articles 31 à 33 — Application de la Convention en ce qui concerne les Etats plurilégislatifs

141 Ces trois articles règlent l'application de la Convention en ce qui concerne les Etats à systèmes juridiques non unifiés. A l'instar des dernières conventions élaborées par la Conférence de La Haye, une distinction est faite entre les Etats ayant plusieurs systèmes de droit d'application territoriale, et les Etats ayant plusieurs systèmes de droit applicables à des catégories différentes de personnes. Plus précisément, les solutions retenues s'inspirent de celles adoptées dans les conventions élaborées au cours de la Treizième session de la Conférence.[56]
En ce qui concerne le premier groupe d'Etats, l'article 31 précise comment il faut comprendre, d'une part la référence à la résidence habituelle de l'enfant, et d'autre part la référence au droit de l'Etat d'une telle résidence.
En ce qui concerne le deuxième groupe d'Etats, l'article 32 confie la détermination du droit dont il faut tenir compte aux règles en vigueur dans chaque Etat.
Finalement, sur le contenu de ces deux articles, il faut souligner que leur intérêt ne se limite pas aux Etats directement envisagés; en effet, les normes en question devront être prises en considération par tout Etat contractant dans ses relations avec eux, par exemple chaque fois qu'un enfant sera déplacé d'un de ses Etats vers un autre Etat ayant un système de droit unifié ou non.

142 D'autre part, l'article 33 délimite les cas dans lesquels les Etats plurilégislatifs sont tenus d'appliquer la Convention, en excluant les situations où un Etat ayant un système de droit unifié ne serait pas tenu de le faire. En somme, cet article se limite à déclarer que la Convention n'est applicable qu'aux relations internationales, en même temps qu'il qualifie de relations internes toutes celles qui se passent à l'intérieur d'un Etat, plurilégislatif ou non.

Article 34 — Relations avec d'autres conventions

143 Cet article a été commenté dans la première partie de ce Rapport (Nos 39 et 40).

Article 35 — Domaine d'application ratione temporis *de la Convention*

144 La question de déterminer si la Convention devait s'appliquer aux enlèvements qui se seraient produits entre deux Etats contractants antérieurement à son entrée en vigueur, ou seulement à ceux qui auraient eu lieu après cette date, s'est vue proposer différentes solutions au cours de la Quatorzième session. La première était sans doute la plus généreuse, puisqu'elle prévoyait l'application de la Convention à tout «enlèvement», indépendamment du moment de sa réalisation.[57] Cependant, cette décision a été suivie plus tard par l'acceptation de la possibilité pour tout Etat contractant de faire une déclaration en vue de limiter l'application de la Convention aux «enlèvements» intervenus après son entrée en vigueur dans cet Etat.[58] La situation restait ainsi largement ouverte, tout en reconnaissant néanmoins à chaque Etat la possibilité de restreindre l'application de la Convention, s'il le jugeait nécessaire. Il est clair

[56] Voir notamment le Rapport de M. von Overbeck sur la Convention sur la loi applicable aux régimes matrimoniaux, *Actes et documents de la Treizième session*, tome II, p. 374 et s.
[57] Voir Doc. trav. No 53 (*Proposal of the United Kingdom delegation*) et P.-v. No 13.
[58] Voir Doc. trav. No 68 (Proposition de la délégation du Canada) et P.-v. No 15.

Articles 31 to 33 — Application of the Convention in relation to States with more than one system of law

141 These three articles govern the Convention's application to States with non-unitary legal systems. As in recent conventions of the Hague Conference, a distinction has been drawn between States which have several systems of law applicable in different territorial units, and those with several systems of law applicable to different categories of persons. To be more precise, the solution adopted received its inspiration from that reached by the conventions drawn up during the Thirteenth Session of the Conference.[56]

As regards the first group of States, article 31 explains how references to the child's habitual residence and to the law of the State of its habitual residence are to be understood.

As regards the second type, article 32 leaves the determination of the applicable law to the rules in force in each State.

Finally, it must be emphasized that the substantive provisions of these two articles are not restricted to the States directly concerned. In actual fact, the relevant rules are to be taken into consideration by all Contracting States in their relations with each other, for example whenever a child is removed from one of those States to another State with a unified or non-unified legal system.

142 On the other hand, article 33 limits the occasions where States with more than one system of law are obliged to apply the Convention, by excluding those in which a State with a unified system of law would not be bound to do so. Put shortly, this article merely states that the Convention applies only at the international level and at the same time characterizes as internal all those relationships which arise within a State, whether or not that State has more than one system of law.

Article 34 — Relationship to other conventions

143 This article was commented upon in the first part of the Report (Nos 39 and 40).

Article 35 — Scope of the Convention ratione temporis

144 The question as to whether the Convention should apply to abductions involving two States and which occurred prior to its entry into force or only to those occurring thereafter, was met with different proposed solutions during the Fourteenth Session. The first proposal was undoubtedly the most liberal, since it envisaged the Convention's applying to all 'abductions', irrespective of when it came into effect.[57] However, this decision was followed by acceptance of the idea that any Contracting State could declare that the Convention would apply only to 'abductions' which occurred after its entry into force in that State.[58] The situation therefore remained largely unresolved, with each State, where it deemed this necessary, being able to limit the Convention's application. It was clear that the operation of such declarations within a convention which is clearly bilateral in its application would create some technical problems, to

[56] See in particular Mr von Overbeck's Report on the Convention on the Law Applicable to Matrimonial Property Regimes, in *Acts and Documents of the Thirteenth Session*, Book II, p. 374 *et seq.*
[57] See Working Document No 53 (Proposal of the United Kingdom delegation) and *P.-v.* No 13.
[58] See Working Document No 68 (Proposal of the Canadian delegation) and *P.-v.* No 15.

que le jeu de telles déclarations dans le contexte d'une convention d'application nettement bilatérale posait quelques problèmes techniques. Pour y pallier, la Première commission s'est finalement prononcée en faveur de la solution contraire à la première, c'est-à-dire pour la plus restrictive. C'est donc celle qui apparaît à l'article 35, d'après lequel la Convention ne s'applique entre les Etats contractants, «qu'aux enlèvements ou aux non-retours illicites qui se sont produits après son entrée en vigueur dans ces Etats».[59] D'autre part, de l'ensemble des dispositions conventionnelles (et notamment de l'article 12, alinéa 2) on doit déduire qu'il n'existe pas de limite pour introduire l'action, dès lors que l'enfant n'a pas atteint l'âge de seize ans, selon l'article 4. En effet, l'introduction de l'action après l'expiration de la période d'un an, envisagée au premier alinéa de l'article 12, ne fait que nuancer l'obligation de faire retourner l'enfant, en admettant qu'elle ne s'impose pas lorsqu'il est établi que l'enfant s'est intégré dans son nouveau milieu.

145 La disposition a sans doute le mérite d'être claire. On ne peut cependant pas ignorer que son application est destinée à frustrer les expectatives légitimes des particuliers concernés. Mais étant donné qu'il s'agit en définitive d'une restriction à l'obligation de retourner l'enfant, rien ne s'oppose à ce que deux ou plusieurs Etats conviennent entre eux d'y déroger conformément à l'article 36, c'est-à-dire qu'ils se mettent d'accord pour appliquer rétroactivement la Convention.
D'ailleurs, la disposition ne concerne que les dispositions conventionnelles visant le retour de l'enfant. En effet, la réglementation conventionnelle du droit de visite ne peut être invoquée, par la nature même des choses, qu'à propos du refus de son exercice s'étant produit ou continuant à se produire après l'entrée en vigueur de la Convention.

Article 36 — Possibilité de limiter conventionnellement les restrictions au retour de l'enfant

146 En concordance avec les principes généraux qui inspirent la Convention et sur la base de l'expérience d'autres Conventions de la Conférence de La Haye,[60] cet article admet la possibilité que deux ou plusieurs Etats contractants conviennent de déroger entre eux aux dispositions de la Convention pouvant impliquer des restrictions au retour des enfants, notamment celles visées aux articles 13 et 20. Cela montre d'une part le caractère de compromis de certaines dispositions conventionnelles et la possibilité d'adopter des critères plus favorables à l'objectif principal de la Convention dans les relations entre Etats de conceptions juridiques très homogènes, et d'autre part que, comme nous l'avons souligné à plusieurs reprises au cours de ce Rapport, la Convention n'est inspirée par aucune idée d'exclusivité dans son domaine d'application. Or, si de telles conventions complémentaires voient le jour, il faudrait éviter un effet négatif, redouté par certaines délégations: le fait qu'en dehors du domaine d'application géographiquement restreint de tels accords, les Etats parties soient tentés de donner une interprétation large aux restrictions incluses dans cette Convention, de manière à affaiblir sa portée.[61]

alleviate which the First Commission finally pronounced itself in favour of the opposite solution to that first adopted, *i.e.* the more restrictive. It is seen therefore in article 35, by which the Convention is to apply as among Contracting States 'only to wrongful removals or retentions occurring after its entry into force in those States'.[59] On the other hand, the inference must be drawn from the Convention's provisions as a whole (and in particular article 12, second paragraph) that no time-limit is imposed on the submission of applications, provided the child has not reached sixteen years of age, in terms of article 4. In fact, the commencement of an action after the expiry of the one year period stated in the first paragraph of article 12, merely lessens the obligation to cause the child to be returned, whilst it is recognized that the obligation will not arise if the child is shown to have become settled in its new environment.

145 The provision certainly has the merit of being clear. However, it cannot be denied that its application is fated to frustrate the legitimate expectations of the individuals concerned. But since in the last resort it is a limitation on the duty to return the child, it in no way prevents two or more States agreeing amongst themselves to derogate from it in terms of article 36, by agreeing to apply the Convention retroactively.

Moreover, the provision concerns only those provisions in the Convention regarding the return of the child. In actual fact, the provision of the Convention governing access rights can, in the nature of things, only be invoked where their exercise is refused or continues to be refused after the Convention has come into force.

Article 36 — Possibility of limiting by agreement the restrictions on the return of the child

146 This article, conform to the general principles underlying the Convention, which are based on the experience derived from other Hague Conventions,[60] allows two or more Contracting States to agree to derogate as amongst themselves from any of the Convention's provisions which may involve restrictions on the return of the child, in particular those contained in articles 13 and 20. This demonstrates, on the one hand, the compromise character of some of the Convention's provisions and the possibility that criteria more favourable to the principal object of the Convention may be adopted to govern relationships among States which share very similar legal concepts, while on the other hand, as we have emphasized on several occasions throughout this Report, the Convention is not to be regarded as in any way exclusive in its scope. Now, if such supplementary conventions see the light of day, one negative consequence, feared by some delegations, will have to be avoided, namely that beyond the geographical limits of such agreements, the States concerned will be tempted to interpret the limitations contained in the Convention in a wide sense, thus weakening its scope.[61]

[59] Voir Doc. trav. No 81 (Proposition du Président avec l'accord des délégations de l'Autriche, de la République fédérale d'Allemagne, de la Suisse et du Royaume-Uni) et P.-v. No 18. Une proposition orale du Rapporteur tendant à étendre la Convention aux situations créées au cours de l'année antérieure à son entrée en vigueur n'a pas été retenue.
[60] Par exemple la *Convention relative à la procédure civile, du premier mars 1954.*
[61] Voir sur cet article, les Doc. trav. No 70 (Proposition des délégations belge, française et luxembourgeoise) et No 80 (*Proposal of the United States delegation*), ainsi que les P.-v. Nos 15 et 18.

[59] See Working Document No 81 (Proposal of the Chairman with the consent of the delegations of Austria, the Federal Republic of Germany, Switzerland and the United Kingdom) and *P.-v.* No 18. An oral proposal of the Reporter that the Convention be extended to cover situations which occurred during the year prior to its entry into force was not accepted.
[60] See, for example, the *Convention of 1 March 1954 on civil procedure.*
[61] See Working Documents Nos 70 (*Proposition des délégations belge, française et luxembourgeoise*) and 80 (Proposal of the United States delegation) as well as *P.-v.* Nos 16 and 18.

147 Les clauses finales contenues aux articles 37 à 45 de la Convention sont rédigées conformément aux dispositions adoptées à cet effet par les dernières sessions de la Conférence de La Haye. Il n'est donc pas nécessaire d'en faire le commentaire détaillé et nous nous limiterons à quelques brèves remarques à leur propos.
La première concerne l'adaptation des clauses finales à la décision adoptée en ce qui concerne l'ouverture sous condition de la Convention à des Etats non-membres de la Conférence. Ce point ayant été déjà abordé auparavant,[62] il suffit de souligner ici que la nature semi-fermée de la Convention provient du mécanisme de la déclaration d'acceptation par les Etats parties et non pas de l'existence d'une restriction quelconque relative aux Etats pouvant y adhérer (article 38).

148 Quant au «degré» de l'acceptation de la Convention par les Etats qui comprennent deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par la Convention, l'article 40 prévoit qu'ils pourront déclarer — au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion — que la Convention s'applique à toutes ou seulement à certaines des unités territoriales en question. Cette déclaration pourra être modifiée à tout moment par une autre déclaration plus extensive. En effet, une modification de la déclaration tendant à restreindre l'application de la Convention devrait être considérée comme une dénonciation partielle selon l'article 44, alinéa 3.
D'après l'article 39, la même solution s'applique pour les territoires représentés sur le plan international par certains Etats; en effet, bien que de telles situations soient appelées à disparaître comme une conséquence logique de l'application progressive du principe qui proclame le droit des peuples à disposer d'eux-mêmes, la Conférence a considéré souhaitable de maintenir une clause qui peut encore s'avérer utile.

149 Il convient enfin de dire un mot sur l'article 41, la disposition étant tout à fait nouvelle dans une Convention de La Haye; elle fut introduite, de même d'ailleurs que dans l'autre Convention adoptée lors de la Quatorzième session, à savoir la *Convention tendant à faciliter l'accès international à la justice*, à la demande expresse de la délégation australienne.
Le but de cet article est de préciser que la ratification de la Convention par un Etat n'entraîne aucune conséquence quant à la répartition interne des autorités de cet Etat dans le partage des pouvoirs exécutif, judiciaire et législatif.
La chose semble aller de soi, et c'est bien dans ce sens qu'il faut comprendre l'intervention du chef de la délégation canadienne lors des débats de la Quatrième commission où fut décidée l'introduction de cette disposition dans les deux Conventions (voir P.-v. No 4 de la Séance plénière); la délégation canadienne, exprimant ouvertement l'opinion d'un grand nombre de délégations, estimait l'introduction de cet article dans les deux Conventions comme inutile. L'article 41 fut néanmoins adopté, en grande partie pour donner satisfaction à la délégation australienne, pour qui l'absence d'une telle disposition semblait poser une difficulté constitutionnelle insurmontable.

150 En ce qui concerne le problème des réserves, la Con-

[62] Voir *supra* No 42.

147 The final clauses in articles 37 to 45 of the Convention have been drafted in accordance with similar provisions adopted by the most recent sessions of the Hague Conference. No detailed commentary is therefore necessary and we shall make only a few brief comments on them.

Firstly, the adaptation of the final clauses to the decision which was taken on the conditional opening of the Convention to non-Member States. This point has been dealt with earlier,[62] and it is sufficient merely to emphasize here that the 'semi-closed' character of the Convention derives from the means by which States Parties may declare their acceptance and not from any restriction placed on the States which may accede to it (article 38).

148 With regard to the 'degree' of acceptance of the Convention by States which contain two or more territorial units in which different systems of law are applicable to matters dealt with in this Convention, article 40 provides that they may declare — at the time of signature, ratification, acceptance, approval or accession — that the Convention shall extend to all its territorial units or only to one or more of them. Such a declaration can be modified at any time by another more extensive declaration. Actually, any modification of a declaration which tends to limit the applicability of the Convention ought to be regarded as a partial denunciation in terms of article 44, third paragraph.

Under article 39, the same result will occur with regard to States which are responsible for the international relations of other territories. Although such situations are meant to disappear as a logical consequence of the progressive application of the principle which proclaims the right of peoples to self-determination, the Conference felt it advisable to keep a clause which might yet prove to be useful.

149 Finally, a word should be said on article 41, since it contains a wholly novel provision in Hague Conventions. It also appears in the other Convention adopted at the Fourteenth Session, *i.e.* the *Convention on International Access to Justice*, at the express request of the Australian delegation.

This article seeks to make it clear that ratification of the Convention by a State will carry no implication as to the internal distribution of executive, judicial and legislative powers in that State.
This may seem self-evident, and this is the point which the head of the Canadian delegation made during the debates of the Fourth Commission where it was decided to insert such a provision in both Conventions (see *P.-v.* No 4 of the Plenary Session). The Canadian delegation, openly expressing the opinion of a large number of delegations, regarded the insertion of this article in the two Conventions as unnecessary. Nevertheless, article 41 was adopted, largely to satisfy the Australian delegation, for which the absence of such a provision would apparently have created insuperable constitutional difficulties.

150 On the question of reservations, the Convention

[62] See *supra*, No 42.

vention ne permet que celles prévues aux articles 24 et 26. Aucune autre réserve ne sera admise. D'autre part, l'article 42 précise, comme il est habituel, qu'un Etat pourra «à tout moment, retirer une réserve qu'il aura faite».

151 Finalement, il convient de souligner l'importance accrue de l'obligation de notification assumée par le Ministère des Affaires Etrangères du Royaume des Pays-Bas (article 45), dans le contexte d'une convention comme celle-ci, en raison notamment du jeu des déclarations d'acceptation des adhésions éventuelles.

Madrid, avril 1981

ELISA PÉREZ-VERA

allows only those provided for in articles 24 and 26. No other reservation is permitted. Moreover, article 42 sets forth the customary provision whereby a State can 'at any time withdraw a reservation it has made'.

151 Finally, the importance placed on the duty which was assumed by the Ministry of Foreign Affairs of the Kingdom of the Netherlands (article 45) to notify Member States and Contracting States should be emphasized, particularly in view of the role played by declarations of acceptance of future accessions in a convention such as this.

Madrid, April 1981

ELISA PÉREZ-VERA

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DEPARTMENT OF STATE

[Public Notice 957]

51 No. 58 FR 10494

March 26, 1986

Hague International Child Abduction Convention; Text and Legal Analysis

TEXT: On October 30, 1985 President Reagan sent the 1980 Hague Convention on the Civil Aspects of International Child Abduction to the U.S. Senate and recommended that the Senate give early and favorable consideration to the Convention and accord its advice and consent to U.S. ratification. The text of the Convention and the President's Letter of Transmittal, as well as the Secretary of State's Letter of Submittal to the President, were published shortly thereafter in Senate Treaty Doc. 99-11. On January 31, 1986 the Department of State sent to Senator Lugar, Chairman of the Senate Committee on Foreign Relations to which the Convention was referred, a detailed Legal Analysis of the Convention designed to assist the Committee and the full Senate in their consideration of the Convention. It is believed that broad availability of the Letters of Transmittal and Submittal, the English text of the Convention and the Legal Analysis will be of considerable help also to parents, the bench and the bar, as well as federal, State and local authorities, in understanding the Convention, and in resorting to or implementing it should the United States ultimately ratify it. Thus, these documents are reproduced below for the information of the general public.

Questions concerning the status of consideration of the Convention for U.S. ratification may be addressed to the Office of the Assistant Legal Adviser for Private International Law, Department of State, Washington, D.C. 20520 (telephone: (202) 653-9851). Inquiries on the action concerning the Convention taken by other countries may be addressed to the Office of the Assistant Legal Adviser for Treaty Affairs, Department of State (telephone: (202) 647-8135). Questions on the role of the federal government in the invocation and implementation of the Convention may be addressed to the Office of Citizens Consular Sevices, Department of State (telephone: (202) 647-3444).

Peter H. Pfund,

Assistant Legal Adviser for Private International Law.

Appendices:

A -- Letters of Transmittal and Submittal from Senate Treaty Doc. 99-11

B -- English text of Convention

C -- Legal Analysis

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[*10495]

Appendix A

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *October 30, 1985.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a certified copy of the Hague Convention on the Civil Aspects of International Child Abduction, adopted on October 24, 1980 by the Fourteenth Session of the Hague Conference on Private International Law and opened for signature on October 25, 1980.

The Convention is designed to secure the prompt return of children who have been abducted from their country of habitual residence or wrongfully retained outside that country. It also seeks to facilitate the exercise of visitation rights across international borders. The Convention reflects a worldwide concern about the harmful effects on children of parental kidnapping and a strong desire to fashion an effective deterrent to such conduct.

The Convention's approach to the problem of international child abduction is a simple one. The Convention is designed promptly to restore the factual situation that existed prior to a child's removal or retention. It does not seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children. The international abductor is denied legal advantage from the abduction to or retention in the country where the child is located, as resort to the Convention is to effect the child's swift return to his or her circumstances before the abduction or retention. In most cases this will mean return to the country of the child's habitual residence where any dispute about custody rights can be heard and settled.

The Convention calls for the establishment of a Central Authority in every Contracting State to assist applicants in securing the return of their children or in exercising their custody or visitation rights, and to cooperate and coordinate with their counterparts in other countries toward these ends. Moreover, the Convention establishes a judicial remedy in wrongful removal or retention cases which permits an aggrieved parent to seek a court order for the prompt return of the child when voluntary agreement cannot be achieved. An aggrieved parent may pursue both of these courses of action or seek a judicial remedy directly without involving the Central Authority of the country where the child is located.

The Convention would represent an important addition to the State and Federal laws currently in effect in the United States that are designed to combat parental kidnapping -- specifically, the Uniform Child Custody Jurisdiction Act now in effect in every State in the country, the Parental Kidnapping Prevention Act of 1980, the 1982 Missing Children Act and the Missing Children's Assistance Act. It would significantly improve the chances a parent in the United States has of recovering a child from a foreign Contracting State. It also provides a clear-cut method for parents abroad to apply for the return of children who have been wrongfully taken to or retained in this country. In short, by establishing a legal right and streamlined procedures for the prompt return of internationally abducted children, the Convention should remove many of the uncertainties and the legal difficulties that now confront parents in international child abduction cases.

Federal legislation will be submitted to provide for the smooth implementation of the Convention within the United States. This legislation will be consistent with the spirit and intent of recent congressional

initiatives dealing with the problem of interstate child abduction and missing children.

United States ratification of the Convention is supported by the American Bar Association. The authorities of many States have indicated a willingness to do their part to assist the Federal government in carrying out the mandates of the Convention.

I recommend that the Senate give early and favorable consideration to the Convention and accord its advice and consent to ratification, subject to the reservations described in the accompanying report of the Secretary of State.

RONALD REAGAN.

[*10496] LETTER OF SUBMITTAL

DEPARTMENT OF STATE, *Washington, October 4, 1985.*

The PRESIDENT, *The White House.*

THE PRESIDENT: I have the honor to submit to you the Hague Convention on the Civil Aspects of International Child Abduction with the recommendation that it be transmitted to the Senate for its advice and consent to ratification.

The Convention was adopted on October 24, 1980 at the Fourteenth Session of the Hague Conference on Private International Law in Plenary Session by unanimous vote of twenty-three member states of that organization. The Convention was opened for signature on October 25, 1980, at which time it was signed by Canada, France, Greece and Switzerland. It was signed on behalf of the United States on December 23, 1981, and has also been signed by Belgium and Portugal. The Convention is in force for France, Portugal, Switzerland and most parts of Canada.

The Convention stemmed from a proposal first advanced at a Hague Conference Special Commission meeting in 1976 that the Conference prepare a treaty responsive to the global problem of international child abduction. The overriding objective was to spare children the detrimental emotional effects associated with transnational parental kidnapping.

The Convention establishes a system of administrative and legal procedures to bring about the prompt return of children who are wrongfully removed to or retained in a Contracting State. A removal or retention is wrongful within the meaning of the Convention if it violates custody rights that are defined in an agreement or court order, or that arise by operation of law, provided these rights are actually exercised (Article 3), i.e., custody has not in effect been abandoned. The Convention applies to abductions that occur both before and after issuance of custody decrees, as well as abductions by a joint custodian (Article 3). Thus, a custody decree is not a pre-requisite to invoking the Convention with a view to securing the child's return. By promptly restoring the *status quo ante,* subject to express requirements and exceptions, the Convention seeks to deny the abductor legal advantage in the country to which the child has been taken, as the courts of that country are under a treaty obligation to return the child without conducting legal proceedings on the merits of the underlying conflicting custody claims.

Each country must establish at least one national Central Authority primarily to process incoming and outgoing requests for assistance in securing the return of a child or the exercise of visitation rights (Article 6). In the United States the Central Authority is to be located in an existing agency of the federal government which will, however, need to rely on state and local facilities, including the Federal Parent Locator Service and the private bar, in

carrying out the measures listed in Article 7 of the Convention. These meassures include best efforts to locate abducted or retained children, explore possibilities for their voluntary return, facilitate provision of legal services in connection with judicial proceedings, and coordinate arrangements for the child's return travel (Article 7).

Articles 11-17 are the major provisions governing legal proceedings for the return of an abducted child. Under the Convention, if a proceeding is brought less than a year from the date of the removal or retention and the court finds that the conduct was wrongful, the court is under a treaty obligation to order the child returned. When proceedings are brought a year or more after the date of the removal or retention, the court is still obligated to order the child returned unless the person resisting return demonstrates that the child is settled in the new environment (Article 12).

Althoug15h the Convention ceases to apply as soon as a child reaches sixteen years of age (Article 4), it does not limit the power of appropriate authorities to order the return of an abducted or wrongfully retained child at any time pursuant to other laws or procedures that may make return in the absence of a treaty obligation possible (Article 18).

Articles 13 and 20 enumerate those exceptional circumstances under which the court is not obligated by the Convention to order the child returned. The person opposing return of the child bears the burden of proving that: (1) custody rights were not actually being exercised at the time of the removal or retention by the person seeking return or the person seeking return had consented to or subsequently acquiesced in the removal or retention; or (2) there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. A court also has discretion to refuse to order a child returned if it finds that the child objects to being returned and has reached an age or degree of maturity making it appropriate to consider his or her views (Article 13). A court may also deny a request to return a child if the return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20). Unless one of the enumerated exceptions to the return obligation is deemed to apply, courts in Contracting States will be under a treaty obligation to order a child returned.

Visitation rights are also protected by the Convention, but to a lesser extent than custody rights (Article 21). The remedies for breach of the "access rights" of the non-custodial parent do not include the return remedy provided by Article 12. However, the non-custodial parent may apply to the Central Authority under Article 21 for "organizing or securing the effective exercise of rights of access." The Central Authority is to promote the peaceful enjoyment of these rights. The Convention is supportive of the exercise of visitation rights, i.e., visits of children with non-custodial parents, by providing for the prompt return of children if the non-custodial parent should seek to retain them beyond the end of the visitation **[*10497]** period. In this way the Convention seeks to address the major concern of a custodial parent about permitting a child to visit the non-custodial parent abroad.

If the Convention machinery succeeds in rapidly restoring children to their pre-abduction or pre-retention circumstances, it will have the desirable effect of deterring parental kidnapping, as the legal and other incentives for wrongful removal or retention will have been eliminated. Indeed, while it is hoped that the Convention will be effective in returning children in individual cases, the full extent of its success may never by quantifiable as an untold number of potential parental kidnappings may have been deterred.

This country's participation in the development of the Convention was a logical extension of U.S. membership in the Hague Conference on Private International Law and bipartisan domestic concern with interstate parental kidnapping, a phenomenon with roots in the high U.S. divorce rate and mobility of the population. In response to the public outcry over parental kidnapping, all states and the District of Columbia enacted the Uniform Child Custody Jurisdiction Act (UCCJA), and Congress has enacted the Parental Kidnapping Prevention Act (PKPA), the Missing Children Act, and the Missing Children's Assistance Act. These statutes address almost exclusively problems associated with inter-state parental kidnapping. The Convention will expand the remedies available to victims of parental kidnapping from or to the United States.

The Convention will be of great assistance to parents in the United States whose children are wrongfully taken to or retained in other Contracting States. Such persons now have no choice but to utilize laws and procedures applicable to recognition and enforcement of foreign custody decrees in the country in which the child is located. It is often necessary to retain a foreign lawyer and to apply or reapply for custody to a foreign court, which typically pits the U.S. petitioner against the abducting parent who may have his or her origins in that foreign country and may thus have the benefit of defending the custody suit in what may be a friendly forum. The Convention will be especially meaningful to parents whose children are abducted before U.S. custody orders have been issued because return proceedings under the Convention are not contingent upon the existence of such orders.

At any given time during the past several years, about half of the several hundred requests to the Department of State for assistance in recovering children taken out of the United States have involved abductions to countries which participated in the preparation and negotiation of the Hague Convention. This suggests that U.S. ratification of the Convention, and its ultimate ratification by many of those other countries, is likely to benefit a substantial number of future victim children and parents residing in the United States.

For parents residing outside the United States whose children have been wrongfully taken to or retained in this country, the Convention will likewise serve as a vehicle for prompt return. In such cases involving violations of existing foreign court orders, the victim parent outside the United States may either invoke the Convention or seek return of the child in connection with an action for recognition of the foreign custody decree pursuant to the UCCJA or other available means. The Convention will be especially advantageous in pre-decree abduction cases where no court order exists that may be enforced under the UCCJA.

The Convention has received widespread support. The Secretary of State's Advisory Committee on Private International Law -- on which ten major national legal organizations interested in international efforts to unify private law are represented -- has endorsed the Convention for U.S. ratification. The House of Delegates of the American Bar Association adopted a resolution in February, 1981 urging U.S. signature and ratification of the Convention. U.S. ratification is also supported by the Department of Justice and the Department of Health Services. In reply to a State Department letter inquiring whether and how the states of the United States could assist in implementing the Convention if it were ratified by the United States, officials of many states welcomed the Convention in principle and expressed general willingness to cooperate with the federal Central Authority in its implementation.

The Department believes that federal legislation will be needed fully to give effect to various provisions of the Convention. Draft legislation is being prepared for introduction in both houses of Congress. The United States instrument of ratification would be deposited only after satisfactory legislation has been enacted.

I recommend that the United States enter two reservations at the time of deposit of its instrument of ratification, both of which are specifically permitted by the Convention.

(1) The United States should enter a reservation to ensure that all documents sent to the U.S. Central Authority in a foreign language are accompanied by a translation into English. The reservation should read:

Pursuant to the second paragraph of Article 24, and Article 42, the United States makes the following reservation: All applications, communications and other documents sent to the United States Central Authority should be accompanied by their translation into English.

(2) The second reservation should read:

Pursuant to the third paragraph of Article 26, the United States declares that it will not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except insofar as those costs or expenses are covered by a legal aid program.

It is hoped that the Senate will promptly consider this Convention and give its advice and consent to its ratification by the United States.

Respectfully submitted,

GEORGE P. SHULTZ.

[*10498] Appendix B

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention.

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody.

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions --

CHAPTER I -- SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are --

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where --

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention --

a 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II -- CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures --

a to discover the whereabouts of a child who has been wrongfully removed or retained;

b to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

[*10499] CHAPTER III -- RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain --

a information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b where available, the date of birth of the child;

c the grounds on which the applicant's claim for return of the child is based;

d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanted or supplemented by --

e an authenticated copy of any relevant decision or agreement;

f a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of

that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that --

a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

[*10500] *Article 16*

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

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

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV -- RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V -- GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or

advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

[*10501] *Article 29*

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units --

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors,* as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI -- FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall entend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

[*10502] *Article 41*

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force --

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following --

1 the signatures and ratifications, acceptances and approvals referred to in Article 37;

2 the accessions referred to in Article 38;

3 the date on which the Convention enters into force in accordance with Article 43;

4 the extensions referred to in Article 39;

5 the declarations referred to in Articles 38 and 40;

6 the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

7 the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

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[*10503] Appendix C -- Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction consists of six chapters containing forty-five articles. While not formally incorporated into the Convention, a model form was prepared when the Convention

was adopted by the Hague Conference on Private International Law and was recommended for use in making application for the return of wrongfully removed or retained children. A copy of that form is annexed to this Legal Analysis. (The form to be used for the return of children from the United States may seek additional information.)

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To facilitate understanding of the Convention by the Senate and the use and interpretation of the Convention by parents, judges, lawyers and public and private agency personnel, the articles are analyzed and discussed in the following categories:

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B. Residence (Article 4)

C. Timing/cases covered (Article 35)

D. Effect of custody order concerning the child

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Annexes

-- Recommended Return Application Form

-- Bibliography

Guide to Terminology Used in the Legal Analysis

"Abduction" as used in the Convention title is not intended in a criminal sense. That term is shorthand for the phrase "wrongful removal or retention" which appears throughout the text, beginning with the preambular language and Article 1. Generally speaking, "wrongful removal" refers to the taking of a child from the person who was actually exercising custody of the child. "Wrongful retention" refers to the act of keeping the child without the consent of the person who was actually exercising custody. The archetype of this conduct is the refusal by the noncustodial parent to return a child at the end of an authorized visitation period. "Wrongful retention" is not intended by this Convention to cover refusal by the custodial parent to permit visitation by the other parent. Such obstruction of visitation may be redressed in accordance with Article 21.

The term "abductor" as used in this analysis refers to the person alleged to have wrongfully removed or retained a child. This person is also referred to as the "alleged wrongdoer" or the "respondent."

The term "person" as used in this analysis includes the person, institution or other body who (or which) actually exercised custody prior to the abduction and is seeking the child's return. The "person" seeking the child's return is also referred to as "applicant" and "petitioner."

The terms "court" and "judicial authority" are used throughout the analysis to mean both judicial and administrative bodies empowered to make decisions on petitions made pursuant to this Convention. "Judicial decree" and "court order" likewise include decisions made by courts or administrative bodies.

"Country of origin" and "requesting country" refer to the child's country ("State") of habitual residence prior to the wrongful removal or retention. "Country addressed" refers to the country ("State") where the child is located or the country to which the child is believed to have been taken. It is in that country that a judicial or administrative proceeding for return would be brought.

"Access rights" correspond to "visitation rights."

References to the "reporter" are to Elisa Perez-Vera, the official Hague Conference reporter for the Convention. Her explanatory report is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it. It is referred to herein as the "Perez-Vera Report." The Perez-Vera Report appears in *Actes et* **[*10504]**

documents de la Quatorzieme Session (1980), Volume III, Child Abduction, edited by the Permanent Bureau of the Hague Conference on Private International Law, The Hague, Netherlands. (The volume may be ordered from the Netherlands Government Printing and Publishing Office, 1 Christoffel Plantijnstraat, Postbox 20014, 2500 EA The Hague, Netherlands.)

I. Children Protected by the Convention

A fundamental purpose of the Hague Convention is to protect children from wrongful international removals or retentions by persons bent on obtaining their physical and/or legal custody. Children who are wrongfully moved from country to country are deprived of the stable relationships which the Convention is designed promptly to restore. Contracting States are obliged by Article 2 to take all appropriate measures to implement the objectives of the Convention as set forth in Article 1: (1) To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (2) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States. While these objectives are universal in their appeal, the Convention does not cover all children who might be victims of wrongful takings or retentions. A threshold inquiry, therefore, is whether the child who has been abducted or retained is subject to the Convention's provisions. Only if the child falls within the scope of the Convention will the administrative and judicial mechanisms of the Convention apply.

A. Age

The Convention applies only to children under the age of sixteen (16). Even if a child is under sixteen at the time of the wrongful removal or retention as well as when the Convention is invoked, the Convention ceases to apply when the child reaches sixteen. Article 4.

Absent action by governments to expand coverage of the Convention to children aged sixteen and above pursuant to Article 36, the Convention itself is unavailable as the legal vehicle for securing return of a child sixteen or older. However, it does not bar return of such child by other means.

Articles 18, 29 and 34 make clear that the Convention is a nonexclusive remedy in cases of international child abduction. Article 18 provides that the Convention does not limit the power of a judicial authority to order return of a child at any time, presumably under other laws, procedures or comity, irrespective of the child's age. Article 29 permits the person who claims a breach of custody or access rights, as defined by Articles 3 and 21, to bypass the Convention completely by invoking any applicable laws or procedures to secure the child's return. Likewise, Article 34 provides that the Convention shall not restrict the application of any law in the State addressed for purposes of obtaining the child's return or for organizing visitation rights. Assuming such laws are not restricted to children under sixteen, a child sixteen or over may be returned pursuant to their provisions.

Notwithstanding the general application of the Convention to children under sixteen, it should be noted that the wishes of mature children regarding their return are not ignored by the Convention. Article 13 permits, but does not require, the judicial authority to refuse to order the child returned if the child "objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." The role of the child's preference in return proceedings is discussed further at III.I(2)(d), *infra.*

B. Residence

In order for the Convention to apply the child must have been "habitually resident in a Contracting State immediately before any breach of custody or access rights." Article 4. In practical terms, the Convention may be invoked only where the child was habitually resident in a Contracting State and taken to or retained in another Contracting State. Accordingly, child abduction and retention cases are actionable under the Convention if they are international in nature (as opposed to interstate), and provided the Convention has entered into force for both countries involved. *See* discussion of Article 38, VI.B, *infra.*

To illustrate, take the case of a child abducted to California from his home in New York. The Convention could not be invoked to secure the return of such child. This is true even if one of the child's parents is an American citizen and the other a foreign national. The Uniform Child Custody Jurisdiction Act (UCCJA) and/or the Parental Kidnapping Prevention Act (PKPA), domestic state and federal law, respectively, would govern the return of the child in question. If the same child were removed from New York to Canada, application under the Convention could be made to secure the child's return provided the Convention had entered into force both for the United States and the Canadian province to which the child was taken. An alternative remedy might also lie under other Canadian law. If the child had been removed from Canada and taken to the United States, the aggrieved custodial parent in Canada could seek to secure the child's return by petitioning for enforcement of a Canadian custody order pursuant to the UCCJA, or by invoking the Convention, or both.

C. Timing/Cases Covered

Article 35 states that the Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States. Following a strict interpretation of that Article, the Convention will not apply to a child who is wrongfully shifted from one Contracting State to another if the wrongful removal or retention occurred before the Convention's entry into force in those States. However, under a liberal interpretation Article 35 could be construed to cover wrongful removal or retention cases which began before the Convention took effect but which continued and were ongoing after its entry into force.

D. Effect of Custody Order Concerning the Child

1. Existing Custody Orders

Children who otherwise fall within the scope of the Convention are not automatically removed from its protections by virtue of a judicial decision awarding custody to the alleged wrongdoer. This is true whether the decision as to custody was made, or is entitled to recognition, in the State to which the child has been taken. Under Article 17 that State cannot refuse to return a child solely on the basis of a court order awarding custody to the alleged wrongdoer made by one of its own courts or by the courts of another country. This provision is intended to ensure, *inter alia,* that the Convention takes precedence over decrees made in favor of abductors before the court had notice of the wrongful removal or retention.

Thus, under Article 17 the person who wrongfully removes or retains the child in a Contracting State cannot insulate the child from the Convention's return provisions merely by obtaining a custody order in the country of new residence, or by seeking there to enforce another country's order. Nor may the alleged wrongdoer rely upon a stale decree awarding him or her custody, the provisions of which have been **[*10505]** derogated from subsequently by agreement or acquiescence of the parties, to prevent the child's return under the Convention. Article 3.

It should be noted that Article 17 does permit a court to take into account the reasons underlying an existing custody decree when it applies the Convention.

II. Pre-Decree Removals or Retentions

Children who are wrongfully removed or retained prior to the entry of a custody order are protected by the Convention. There need not be a custody order in effect in order to invoke the Convention's return provisions. Accordingly, under the Convention a child will be ordered returned to the person with whom he or she was habitually resident in pre-decree abduction cases as well as in cases involving violations of existing custody orders.

Application of the Convention to pre-decree cases comes to grips with the reality that many children are abducted or retained long before custody actions have been initiated. In this manner a child is not prejudiced by the legal inaction of his or her physical custodian, who may not have anticipated the abduction, and the abductor is denied any legal advantage since the child is subject to the return provisions of the Convention.

The Convention's treatment of pre-decree abduction cases is distinguishable from the Council of Europe's Convention on Recognition and Enorcement of Decisions Relating to the Custody of Children, adopted in Strasbourg, France in November 1979 ("Strasbourg Convention"), and from domestic law in the United States, specifically the UCCJA and the PKPA, all of which provide for enforcement of custody decrees. Although the UCCJA and PKPA permit enforcement of a decree obtained by a parent in the home state after the child has been removed from that state, in the absence of such decree the enforcement provisions of those laws are inoperative. In contrast to the restoration of the *legal* status quo ante brought about by application of the UCCJA, the PKPA, and the Strasbourg Convention, the Hague Convention seeks restoration of the *factual* status quo ante and is not contingent on the existence of a custody decree. The Convention is premised upon the notion that the child should be promptly restored to his or her country of habitual residence so that a court there can examine the merits of the custody dispute and award custody in the child's best interests.

Pre-decree abductions are discussed in greater detail in the section dealing with actionable conduct. *See* II.B(2)(c)(i).

II. Conduct Actionable Under the Convention

A. "International Child Abduction" not Criminal: Hague Convention Distinguished From Extradition Treaties

Despite the use of the term "abduction" in its title, the Hague Convention is not an extradition treaty. The conduct made actionable by the Convention -- the wrongful removal or retention of children -- is wrongful not in a criminal sense but in a civil sense.

The Hague Convention establishes civil procedures to secure the return of so-called "abducted" children. Article 12. In this manner the Hague Convention seeks to satisfy the overriding concern of the aggrieved parent. The Convention is not concerned with the question of whether the person found to have wrongfully removed or retained the child returns to the child's country of habitual residence once the child has been returned pursuant to the Convention. This is in contrast to the criminal extradition process which is designed to secure the return of the fugitive wrong-doer. Indeed, when the fugitive-parent is extradited for trial or to serve a criminal sentence, there is no guarantee that the abducted child will also be returned.

While it is uncertain whether criminal extradition treaties will be routinely invoked in international custody cases between countries for which the Hague Convention is in force, nothing in the Convention bars their application or use.

B. Wrongful Removal or Retention

The Convention's first stated objective is to secure the prompt return of children who are wrongfully removed from or retained in any Contracting State. Article 1(a). (The second stated objective, i.e., to ensure that rights of custody and of access under the law of one Contracting State are effectively exercised in other Contracting States (Article 1(b)), is discussed under the heading "Access Rights," V., *infra.*) The removal or retention must be wrongful within the meaning of Article 3, as further clarified by Article 5(a), in order to trigger the return procedures established by the Convention. Article 3 provides that the removal or retention of a child is to be considered wrongful where:

(a) it is in breach of custody rights attributed to a person, an institution or another body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

This Article is a cornerstone of the Convention. It is analyzed by examining two questions:

1. Who holds rights protected by the Convention (or, with respect to whom is the removal or retention deemed to be wrongful?); and

2. What are the factual and legal elements of a wrongful removal or retention?

1. Holders of Rights Protected by the Convention

(a) *"Person, institution or other body".* While the child is the ultimate beneficiary of the Convention's judicial and administrative machinery, the child's role under the Convention is passive. In contrast, it is up to the "person, institution or other body" (hereinafter referred to simply as "the person") who "actually exercised" custody of the child prior to the abduction, or who would have exercised custody but for the abduction, to invoke the Convention to secure the child's return. Article 3 (a), (b). It is this person who holds the rights protected by the Convention and who has the right to seek relief pursuant to its terms.

Since the vast majority of abduction cases arises in the context of divorce or separation, the person envisioned by Article 3(a) most often will be the child's parent. The typical scenario would involve one parent taking a child from one Contracting State to another Contracting State over objections of the parent with whom the child had been living.

However, there may be situations in which a person other than a biological parent has actually been exercising custody of the child and is therefore eligible to seek the child's return pursuant to the Convention. An example would be a grandparent who has had physical custody of a child following the death of the parent with whom the child had been residing. If the child is subsequently removed from the custody of the grandparent by the surviving parent, the aggrieved grandparent could invoke the Convention to secure the child's return. In another situation, the child may be in the care of foster parents. If custody rights exercised by the foster parents are breached, for

instance, by abduction of the child by its biological parent, the foster parents **[*10506]** could invoke the Convention to secure the child's return.

In the two foregoing examples (not intended to be exhaustive) a family relationship existed between the victim-child and the person who had the right to seek the child's return. However, institutions such as public or private child care agencies also may have custody rights the breach of which would be remediable under the Convention. If a natural parent relinquishes parental rights to a child and the child is subsequently placed in the care of an adoption agency, that agency may invoke the Convention to recover the child if the child is abducted by its parent(s).

(b) *"Jointly or alone".* Article 3 (a) and (b) recognize that custody rights may be held either jointly or alone. Two persons, typically mother and father, can exercise joint custody, either by court order following a custody adjudication, or by operation of law prior to the entry of a decree. The Convention does not distinguish between these two situations, as the commentary of the Convention reporter indicates:

Now, from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties. Perez-Vera Report, paragraph 71 at 447-448.

Article 3(a) ensures the application of the Convention to pre-decree abductions, since it protects the rights of a parent who was exercising custody of the child jointly with the abductor at the time of the abduction, before the issuance of a custody decree.

2. "Wrongful Removal or Retention" Defined

The obligation to return an abducted child to the person entitled to custody arises only if the removal or the retention is wrongful within the meaning of the Convention. To be considered wrongful, certain factual and legal elements must be present.

(a) *Breach of "custody rights".* The removal or retention must be in breach of "custody rights," defined in Article 5(a) as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."

Accordingly, a parent who sends his or her child to live with a caretaker has not relinquished custody rights but rather has exercised them within the meaning of the Convention. Likewise, a parent hospitalized for a protracted period who places the child with grandparents or other relatives for the duration of the illness has effectively exercised custody.

(b) *"Custody rights" determined by law of child's habitual residence.* In addition to including the right to determine the child's residence (Article 5(a)), the term "custody rights" covers a collection of rights which take on more specific meaning by reference to the law of the country in which the child

was habitually resident immediately before the removal or retention. Article 3(a). Nothing in the Convention limits this "law" to the internal law of the State of the child's habitual residence. Consequently, it could include the laws of another State if the choice of law rules in the State of habitual residence so indicate.

If a country has more than one territorial unit, the habitual residence refers to the particular territorial unit in which the child was resident, and the applicable laws are those in effect in that territorial unit. Article 31. In the United States, the law in force in the state in which a child was habitually resident (as possibly preempted by federal legislation enacted in connection with U.S. ratification of the Convention) would be applicable for the determination as to whether a removal or retention is wrongful.

Articles 32 and 33 also control, respectively, how and whether the Convention applies in States with more than one legal system. Perez-Vera Report, paragraphs 141 and 142 at 470.

(c) *Sources of "custody rights".* Although the Convention does not exhaustively list all possible sources from which custody rights may derive, it does identify three sources. According to the final paragraph of Article 3, custody rights may arise: (1) by operation of law; (2) by reason of a judicial or administrative decision; or (3) by reason of an agreement having legal effect under the law of that State.

i. *Custody rights arising by operation of law.* Custody rights which arise by operation of law in the State of habitual residence are protected; they need not be conferred by court order to fall within the scope of the Convention. Article 3. Thus, a person whose child is abducted prior to the entry of a custody order is not required to obtain a custody order in the State of the child's habitual residence as a prerequisite to invoking the Convention's return provisions.

In the United States, as a general proposition both parents have equal rights of custody of their children prior to the issuance of a court order allocating rights between them. If one parent interferes with the other's equal rights by unilaterally removing or retaining the child abroad without consent of the other parent, such interference could constitute wrongful conduct within the meaning of the Convention. (See excerpts from Perez-Vera Report quoted at II.B.1(b), *supra.*) Thus, a parent left in the United States after a pre-decree abduction could seek return of a child from a Contracting State abroad pursuant to the Convention. In cases involving children wrongfully brought to or retained in the United States from a Contracting State abroad prior to the entry of a decree, in the absence of an agreement between the parties the question of wrongfulness would be resolved by looking to the law of the child's country of habitual residence.

Although a custody decree is not needed to invoke the Convention, there are two situations in which the aggrieved parent may nevertheless benefit by securing a custody order, assuming the courts can hear swiftly a petition for custody. First, to the extent that an award of custody to the left-behind parent (or other person) is based in part upon an express finding by the court that the child's removal or retention was wrongful within the meaning of Article 3, the applicant anticipates a possible request by the judicial authority applying the Convention, pursuant to Article 15, for a court determination of wrongfulness. This may accelerate disposition of a return petition under the Convention. Second, a person outside the United States who obtains a custody decree from a foreign court subsequent to the child's abduction, after notice and opportunity to be heard have been accorded to the absconding parent, may be able to invoke either the Convention or the UCCJA. or both, to secure the

child's return from the United States. The UCCJA may be preferable inasmuch as its enforcement provisions are not subject to the exceptions contained in the Convention.

ii. *Custody rights arising by reason of judicial or administrative decision.* Custody rights embodied in judicial or **[*10507]** administrative decisions fall within the Convention's scope. While custody determinations in the United States are made by state courts, in some Contracting States, notably the Scandinavian countries, administrative bodies are empowered to decide matters relating to child custody including the allocation of custody and visitation rights. Hence the reference to "administrative decisions" in Article 3.

The language used in this part of the Convention can be misleading. Even when custody rights are conferred by court decree, technically speaking the Convention does not mandate recognition and enforcement of that decree. Instead, it seeks only to restore the factual custody arrangements that existed prior to the wrongful removal or retention (which incidentally in many cases will be the same as those specified by court order).

Finally, the court order need not have been made by a court in the State of the child's habitual residence. It could be one originating from a third country. As the reporter points out, when custody rights were exercised in the State of the child's habitual residence on the basis of a foreign decree, the Convention does not require that the decree have been formally recognized. Perez-Vera Report, paragraph 69 at 447.

iii. *Custody rights arising by reason of agreement having legal effect.* Parties who enter into a private agreement concerning a child's custody have recourse under the Convention if those custody rights are breached. Article 3. The only limitation is that the agreement have legal effect under the law of the child's habitual residence.

Comments of the United States with respect to language contained in an earlier draft of the Convention (*i.e.,* that the agreement "have the force of law") shed some light on the meaning of the expression "an agreement having legal effect". In the U.S. view, the provision should be interpreted expansively to cover more than only those agreements that have been incorporated in or referred to in a custody judgment. *Actes et documents de la Quatorzieme Session, (1980) Volume III. Child Abduction,* Comments of Governments at 240. The reporter's observations affirm a broad interpretation of this provision:

As regards the definition of an agreement which has "legal effect" in terms of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities. Perez-Vera Report, paragraph 70 at 447.

(d) *"Actually exercised".* The most predictable fact pattern under the Convention will involve the abduction of a child directly from the parent who was actually exercising physical custody at the time of the abduction.

To invoke the Convention, the holder of custody rights must allege that he or she actually exercised those rights at the time of the breach or would have exercised them but for the breach. Article 3(b). Under Article 5, custody rights are defined to include the right to determine the child's place of residence. Thus, if a child is abducted from the physical custody of the person in whose care the child has been entrusted by the custodial parent who was "actually exercising" custody, it is the parent who placed the child who may make application under the Convention for the child's return.

Very little is required of the applicant in support of the allegation that custody rights have actually been or would have been exercised. The applicant need only provide some preliminary evidence that he or she actually exercised custody of the child, for instance, took physical care of the child. Perez-Vera Report, paragraph 73 at 448. The Report points out the informal nature of the pleading and proof requirements; Article 8(c) merely requires a statement in the application to the Central Authority as to "the grounds on which the applicant's claim for return of the child is based." *Id.*

In the scheme of the Convention it is presumed that the person who has custody actually exercised it. Article 13 places on the alleged abductor the burden of proving the nonexercise of custody rights by the applicant as an exception to the return obligation. Here, again, the reporter's comments are insightful:

Thus, we may conclude that the Convention, taken as a whole, is built upon the tacit presumption that the person who has care of the child actually exercises custody over it. This idea has to be overcome by discharging the burden of proof which has shifted, as is normal with any presumption (*i.e.* discharged by the "abductor" if he wishes to prevent the return of the child.) Perez-Vera Report paragraph 73 at 449.

III. Judicial Proceedings for Return of Child

A. Right To Seek Return

When a person's custody rights have been breached by the wrongful removal or retention of the child by another, he or she can seek return of the child pursuant to the Convention. This right of return is the core of the Convention. The Convention establishes two means by which the child may be returned. One is through direct application by the aggrieved person to a court in the Contracting State to which the child has been taken or in which the child is being kept. Articles 12, 29. The other is through application to the Central Authority to be established by every Contracting State. Article 8. These remedies are not mutually exclusive; the aggrieved person may invoke either or both of them. Moreover, the aggrieved person may also pursue remedies outside the Convention. Articles 18, 29 and 34. This part of the report describes the Convention's judicial remedy in detail. The administrative remedy is discussed in IV, *infra.*

Articles 12 and 29 authorize any person who claims a breach of custody rights within the meaning of Article 3 to apply for the child's return directly to the judicial authorities of the Contracting State where the child is located.

A petition for return pursuant to the Convention may be filed any time after the child has been removed or retained up until the child reaches sixteen. While the window of time for filing may be wide in a particular case without threat of technically losing rights under the Convention, there are numerous reasons to commence a return proceeding promptly if the likelihood of a voluntary return is remote. The two most crucial reasons are to preclude adjudication of custody on the merits in a country other than the child's habitual residence (see discussion of Article 16, *infra*) and to maximize the chances for the child's return by reducing the alleged abductor's opportunity to establish that the child is settled in a new environment (see discussion of Article 12, *infra*).

A petition for return would be made directly to the appropriate court in the Contracting State where the child is located. If the return proceedings are commenced less than one year from the date of the wrongful removal or retention, Article 12 requires the court to order the return of the child forthwith. If the return proceedings are commenced a year or more after the alleged wrongful

removal or retention, the court remains obligated by Article 12 to order the child returned unless it is demonstrated that the child is settled in its new environment.

Under Article 29 a person is not precluded from seeking judicially-ordered return of a child pursuant to laws and procedures other than the Convention. Indeed, Articles 18 and 34 make clear that nothing in the Convention limits the power of a court to return a child at any time by applying **[*10508]** other laws and procedures conducive to that end.

Accordingly, a parent seeking return of a child from the United States could petition for return pursuant to the Convention, or in the alternative or additionally, for enforcement of a foreign court order pursuant to the UCCJA. For instance, an English father could petition courts in New York either for return of his child under the Convention and/or for recognition and enforcement of his British custody decree pursuant to the UCCJA. If he prevailed in either situation, the respective court could order the child returned to him in England. The father in this illustration may find the UCCJA remedy swifter than invoking the Convention for the child's return because it is not subject to the exceptions set forth in the Convention, discussed at III.I., *infra.*

B. Legal Advice and Costs

Article 25 provides for the extension of legal aid and advice to foreign applicants on the same basis and subject only to the same eligibility requirements as for nationals of the country in which that aid is sought.

Article 26 prohibits Central Authorities from charging applicants for the cost and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. This provision will be of no help to an applicant, however, if the Contracting State in question has made a reservation in accordance with Articles 26 and 42 declaring that it shall not be bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

It is expected that the United States will enter a reservation in accordance with Articles 26 and 42. This will place at least the initial burden of paying for counsel and legal proceedings on the applicant rather than on the federal government. Because the reservation is nonreciprocal, use of it will not automatically operate to deny applicants from the United States free legal services and judicial proceedings in other Contracting States. However, if the Contracting State in which the child is located has itself made use of the reservation in question, the U.S. applicant will not be eligible for cost-free legal representation and court proceedings. For more information on costs, including the possibility that the petitioner's costs may be levied on the abductor if the child is ordered returned, see III.J 2 and IV.C (d) of this analysis.

C. Pleading Requirements

The Convention does not expressly set forth pleading requirements that must be satisfied by an applicant who commences a judicial return proceeding. In contrast, Article 8 sets forth the basic requirements for an application placed before a Central Authority (discussed IV.C(1), *infra*) for the return of the child. Since the objective is identical -- the child's return -- whether relief is sought through the courts or through intercession of the Central Authority, it follows that a court should be provided with at least as much information as a Central Authority is to be provided in a return application filed in compliance with Article 8. To ensure that all necessary information is

provided, the applicant may wish to append to the petition to the court a completed copy of the recommended model form for return of a child (see Annex A to this analysis).

In addition to providing the information set forth in Article 8, the petition for return should allege that the child was wrongfully removed or retained by the defendant in violation of custody rights that were actually being exercised by the petitioner. The petition should state the source of the custody rights, the date of the wrongful conduct, and the child's age at that time. In the prayer for relief, the petitioner should request the child's return and an order for payment by the abducting or retaining parent of all fees and expenses incurred to secure the child's return.

Any return petition filed in a court in the United States pursuant to the Convention must be in English. Any person in the United States who seeks return of a child from a foreign court must likewise follow the requirements of the foreign state regarding translation of legal documents. See Perez-Vera Report, paragraph 132 at page 467.

D. Admissibility of Evidence

Under Article 30, any application submitted to the Central Authority or petition submitted to the judicial authorities of a Contracting State, and any documents or information appended thereto, are admissible in the courts of the State. Moreover, under Article 23, no legalization or similar formalities may be required. However, authentication of private documents may be required. According to the official report, "any requirement of the internal law of the authorities in question that copies or private documents be authenticated remains outside the scope of this provision." Perez-Vera Report, paragraph 131 at page 467.

E. Judicial Promptitude/Status Report

Once an application for return has been filed, the court is required by Article 11 "to act expeditiously in proceedings for the return of children." To keep matters on the fast track, Article 11 gives the applicant or the Central Authority of the requested State the right to request a statement from the court of the reasons for delay if a decision on the application has not been made within six weeks from the commencement of the proceedings.

F. Judicial Notice

In ascertaining whether there has been a wrongful removal or retention of a child within the meaning of Article 3, Article 14 empowers the court of the requested State to take notice directly of the law and decisions in the State of the child's habitual residence. Standard procedures for the proof of foreign law and for recognition of foreign decisions would not need to be followed and compliance with such procedures is not to be required.

G. Court Determination of "Wrongfulness"

Prior to ordering a child returned pursuant to Article 12, Article 15 permits the court to request the applicant to obtain from the authorities of the child's State of habitual residence a decision or other determination that the alleged removal or retention was wrongful within the meaning of Article 3. Article 15 does not specify which "authorities" may render such a determination. It therefore could include agencies of government (*e.g.,* state attorneys general) and courts. Central Authorities shall assist applicants to obtain such a decision or determination. This request may only be made where such a decision or determination is obtainable in that State.

This latter point is particularly important because in some countries the absence of the defendant-abductor and child from the forum makes it legally impossible to proceed with an action for custody brought by the left-behind parent. If an adjudication in such an action were a prerequisite to obtaining a determination of wrongfulness, it would be impossible for the petitioner to comply with an Article 15 request. For this reason a request for a decision or determination on wrongfulness can not be made in such circumstances consistent with the limitation in Article 15. Even if local law permits an adjudication of custody in the absence of the child and defendant (*i.e.,* post-abduction) or would otherwise allow a petitioner to obtain a determination of **{*10509]** wrongfulness, the provisions of Article 15 will probably not be resorted to routinely. That is so because doing so would convert the purpose of the Convention from seeking to restore the *factual* status quo prior to an abduction to emphasizing substantive legal relationships.

A further consideration in deciding whether to request an applicant to comply with Article 15 is the length of time it will take to obtain the required determination. In countries where such a determination can be made only by a court, if judicial dockets are seriously backlogged, compliance with an Article 15 order could significantly prolong disposition of the return petition, which in turn would extend the time that the child is kept in a state of legal and emotional limbo. If "wrongfulness" can be established some other way, for instance by taking judicial notice of the law of the child's habitual residence as permitted by Article 14, the objective of Article 15 can be satisfied without further prejudice to the child's welfare or undue delay of the return proceeding. This would also be consistent with the Convention's desire for expeditious judicial proceedings as evidenced by Article 11.

In the United States, a left-behind parent or other claimant can petition for custody after the child has been removed from the forum. The right of action is conferred by the UCCJA, which in many states also directs courts to hear such petitions expeditiously. The result of such proceeding is a temporary or permanent custody determination allocating custody and visitation rights, or joint custody rights, between the parties. However, a custody determination on the merits that makes no reference to the Convention may not by itself satisfy an Article 15 request by a foreign court for a determination as to the wrongfulness of the conduct within the meaning of Article 3. Therefore, to ensure compliance with a possible Article 15 request the parent in the United States would be well-advised to request an explicit finding as to the wrongfulness of the alleged removal or retention within the meaning of Article 3 retention within the mearning of Article 3 in addition to seeking custody.

H. Constraints Upon Courts in Requested States in Making Substantive Custody Decisions

Article 16 bars a court in the country to which the child has been taken or in which the child has been retained from considering the merits of custody claims once it has received notice of the removal or retention of the child. The constraints continue either until it is determined that the child is not to be returned under the Convention, or it becomes evident that an application under the Convention will not be forthcoming within a reasonable time following receipt of the notice.

A court may get notice of a wrongful removal or retention in some manner other than the filing of a petition for return, for instance by communication from a Central Authority, from the aggrieved party (either directly or through counsel), or from a court in a Contracting State which has stayed or dismissed return proceedings upon removal of the child from that State.

No matter how notice may be given, once the tribunal has received notice, a formal application for the child's return pursuant to the Convention will normally be filed promptly to avoid a decision on the merits from being made. If circumstances warrant a delay in filing a return petition, for instance pending the outcome of private negotiations for the child's return or interventions toward that end by the Central Authority, or pending determination of the location of the child and alleged abductor, the aggrieved party may nevertheless wish to notify the court as to the reason(s) for the delay so that inaction is not viewed as a failure to proceed under the Convention.

I. Duty To Return not Absolute

The judicial duty to order return of a wrongfully removed or retained child is not absolute. Temporal qualifications on this duty are set forth in Articles 12, 4 and 35. Additionally, Articles 13 and 20 set forth grounds upon which return may be denied.

1. Temporal Qualifications

Articles 4, 35 and 12 place time limitations on the return obligation.

(a) *Article 4.* Pursuant to Article 4, the Convention ceases to apply once the child reaches age sixteen. This is true regardless of when return proceedings were commenced and irrespective of their status at the time of the child's sixteenth birthday. *See* I.A., *supra.*

(b) *Article 35.* Article 35 limits application of the Convention to wrongful removals or retentions oocurring after its entry into force between the two relevant Contracting States. *But see* I.C., *supra.*

(c) *Article 12.* Under Article 12, the court is not obligated to return a child when return proceedings pursuant to the Convention are commenced a year or more after the alleged removal or retention *and* it is demonstrated that the child is settled in its new environment. The reporter indicates that "[T]he provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child . . ." Perez-Vera Report, paragraph 109 at page 459.

If the Convention is to succeed in deterring abductions, the alleged abductor must not be accorded preferential treatment by courts in his or her country of origin, which, in the absence of the Convention, might be prone to favor "home forum" litigants. To this end, nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof. Moreover, any claims made by the person resisting the child's return will be considered in light of evidence presented by the applicant concerning the child's contacts with and ties to his or her State of habitual residence. The reason for the passage of time, which may have made it possible for the child to form ties to the new country, is also relevant to the ultimate disposition of the return petition. If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.

2. Article 13 Limitations on the Return Obligation

(a) *Legislative history.* In drafting Articles 13 and 20, the representatives of countries participating in negotiations on the Convention were aware that any exceptions had to be drawn very narrowly lest their application undermine the express purposes of the Convention -- to effect the prompt return of abducted

children. Further, it was generally believed that courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions and allowing their use only in clearly meritorious cases, and only when the person opposing return had met the burden of proof. Importantly, a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory. The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies. Finally, the wording of each exception represents a compromise to accommodate the different legal systems and tenets of family law in effect in the **[*10510]** countries negotiating the Convention, the basic purpose in each case being to provide for an exception that is narrowly construed.

(b) *Non-exercise of custody rights.* Under Article 13(a), the judicial authority may deny an application for the return of a child if the person having the care of the child was not actually exercising the custody rights at the time of the removal or retention, or had consented to or acquiesced in the removal or retention. This exception derives from Article 3(b) which makes the Convention applicable to the breach of custody rights that were actually exercised at the time of the removal or retention, or which would have been exercised but for the removal or retention.

The person opposing return has the burden of proving that custody rights were not actually exercised at the time of the removal or retention, or that the applicant had consented to or acquiesced in the removal or retention. The reporter points out that proof that custody was not actually exercised does not form an exception to the duty to return if the dispossessed guardian was unable to exercise his rights precisely because of the action of the abductor. Perez-Vera Report, paragraph 115 at page 461.

The applicant seeking return need only allege that he or she was actually exercising custody rights conferred by the law of the country in which the child was habitually resident immediately before the removal or retention. The statement would normally include a recitation of the circumstances under which physical custody had been exercised, *i.e.,* whether by the holder of these rights, or by a third person on behalf of the actual holder of the custody rights. The applicant would append copies of any relevant legal documents or court orders to the return application. *See* III, C., *supra,* and Article 8.

(c) *Grave risk of harm/intolerable situation.* Under Article 13(b), a court in its discretion need not order a child returned if there is a grave risk that return would expose the child to physical harm or otherwise place the child in an intolerable situation.

This provision was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests. Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious.

A review of deliberations on the Convention reveals that "intolerable situation" was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the

court may deny the petition. Such action would protect the child from being returned to an "intolerable situation" and subjected to a grave risk of psychological harm.

(d) *Child's preference.* The third, unlettered paragraph of Article 13 permits the court to decline to order the child returned if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views. As with the other Article 13 exceptions to the return obligation, the application of this exception is not mandatory. This discretionary aspect of Article 13 is especially important because of the potential for brainwashing of the child by the alleged abductor. A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child.

(e) *Role of social studies.* The final paragraph of Article 13 requires the court, in considering a respondent's assertion that the child should not be returned, to take into account information relating to the child's social background provided by the Central Authority or other competent authority in the child's State of habitual residence. This provision has the dual purpose of ensuring that the court has a balanced record upon which to determine whether the child is to be returned, and preventing the abductor from obtaining an unfair advantage through his or her own forum selection with resulting ready access to evidence of the child's living conditions in that forum.

3. Article 20

Article 20 limits the return obligation of Article 12. It states: "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

The best explanation for this unique formulation is that the Convention might never have been adopted without it. The negotiating countries were divided on the inclusion of a public policy exception in the Convention. Those favoring a public policy exception believed that under some extreme circumstances not covered by the exceptions of Article 13 a court should be excused from returning a child to the country of habitual residence. In contrast, opponents of a public policy exception felt that such an exception could be interpreted so broadly as to undermine the fabric of the entire Convention.

A public policy clause was nevertheless adopted at one point by a margin of one vote. That clause provided: "Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed." To prevent imminent collapse of the negotiating process engendered by the adoption of this clause, there was a swift and determined move to devise a different provision that could be invoked on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process.

The resulting language of Article 20 has no known precedent in other international agreements to serve as a guide in its interpretation. However, it should be emphasized that this exception, like the others, was intended to be restrictively interpreted and applied, and is not to be used, for example, as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed. Two characterizations of the effect to be given Article 20 are recited below for illumination.

The following explanation of Article 20 is excerpted from paragraph 118 of the Perez-Vera Report at pages 461-2:

It is significant that the possibility, acknowledged in *article 20,* that the child may not be returned when its return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms' has been placed in the last article of the chapter; it was thus intended to emphasize the always clearly exceptional nature of this provision's application. As for the substance of this provision, two comments only are required. Firstly, even if its literal meaning is strongly reminiscent of the terminology used in international texts concerning the protection **[*10511]** of human rights, this particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently, so as to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject-matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles. Secondly, such principles must not be invoked any more frequently, nor must their invocation be more readily admissible than they would be in their application to purely internal matters. Otherwise, the provision would be discriminatory in itself, and opposed to one of the most widely recognized fundamental principles in internal laws. A study of the case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the Convention has in view.

A. E. Anton, Chairman of the Commission on the Hague Conference on Private International Law that drafted the Convention, explained Article 20 in his article, "The Hague Convention on International Child Abduction," 30 I.C.L.Q. 537, 551-2 (July, 1981), as follows:

Its acceptance may in part have been due to the fact that it states a rule which many States would have been bound to apply in any event, for example, by reason of the terms of their constitutions. The reference in this provision to "the fundamental principles of the requested State" make it clear that the reference is not one to international conventions or declarations concerned with the protection of human rights and fundamental freedoms which have been ratified or accepted by Contracting States. It is rather to the fundamental provisions of the law of the requested State in such matters . . . If the United Kingdom decides to ratify the Hague Convention, it will, of course, be for the implementing legislation or the courts to specify what provisions of United Kingdom law come within the scope of Article 20. The Article, however, is merely permissive and it is to be hoped that States will exercise restraint in availing themselves of it.

4. Custody Order no Defense to Return

See I.D.1, *supra, for discussion of Article 17.*

J. Return of the Child

Assuming the court has determined that the removal or retention of the child was wrongful within the meaning of the Convention and that no exceptions to the return obligation have been satisfactorily established by the respondent, Article 12 provides that "the authority concerned shall order the return of the

child forthwith." The Convention does not technically require that the child be returned to his or her State of habitual residence, although in the classic abduction case this will occur. If the petitioner has moved from the child's State of habitual residence the child will be returned to the petitioner, not the State of habitual residence.

1. Return Order not on Custody merits

Under Article 19, a decision under the Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue. It follows that once the factual status quo ante has been restored, litigation concerning custody or visitation issues could proceed. Typically this will occur in the child's State of habitual residence.

2. Costs, Fees and Expenses Shifted to Abductor

In connection with the return order, Article 26 permits the court to direct the person who removed or retained the child to pay necessary expenses incurred by or on behalf of the applicant to secure the child's return, including expenses, costs incurred or payments made for locating the child, costs of legal representation of the applicant, and those of returing the child. The purposes underlying Article 26 are to restore the applicant to the financial position he or she would have been in had there been no removal or retention, as well as to deter such conduct from happening in the first place. This fee shifting provision has counterparts in the UCCJA (sections 7(g), 8(c), 15(b)) and the PKPA *(28 U.S.C. 1738A* note).

IV. Central Authority

In addition to creating a judicial remedy for cases of wrongful removal and retention, the Convention requires each Contracting State to establish a Central Authority (hereinafter "CA") with the broad mandate of assisting applicants to secure the return of their children or the effective exercise of their visitation rights. Articles 1, 10, 21. The CA is expressly directed by Article 10 to take all appropriate measures to obtain the voluntary return of children. The role of the CA with respect to visitation rights is discussed in V., *infra.*

A. Establishment of Central Authority

Article 6 requires each Contracting State to designate a Central Authority to discharge the duties enumerated in Articles 7, 9, 10, 11, 15, 21, 26, 27, and 28.

In France, the Central Authority is located within the Ministry of Justice. Switzerland has designated its Federal Justice Office as CA, and Canada has designated its Department of Justice; However, each Canadian province and territory in which the Convention has come into force has directed its Attorney General to serve as local CA for cases involving that jurisdiction.

In the United States it is very unlikely that the volume of cases will warrant the establishment of a new agency or office to fulfill Convention responsibilities. Rather, the duties of the CA will be carried out by an existing agency of the federal government with experience in dealing with authorities of other countries.

The Department of State's Office of Citizens Consular Services (CCS) within its Bureau of Consular Affairs will most likely serve as CA under the Hague Convention. CCS presently assists parents here and abroad with child custody-related problems within the framework of existing laws and procedures. The Convention should systematize and expedite CCS handling of requests from abroad for assistance in securing the return of children wrongfully abducted to or

retained in the United States, and will provide additional tools with which CCS can help parents in the United States who are seeking return of their children from abroad.

The establishment of an interagency coordinating body is envisioned to assist the State Department in executing its functions as CA. This body is to include representatives of the Departments of State, Justice, and Health and Human Services.

In addition to the mandatory establishment of a CA in the national government, Contracting States are free to appoint similar entities in political subdivisions throughout the country. Rather than mandating the establishment of a CA in every state, it is expected that state governments in the United States will be requested on a case-by-case basis to render specified assistance, consistent with the Convention, aimed at resolving international custody and visitation disputes with regard to children located within their jurisdiction.

B. Duties

Article 7 enumerates the majority of the tasks to be carried out either directly by the CA or through an intermediary. The CA is to take "all appropriate measures" to execute these responsibilities. Although they are free to do so, the Convention does not obligate Contracting States to amend their internal laws to discharge **[*10512]** Convention tasks more efficaciously. *See* Perez-Vera Report, paragraph 63 at page 444.

The following paragraphs of subsections of Article 7 of the Convention are couched in terms of the tasks and functions of the United States CA. The corresponding tasks and functions of the CA's in other States party to the Convention will be carried out somewhat differently in the context of each country's legal system.

Article 7(a). When the CA in the United States is asked to locate a child abducted from a foreign contracting State to this country, it would utilize all existing tools for determining the whereabouts of missing persons. Federal resources available for locating missing persons include the FBI-operated National Crime Information Center (NCIC) computer (pursuant to Pub. L. No. 97-292, the Missing Children Act), the Federal Parent Locator Service (pursuant to section 9 of Pub. L. No. 96-611, the Parental Kidnapping Prevention Act) and the National Center for Missing and Exploited Children. If the abductor's location is known or suspected, the relevant state's Parent Locator Service or Motor Vehicle Bureau and the Internal Revenue Service, Attorney General and Secretary of Education may be requested to conduct field and/or record searches. Also at the state level, public or private welfare agencies can be called upon to verify discreetly any address information about the abductor that may be discovered.

Article 7(b). To prevent further harm to the child, the CA would normally call upon the state welfare agency to take whatever protective measures are appropriate and available consistent with that state's child abuse and neglect laws. The CA, either directly or with the help of state authorities, may seek a written agreement from the abductor (and possibly from the applicant as well) not to remove the child from the jurisdiction pending procedures aimed at return of the child. Bonds or other forms of security may be required.

Article 7(c). The CA, either directly or through local public or private mediators, attorneys, social workers, or other professionals, would attempt to develop an agreement for the child's voluntary return and/or resolution of other outstanding issues. The obligation of the CA to take or cause to be taken all appropriate measures to obtain the voluntary return of the child is so fundamental a purpose of this Convention that it is restated in Article 10.

However, overtures to secure the voluntary return of a child may not be advisable if advance awareness by the abductor that the Convention has been invoked is likely to prompt further flight and concealment of the child. If the CA and state authorities are successful in facilitating a voluntary agreement between the parties, the applicant would have no need to invoke or pursue the Convention's judicial remedy.

Article 7(d). The CA in the United States would rely upon court personnel or social service agencies in the child's state of habitual residence to compile information on the child's social background for the use of courts considering exceptions to a return petition in another country in which an abducted or retained child is located. *See* Article 13.

Article 7(e). The CA in the United States would call upon U.S. state authorities to prepare (or have prepared) general statements about the law of the state of the child's habitual residence for purposes of application of the Convention in the country where the child is located, *i.e.,* to determine whether a removal or retention was wrongful.

Articles 7(f) and (g). In the United States the federal CA will not act as legal advocate for the applicant. Rather, in concert with state authorities and interested family law attorneys, the CA, through state or local bodies, will assist the applicant in identifying competent private legal counsel or, if eligible, in securing representation by a Legal Aid or Legal Services lawyer. In some states, however, the Attorney General or local District Attorney may be empowered under state law to intervene on behalf of the applicant-parent to secure the child's return.

In some foreign Contracting States, the CA may act as the legal representative of the applicant for all purposes under the Convention.

Article 28 permits the CA to require written authorization empowering it to act on behalf of the applicant, or to designate a representative to act in such capacity.

Article 7(h). Travel arrangements for the return of a child from the United States would be made by the CA or by state authorities closest to the case in cooperation with the petitioner and/or interested foreign authorities. If it is necessary to provide short-term care for the child pending his or her return, the CA presumably will arrange for the temporary placement of the child in the care of the person designated for that purpose by the applicant, or, failing that, request local authorities to appoint a guardian, foster parent, etc. The costs of transporting the child are borne by the applicant unless the court, pursuant to Article 26, orders the wrongdoer to pay.

Article 7(i). The CA will monitor all cases in which its assistance has been sought. It will maintain files on the procedures followed in each case and the ultimate disposition thereof. Complete records will aid in determining how frequently the Convention is invoked and how well it is working.

C. Other Tasks

1. Processing Applications

Article 8 sets forth the required contents of a return application submitted to a CA, all of which are incorporated into the model form recommended for use when seeking a child's return pursuant to the Convention (see Annex A of this analysis). Article 8 further provides that an application for assistance in securing the return of a child may be submitted to a CA in either the country of the child's habitual residence or in any other Contracting State. If a CA receives an application with respect to a child whom it believes to be located

in another Contracting State, pursuant to Article 9 it is to transmit the application directly to the appropriate CA and inform the requesting CA or applicant of the transmittal.

It is likely that an applicant who knows the child's whereabouts can expedite the return process by electing to file a return application with the CA in the country in which the child is located. The applicant who pursues this course of action may also choose to file a duplicate copy of the application for information purposes with the CA in his or her own country. Of course, the applicant may prefer to apply directly to the CA in his or her own country even when the abductor's location is known, and rely upon the CA to transfer documents and communicate with the foreign CA on his or her behalf. An applicant who does not know the whereabouts of the child will most likely file the return application with the CA in the child's State of habitual residence.

Under Article 27, a CA may reject an application if "it is manifest that the requirements of the Convention are not fulfilled or that the application is otherwise not well founded." The CA must promptly inform the CA in the requesting State, or the applicant directly, of its reasons for such rejection. Consistent with the spirit of the Convention and in the absence of any prohibition on doing so, the applicant should be allowed to correct the defects and refile the application.

Under Article 28, a CA may require the applicant to furnish a written **[*10513]** authorization empowering it to act on behalf of the applicant, or designating a representative so to act.

2. Assistance in Connection With Judicial Proceedings

(a) *Request for status report.* When an action has been commenced in court for the return of a child and no decision has been reached by the end of six weeks, Article 11 authorizes the applicant or the CA of the requested State to ask the judge for a statement of the reasons for the delay. The CA in the country where the child is located may make such a request on its own initiative, or upon request of the CA of another Contracting State. Replies received by the CA in the requested State are to be transmitted to the CA in the requesting State or directly to the applicant, depending upon who initiated the request.

(b) *Social studies/background reports.* Information relating to the child's social background collected by the CA in the child's State of habitual residence pursuant to Article 7(d) may be submitted for consideration by the court in connection with a judicial return proceeding. Under the last paragraph of Article 13, the court must consider home studies and other social background reports provided by the CA or other competent authorities in the child's State of habitual residence.

(c) *Determination of "wrongfulness".* If a court requests an applicant to obtain a determination from the authorities of the child's State of habitual residence that the removal or retention was wrongful, Central Authorities are to assist applicants, so far as practicable, to obtain such a determination. Article 15.

(d) *Costs.* Under Article 26, each CA bears its own costs in applying the Convention. The actual operating expenses under the Convention will vary from one Contracting State to the next depending upon the volume of incoming and outgoing requests and the number and nature of the procedures available under internal law to carry out specified Convention tasks.

Subject to limited exceptions noted in the next paragraph, the Central Authority and other public services are prohibited from imposing any charges in

relation to applications submitted under the Convention. Neither the applicant nor the CA in the requesting State may be required to pay for the services rendered directly or indirectly by the CA of the requested State.

The exceptions relate to transportation and legal expenses to secure the child's return. With respect to transportation, the CA in the requested State is under no obligation to pay for the child's return. The applicant can therefore be required to pay the costs of transporting the child. With respect to legal expenses, if the requested State enters a reservation in accordance with Articles 26 and 42, the applicant can be required to pay all costs and expenses of the legal proceedings, and those arising from the participation of legal counsel or advisers. However, see III. J 2 of this analysis discussing the possibility that the court ordering the child's return will levy these and other costs upon the abductor. Even if the reservation under Articles 26 and 42 is entered, under Article 22 no security, bond or deposit can be required to guarantee the payment of costs and expenses of the judicial or administrative proceedings falling within the Convention.

Under the last paragraph of Article 26 the CA may be able to recover some of its expenses from the person who engaged in the wrongful conduct. For instance, a court that orders a child returned may also order the person who removed or retained the child to pay the expenses incurred by or on behalf of the petitioner, including costs of court proceedings and legal fees of the petitioner. Likewise, a court that issues an order concerning visitation may direct the person who prevented the exercise of visitation rights to pay necessary expenses incurred by or on behalf of the petitioner. In such cases, the petitioner could recover his or her expenses, and the CA could recover its outlays on behalf of the petitioner, including costs associated with, or payments made for, locating the child and the legal representation of the petitioner.

V. Access Rights -- Article 21

A. Remedies for Breach

Up to this point this analysis has focused on judicial and administrative remedies for the removal or retention of children in breach of custody rights. "Access rights," which are synonymous with "visitation rights", are also protected by the Convention, but to a lesser extent than custody rights. While the Convention preamble and Article 1(b) articulate the Convention objective of ensuring that rights of access under the law of one state are respected in other Contracting States, the remedies for breach of access rights are those enunciated in Article 21 and do not include the return remedy provided by Article 12.

B. Defined

Article 5(b) defines "access rights" as including "the right to take a child for a limited period of time to a place other than the child's habitual residence."

A parent who takes a child from the country of its habitual residence to another country party to the Convention for a summer visit pursuant to either a tacit agreement between the parents or a court order is thus exercising his or her access rights. Should that parent fail to return the child at the end of the agreed upon visitation period, the retention would be wrongful and could give rise to a petition for return under Article 12. If, on the other hand, a custodial parent resists permitting the child to travel abroad to visit the noncustodial parent, perhaps out of fear that the child will not be returned at the end of the visit, this interference with access rights does not constitute a

wrongful retention within the meaning of Article 3 of the Convention. The parent whose access rights have been infringed is not entitled under the Convention to the child's "return," but may request the Central Authority to assist in securing the exercise of his or her access rights pursuant to Article 21.

Article 21 may also be invoked as a precautionary measure by a custodial parent who anticipates a problem in getting the child back at the end of a visit abroad. That parent may apply to the CA of the country where the child is to visit the noncustodial parent for steps to ensure the return of the child at the end of the visit -- for example, through appropriate imposition of a performance bond or other security.

C. Procedure for Obtaining Relief

Procedurally Article 21 authorizes a person complaining of, or seeking to prevent, a breach of access rights to apply to the CA of a Contracting State in the same way as a person seeking return of the child. The application would contain the information described in Article 8, except that information provided under paragraph (c) would be the grounds upon which the claim is made for assistance in organizing or securing the effective exercise of rights of access.

Once the CA receives such application, it is to take all appropriate measures pursuant to Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights is subject. This includes initiating or facilitating the institution of proceedings, either directly or through intermediaries, to organize or protect access rights and to secure respect for conditions to which these rights are subject. **[*10514]**

If legal proceedings are instituted in the Contracting State in which the noncustodial parent resides. Article 21 may not be used by the noncustodial parent to evade the jurisdiction of the courts of the child's habitual residence, which retain authority to define and/or condition the exercise of visitation rights. A parent who has a child abroad for a visit is not to be allowed to exploit the presence of the child as a means for securing from the CA (or court) in that country more liberal visitation rights than those set forth in a court order agreed upon in advance of the visit. Such result would be tantamount to sanctioning forum-shopping contrary to the intent of the Convention. Any such application should be denied and the parent directed back to the appropriate authorities in the State of the child's habitual residence for consideration of the desired modification. Pending any such modification, once the lawful visitation period has expired, the custodial parent would have the right to seek the child's return under Article 3.

The Perez-Vera Report gives some limited guidance as to how CA's are to cooperate to secure the exercise of access rights:

. . . it would be advisable that the child's name not appear on the passport of the holder of the right of access, whilst in 'transfrontier' access cases it would be sensible for the holder of the access rights to give an undertaking to the Central Authority of the child's habitual residence to return the child on a particular date and to indicate also the places where he intends to stay with the child. A copy of such an undertaking would then be sent to the Central Authority of the habitual residence of the holder of the access rights, as well as to the Central Authority of the State in which he has stated his intention of staying with the child. This would enable the authorities to know the whereabouts of the child at any time and to set in motion proceedings for bringing about its return, as soon as the stated time-limit has expired. Of course, none of the measures could by itself ensure that access rights are

exercised properly, but in any event we believe that this Report can go no further: the specific measures which the Central Authorities concerned are able to take will depend on the circumstances of each case and on the capacity to act enjoyed by each Central Authority. Perez-Vera Report, paragraph 128 at page 466.

D. Alternative Remedies

In addition to or in lieu of invoking Article 21 to resolve visitation-related problems, under Articles 18, 29 and 34 an aggrieved parent whose access rights have been violated may bypass the CA and the Convention and apply directly to the judicial authorities of a Contracting State for relief under other applicable laws.

In at least one case it is foreseeable that a parent abroad will opt in favor of local U.S. law instead of the Convention. A noncustodial parent abroad whose visitation rights are being thwarted by the custodial parent resident in the United States could invoke the UCCJA to seek enforcement of an existing foreign court order conferring visitation rights. Pursuant to section 23 of the UCCJA, a state court in the United States could order the custodial parent to comply with the prescribed visitation period by sending the child to the parent outside the United States. This remedy is potentially broader and more meaningful than the Convention remedy, since the latter does not include the right of return when a custodial parent obstructs the noncustodial parent's visitation rights, *i.e.,* by refusing to allow the other parent to exercise those rights. It is possible that a parent in the United States seeking to exercise access rights with regard to a child habitually resident abroad may similarly find greater relief under foreign law than under the Convention.

VI. Miscellaneous and Final Clauses

A. Article 36

Article 36 permits Contracting States to limit the restrictions to which a child's return may be subject under the Convention, *i.e.,* expand the return obligation or cases to which the Convention will apply. For instance, two or more countries may agree to extend coverage of the Convention to children beyond their sixteenth birthdays, thus expanding upon Article 4. Or, countries may agree to apply the Convention retroactively to wrongful removal and retention cases arising prior to its entry into force for those countries. Such agreement would remove any ambiguity concerning the scope of Article 35. The Department of State is not proposing that the United States make use of this Article.

B. Articles 37 and 38

Chapter VI of the Hague Convention consists of nine final clauses concerned with procedural aspects of the treaty, most of which are self-explanatory. Article 37 provides that states which were members of the Hague Conference on Private International Law at the time of the Fourteenth Session (October 1980) may sign and become parties to the Convention by ratification, acceptance or approval. Significantly, under Article 38 the Convention is open to accession by non-member States, but enters into force only between those States and member Contracting States which specifically accept their accession to the Convention. Article 38.

C. Articles 43 and 44

In Article 43 the Convention provides that it enters into force on the first day of the third calendar month after the third country has deposited its instrument of ratification, acceptance, approval or accession. For countries that become parties to the Convention subsequently, the Convention enters into

force on the first day of the third calendar month following the deposit of the instrument of ratification. Pursuant to Article 43, the Convention entered into force on December 1, 1983 among France, Portugal and five provinces of Canada, and on January 1, 1984 for Switzerland. As of January, 1986 it is in force for all provinces and territories of Canada with the exception of Alberta, the Northwest Territories, Prince Edward Island and Saskatchewan.

The Convention enters into force in ratifying countries subject to such declarations or reservations pursuant to Articles 39, 40, 24 and 26 (third paragraph) as may be made by each ratifying country in accordance with Article 42.

The Convention remains in force for five years from the date it first entered into force (*i.e.,* December 1, 1983), and is renewed tacitly every five years absent denunciations notified in accordance with Article 44.

D. Articles 39 and 40

Article 39 authorizes a Contracting State to declare that the Convention extends to some or all of the territories for the conduct of whose international relations it is responsible.

Under Article 40, countries with two or more territorial units having different systems of law relative to custody and visitation rights may declare that the Convention extends to all or some of them. This federal state clause was included at the request of Canada to take account of Canada's special constitutional situation. The Department of State is not proposing that the United States make use of this provision. Thus, if the United States ratifies the Convention, it would come into force throughout the United States as the supreme law of the land in every state and other jurisdiction.

E. Article 41

Article 41 is another provision inserted at the request of one country, and is best understood by reciting the reporter's explanatory comments:

Finally a word should be said on Article 41, since it contains a wholly novel provision in **[*10515]** Hague Conventions. It also appears in the other Conventions adopted at the Fourteenth Session, *i.e.,* the *Convention on International Access to Justice,* at the express request of the Australian delegation.

This article seeks to make it clear that ratification of the Convention by a State will carry no implication as to the internal distribution of executive, judicial and legislative powers in that State.

This may seem self-evident, and this is the point which the head of the Canadian delegation made during the debates of the Fourth Commission where it was decided to insert such a provision in both Conventions (see P.-v. No. 4 of the Plenary Session). The Canadian delegation, openly expressing the opinion of a large number of delegations, regarded the insertion of this article in the two Conventions as unnecessary. Nevertheless, Article 41 was adopted, largely to satisfy the Australian delegation, for which the absence of such a provision would apparently have created insuperable constitutional difficulties. Perez-Vera Report, paragraph 149 at page 472.

F. Article 45

Article 45 vests the Ministry of Foreign Affairs of the Kingdom of the Netherlands, as depository for the Convention, with the responsibility to notify Hague Conference member States and other States party to the Convention of all actions material to the operation of the Convention.

Annex A

The following model form was recommended by the Fourteenth Session of the Hague Conference on Private International Law (1980) for use in making applications pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction for the return of wrongfully removed or retained children. The version of the form to be used for requesting the return of such children from the United States will probably seek additional information, in particular to help authorities in the United States in efforts to find a child whose whereabouts are not known to the applicant.

Request for Return

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

Requesting Central Authority or Applicant

Requested Authority

Concerns the following child: who will attain the age of 16 on , 19 .

Note. -- The following particulars should be completed insofar as possible.

I -- Identity of the Child and its Parents

1 Child

Name and first names

Date and place of birth

Passport or identity card No., if any

Description and photo, if possible (see annexes)

2 Parents

2.1 Mother:

Name and first names

Date and place of birth

Nationality

Occupation

Habitual residence

Passport or identity card No., if any

2.2 Father:

Name and first names

Date and place of birth

Nationality

Occupation

Habitual residence

Passport or identity card No., if any

2.3 Date and place of marriage

II -- Requesting Individual or Institution (who actually exercised custody before the removal or retention)

3 Name and first names

Nationality of individual applicant

Occupation of individual applicant

Address

Passport or identity card No., if any

Relation to the child

Name and address of legal adviser, if any

III -- Place Where the Child Is Thought To Be

4.1 Information concerning the person alleged to have removed or retained the child

Name and first names

Date and place of birth, if known

Nationality, if known

Occupation

Last known address

Passport or identity card No., if any

Description and photo, if possible (see annexes)

4.2 Address of the child

4.3 Other persons who might be able to supply additional information relating to the whereabouts of the child

IV -- Time, Place, Date and Circumstances of the Wrongful Removal or Retention

V -- Factual or Legal Grounds Justifying the Request

VI -- Civil Proceedings in Progress

VII -- Child Is To Be Returned To:

a. Name and first names

Date and place of birth

Address

Telephone number

b. Proposed arrangements for return of the child

VIII -- Other Remarks

IX -- List of Documents Attached *

* E.g. Certified copy of relevant decision or agreement concerning custody or access; certificate or affidavit as to the applicable law; information relating to the social background of the child; authorization empowering the Central Authority to act on behalf of applicant.

Date

Place

Signature and/or stamp of the requesting Central Authority or applicant

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