Litigating International Child Abduction Cases Under the Hague Convention

A Manual to provide attorneys with a road map to assist in the effective and competent litigation of a Hague Convention case involving the abduction of a child from his or her home country.

NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN

Prepared by

KILPATRICK TOWNSEND
ATTORNEYS AT LAW

Litigating International Child Abduction Cases Under the Hague Convention

Prepared by

2012

National Center for Missing & Exploited Children®
Charles B. Wang International Children's Building
699 Prince Street
Alexandria, VA 22314-3175
1-800-THE-LOST®
(1-800-843-5678)

NCMEC INTERNATIONAL CHILD ABDUCTION TRAINING MANUAL
TABLE OF CONTENTS

Page

I. INTRODUCTION

A. THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION.

The purpose of the first Manual, issued in 2007, was to provide attorneys with a road map for litigating international child abduction cases. Since the publication of the first Manual, the United States Supreme Court issued its first opinion concerning the Hague Convention on the Civil Aspects of International Child Abduction, and more parties have sought to resolve international abduction matters through alternative methods, including mediation. This updated Manual not only provides a general understanding of the law and its recent developments, but also describes practical considerations to aid attorneys in advocating for their clients. Finally, it raises issues and makes suggestions to ameliorate the potentially negative impact that these proceedings may have on the children involved in such disputes.[1] As is evident in this Manual, representing a client in an international abduction matter requires a balancing of various considerations.

The Hague Convention on the Civil Aspects of International Child Abduction (the "*Hague Convention*") (attached as Exhibit B),[2] is a treaty between multiple signatory countries wherein the countries agree to cooperate in returning children to their home country for custody proceedings. The United States assisted in drafting the Hague Convention and became a signatory in 1981. Eighty-seven countries throughout the world are parties to the Hague

[1] For ease of reference, the cases cited throughout this Manual are included in a list (attached as Exhibit A) organized by circuit of origin.

[2] October 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 22514 (the "Hague Convention"). The Hague Convention was the product of the final act of the Fourteenth Session of the Hague Conference on Private International Law, agreed upon in The Hague on October 25, 1980. At this session, each signatory country agreed to submit the Hague Convention draft to their governments. *See* Hague Conference on Private International Law: Final Act, *reprinted in* 19 I.L.M. 1501 (Am. Soc't Int'l Law 1980).

Convention, including most recently Russia, Morocco, and Singapore. The signatories to the Hague Convention that are recognized by the United States are listed in Exhibit C.[3]

The United States Congress enacted the International Child Abduction Remedies Act ("ICARA")[4] as the implementing legislation for the Hague Convention. A copy of ICARA, as currently codified, is attached as Exhibit D. ICARA establishes the Hague Convention as the law of the United States, provides definitions, sets forth jurisdiction, and addresses certain details regarding how the United States will enforce the provisions of the treaty. ICARA explicitly states that its provisions are in addition to, and not in lieu of, the Hague Convention.[5]

The State Department's analysis of the Hague Convention is set forth in a document known as Public Notice 957 (attached as Exhibit E).[6] In addition, the history and commentary by the official reporter at the Fourteenth Session of the Hague Convention on Private International Law is set forth in a document commonly known as the "Perez-Vera Report." A copy of the Perez-Vera Report is attached as Exhibit F.[7] Both Public Notice 957 and the Perez-Vera Report provide insight into the purposes and procedures of the Hague Convention.

---

[3] Although there are 87 contracting countries to the Hague Convention, at this time, the United States recognizes only 68 countries as "partner countries" for purposes of resolving international child abductions under the Hague Convention.

[4] Pub. L. No. 100-300, 102 Stat. 437 (1988) ("ICARA"). ICARA is codified at 42 U.S.C. §§ 11601-11611. ICARA was created to deal with the international abduction of children and to allow a petitioner to assert his or her rights in exigent circumstances. *See Distler v. Distler*, 26 F. Supp. 2d 723, 727 (D.N.J. 1998).

[5] *See* 42 U.S.C. § 11601(b)(2).

[6] Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10494 (1986) ("Public Notice 957").

[7] Elisa Perez-Vera, *Explanatory Report in* Vol. III Hague Conference on Private Int'l Law, Actes et document de la Quatatorziem session, at 426 (Bunean Permanent de la Conference 1980), *available at* http://www.hcch.net/upload/expl28.pdf (the "Perez-Vera Report").

B. THE ROLE OF THE STATE DEPARTMENT & THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN.

On April 1, 2008, after the publication of the first Manual, the State Department's Office of Children's Issues reassumed the United States' Central Authority responsibilities in connection with incoming Hague Convention cases. The Central Authority is a government-designated agency within each Hague Convention signatory country that handles child abduction issues. Previously, the State Department delegated these duties to The National Center for Missing and Exploited Children ("NCMEC") under a Cooperative Agreement with the Department of Justice and the State Department. Although NCMEC no longer manages the incoming Central Authority functions, it continues to provide technical assistance and resources to parents, law enforcement, and professionals who are working to prevent and resolve international abductions, including through the publication of this updated Manual.

Most Hague Convention actions follow a similar factual and procedural path. After a parent realizes that his or her child has been abducted to the United States, the parent exhausts all avenues within his or her home country to find the child. The left-behind parent then informs the Central Authority within his or her home country. The Central Authority works with the left-behind parent to complete a set of documents (the "Application") to initiate the process for the return of, or access to, the child. The Central Authority then forwards the Application and all supporting materials to the State Department.

The State Department, with the aid of both governmental and non-governmental agencies, including NCMEC, then begins the process of locating the child in the United States by using school, employment, financial, social security, police, postal, internet or other public records. More information concerning this investigation is provided in Section IV.C.2 of this Manual.

Once the State Department locates the child, if the left-behind parent requests *pro bono* legal representation based on the parent's personal assessment of eligibility under the Legal Services Corporation Poverty Guidelines,[8] the State Department contacts attorneys in the International Child Abduction Attorney Network ("ICAAN")[9] to locate counsel who may be interested in providing representation. The State Department provides potential counsel with basic information such as the country involved and the gender of the potential client. Counsel who consent to considering representation are included on a list with their contact information, and the client is instructed to contact potential counsel.

If counsel is interested in proceeding after having an initial call with the left-behind parent, the State Department will provide additional information such as the Application and custody documents. If the Application is completed in the left-behind parent's native language, the State Department will provide the foreign language Application and the translated Application to counsel. The Application serves as the initial source of relevant details regarding the abduction. After reviewing the materials, counsel will proceed with their independent representation of the left-behind parent in the Hague Convention litigation. Once the client engages counsel and an engagement letter is signed, the State Department provides counsel with the entire file.

---

[8] *See* 45 C.F.R. pt. 1611, App. A (2012).

[9] Until April 2008, NCMEC ran the International Child Abduction Attorney Network ("ICAAN") on behalf of the Department of State. However, in April 2008, the U.S. Central Authority assumed primary responsibility for all "incoming" casework, including operation of the attorney network. Attorneys who had signed up for ICAAN were invited to participate in the U.S. Central Authority's Attorney Network, and nearly all did. Following the transition of incoming Central Authority duties to the Department of State, NCMEC has maintained its network but has broadened the role of ICAAN to provide representation in international (and domestic) family abduction matters of all kinds, including both Hague and non-Hague matters. *See* http://missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=217 and http://travel.state.gov/abduction/attorneysjudges/network/network_4936.html.

NCMEC also provides legal technical assistance for attorneys at any point during the litigation. This assistance includes discussing legal questions, referring attorneys to ICAAN mentors, discussing alternate legal strategies, arranging logistical support, providing third party referrals for counseling and other support, and troubleshooting.

C. OVERVIEW OF A HAGUE CONVENTION CASE.

There are two types of Hague Convention cases: return and access. This Manual focuses primarily on return cases unless otherwise noted. In return cases the left-behind parent with custodial rights seeks the return of his or her child to the child's country of habitual residence.[10] In access cases, the left-behind parent seeks enforcement of visitation rights to his or her child.

In return cases, the Hague Convention mandates that courts should determine only the jurisdictional merits of the case and should not evaluate any underlying merits of the custody dispute. Specifically, under the Hague Convention, courts can determine only *where* a child custody action should be tried. Article 16 of the Hague Convention specifically bars courts in countries to which children have been abducted from considering the merits of custody once they receive notice of the wrongful removal or retention of the children. All circuits that have addressed this issue have followed this mandate of the Hague Convention.[11] When litigating a Hague Convention return action, counsel should be prepared to counter the defense's or the court's attempts to convert the action into a custody proceeding. More importantly, counsel should take every opportunity to remind the court that a Hague Convention case is purely

---

[10] A return case arises when a child is removed from his or her home country of habitual residence or wrongfully prohibited from returning to the country of habitual residence. Both of these circumstances establish a legal basis for a return case and are used interchangeably throughout this Manual.

[11] *See, e.g.*, *Nicolson v. Pappalardo*, 605 F.3d 100, 109 (1st Cir. 2010); *Von Kennel Gaudin v. Remis*,282 F.3d 1178, 1182 (9th Cir. 2002); *Miller v. Miller*, 240 F.3d 392, 398 (4th Cir. 2001); *March v. Levine*, 249 F.3d 462, 472 (6th Cir. 2001); *Diorinou v. Mezitis*, 237 F.3d 133, 140 (2d Cir. 2001); *England v. England*, 234 F.3d 268, 271 (5th Cir. 2000); *Lops v. Lops*, 140 F.3d 927, 936 (11th Cir. 1998); *Friedrich v. Friedrich*, 983 F.2d 1396, 1402 (6th Cir. 1993).

jurisdictional and is not intended to focus on the best interests of the child or other custody issues. *See* Section III.F for additional information on best interests of the child and Section IV.C for additional information on litigation logistics.

Both state and federal courts have jurisdiction to hear Hague Convention return cases.[12] Thus, whether to file in federal or state court is one of counsel's first strategic decisions in a Hague Convention return case.[13] Access cases, in which a left-behind parent seeks only to exercise access rights (as opposed to custodial rights) to the child, can be filed only in state court.[14]

Certain procedural issues of a Hague Convention case are similar to those of a "typical" civil litigation matter. The petition for return,[15] like any other petition or complaint filed in federal court, must set forth the basis for the court's jurisdiction, the general causes of action, and the relief sought by the left-behind parent. A notice of motion or order to show cause often is filed simultaneously with the petition for return to request that the court compel the abducting parent to attend a court proceeding and show why he or she should not return the child. This filing also is intended to ensure that the abducting parent will not leave the court's jurisdiction with the child.

Other procedural issues are unique to Hague Convention cases. One major procedural issue involves assessing the risk that the abducting parent, after being served with the petition,

---

[12] 42 U.S.C. § 11603(a) (providing for concurrent jurisdiction in return cases).

[13] *See* Hague Convention, *supra* note 2, *infra* Section IV.A.1.

[14] *Bromley v. Bromley*, 30 F. Supp. 2d 857, 860 (E.D. Pa. 1998) (holding that the "plain language of the Convention does not provide federal courts with jurisdiction over access rights"); *Wiggill v. Janicki*, 262 F. Supp. 2d 687, 689 (S.D. W.Va. 2003) ("Federal courts do not have jurisdiction to enforce rights of access under the Convention.").

[15] The parties to a Hague Convention case are designated as the petitioner (the left-behind parent) and the respondent (the abducting parent).

will flee the jurisdiction with the child prior to the show cause hearing. This risk may be minimized in a number of ways, including having law enforcement place the child in the temporary custody of the left-behind parent (or Child Protective Services). The potentially competing interests of due process and the security and psychological safety of the child provide challenges that are not typical in the average federal court proceeding. Suggestions for handling these logistical issues follow in Section IV.C.

The hearing to show cause is the first hearing in the action unless an *ex parte* hearing has been held to request that the court remove the child from the abducting parent prior to or upon service. The first hearing is a unique opportunity for the petitioner's attorney to advance the case and explain to the court why the petitioner is seeking relief from the court under the Hague Convention. It may be advisable at that time to provide to the court an explanation of the Hague Convention, how the child's situation falls within the operative scope of the Hague Convention, the specific relief sought by the left-behind parent, and the scope of the court's jurisdiction under the Hague Convention. Again, this is a prime opportunity to inform the court of its jurisdictional limits and ensure that the court understands what issues it can and cannot decide under the Hague Convention.

After the abducting parent has been served, an evidentiary trial is held. The trial typically consists of an opening argument, examination and cross-examination of witnesses, and a closing argument. The court may, *sua sponte*, decide to interview the child. Jurisdictions differ in their approach to considering a child's testimony in a Hague Convention case. If a court decides to speak with the child, typically the child will be taken into chambers where the court will question him or her. Some courts allow counsel to be present, but not the parents. The purpose of the court's questioning is to determine the child's preference regarding residence and/or to obtain

additional testimony regarding defenses that may have been raised in the proceeding. This situation should arise only when the court deems the child sufficiently mature to understand the issues and express objections to being returned.

After this evidentiary hearing, the court will issue a decision on whether the child should be returned to the home country. If the court grants the return, the opposing party may appeal to the appropriate appellate court. In light of the potential for appeal and/or a motion to stay the return order, travel arrangements should be orchestrated so that the left-behind parent and child can leave the country as soon as the court enters a return order, thereby mooting any subsequent filings that may delay enforcement of a return order.[16] If the appellate court issues a stay, the left-behind parent and child may have to stay in the United States for an additional period of time.[17]

In Hague Convention cases, practitioners often struggle with the practical logistics of returning a child. Various options for the payment of travel expenses and potential available airline and hotel discounts should be explored. Where the child will reside pending the final hearing also requires strategic analysis and advocacy, as the lawyers will need to assist the court in deciding where the child will be most secure pending the trial. This process provides counsel with an opportunity to work with judges' chambers, translators, social services, federal marshals, and other law enforcement personnel in a problem-solving mode to achieve the client's goals. It

---

[16] *See* *Bekier v. Bekier*, 248 F.3d 1051, 1056 (11th Cir. 2001) (holding that removal of the children from the jurisdiction of the court mooted the appeal). *But see* *Fawcett v. McRoberts*, 326 F.3d 491, 494-97 (4th Cir. 2003) (holding that an appeal was not moot despite removal of the children from court's jurisdiction).

[17] Both the transportation costs associated with the child's return and attorney's fees can be sought and recovered by the left-behind parent. *See* 42 U.S.C. § 11607(b). This relief should be requested in the initial petition. Realistically, however, these costs usually are borne by the left-behind parent and/or their counsel's firm.

is best to identify these issues as early as possible in the proceeding so they can be incorporated into the trial plan and counsel can be prepared for all related contingencies.

Ultimately, when filing a petition for return, counsel must anticipate the respondent's response. Explosive allegations often are raised in response to the petition for return. For example, defensive allegations may include spousal abuse, neglect or child cruelty. These issues should be discussed in your first substantive client interview.

In addition to preparing the left-behind parent for these potential defenses, the first discussion with your client should cover all relevant topics that can be used to build the case, including the exercise of custody, any agreements between the parties, and other logistical issues. By first identifying the jurisdiction and then reading through this Manual, counsel will have an understanding of the issues a court will consider in deciding a Hague Convention case.

II. ESTABLISHING A *PRIMA FACIE* CASE FOR RETURN

The Hague Convention provides that if the petitioner successfully proves a *prima facie* case, the child must be returned unless the respondent can prove that an affirmative defense applies. *See* Section III. The petitioner must demonstrate a *prima facie* case by a preponderance of the evidence.[18]

[18] 42 U.S.C. § 11603(e).

The elements of a *prima facie* case are enumerated in Articles 3[19] and 4[20] of the Hague Convention. Courts have recognized that the petitioner establish a *prima facie* case if he or she proves three elements: (1) prior to removal or wrongful retention, the child was habitually resident in a foreign country; (2) the removal or retention was in breach of custody rights under the foreign country's law; and (3) the petitioner actually was exercising custody rights at the time of the removal or wrongful retention.[21] If the petitioner establishes a *prima facie* case, the abducted child must be returned to the country of habitual residence unless the respondent can prove that one of the designated affirmative defenses applies.[22]

Although most decisions recite these three elements as establishing a *prima facie* case, technically there is at least one more element: proving that the abducted child is under the age of 16. This is a critical element of a Hague Convention case because, as further discussed below, Article 4 of the Hague Convention explicitly states that "[t]he Convention shall cease to apply when the child attains the age of 16 years."[23]

In addition, although not part of the petitioner's *prima facie* case, if the petitioner can demonstrate that the petition is filed within one year of the wrongful removal or retention, then

---

[19] Hague Convention, *supra* note 2, art. 3. Article 3 provides:

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 subparagraph 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.

[20] *Id.* at art. 4. Article 4 provides: "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."

[21] *Id.* at arts. 3-4.

[22] *Furnes v. Reeves*, 362 F.3d 702, 722 (11th Cir. 2004).

[23] Hague Convention, *supra* note 2, art. 4.

the well-settled affirmative defense in Article 12 of the Hague Convention does not apply. Thus, while technically not part of the petitioner's *prima facie* case, proving that the petition was filed within one year of wrongful removal or retention is critically important and is discussed below as if it were an element of the petitioner's burden of proof.

A. HABITUAL RESIDENCE PRIOR TO WRONGFUL REMOVAL OR RETENTION WAS IN A FOREIGN COUNTRY.

To establish a *prima facie* case, a petitioner first must demonstrate that the child was habitually resident in one Hague signatory country and then was wrongfully removed to or retained in a different Hague signatory country.[24] The determination of the child's country of habitual residence therefore is central to the disposition of a Hague Convention case.

For the Hague Convention to apply, the abducted child must have been "habitually resident in a Contracting State immediately before any breach of custody or access rights."[25] To be actionable under the Hague Convention, child abduction and retention cases must be international, and the involved countries must be recognized by the United States as signatories to the Convention.[26] For example, the Hague Convention would not apply in a case where a child is habitually resident in Atlanta, Georgia and is wrongfully removed to Phoenix, Arizona, since the child remained in the same country. Similarly, the Hague Convention would not apply in a case where the child is removed from the United States to Japan because Japan is not a signatory to the Hague Convention. However, if the child is living in and removed from the United States to Mexico City, the Hague Convention would apply because the child was

[24] Public Notice 957, *supra* note 6, at 10504.

[25] Hague Convention, *supra* note 2, art. 4.

[26] Public Notice 957, *supra* note 6, at 10504.

removed from the country where he or she was a habitual resident and both Mexico and the United States are signatories to the Convention.[27]

The determination of habitual residence also is important because the parents' custody rights are governed by the laws of the country of habitual residence.[28] Despite the significance of determining habitual residence, it is defined neither by the Hague Convention nor by ICARA.[29] Notably, the Hague Permanent Bureau surveyed signatory countries in 2010 and inquired about the feasibility and desirability of a protocol to the Convention to define the term "habitual residence"[30] However, as of February 2012, no such protocol has been implemented and the United States opposed the addition of a definition of "habitual residence," explaining that it would be very difficult for the member countries to come to a consensus on the meaning of the term.[31] United States courts view the habitual residence issue as a mixed question of law and fact that is a highly fact-specific inquiry.[32]

---

[27] *Id.*

[28] Hague Convention, *supra* note 2, art. 3(a).

[29] *See Gitter v. Gitter*, 396 F.3d 124, 131 (2d Cir. 2005) ("Following a long-established tradition of the Hague Conference, the Convention avoided defining its terms.") *(citation omitted)*; *In re Bates*, No. CA 122-89, High Court of Justice, Fam. Div'n, Ct. Royal of Justice, United Kingdom (1989) (explaining the lack of a definition in the following manner: "The notion [of habitual residence is] free from technical rules, which can produce rigidity and inconsistencies as between different legal systems . . . [t]he facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions . . . All that is necessary is that the purpose of living where one does have a sufficient degree of continuity to be properly described as settled.").

[30] *See* QUESTIONNAIRE ON THE DESIRABILITY AND FEASIBILITY OF A PROTOCOL TO THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, *available at* http://www.hcch.net/index_en.php?act=publications.details&pid=5292&dtid=33.

[31] *See* http://www.hcch.net/upload/abduct2011us2.doc (containing the United States' response to the QUESTIONNAIRE ON THE DESIRABILITY AND FEASIBILITY OF A PROTOCOL TO THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION).

[32] *Mozes v. Mozes*, 239 F.3d 1067, 1073 (9th Cir. 2001).

The habitual residence is determined at the point in time "immediately before the removal or retention."[33] Beyond this limited guidance, the Hague Convention offers no insight as to which, if any, factors are to be given weight. Accordingly, an extensive body of domestic and international law has developed. All eleven circuits have addressed the determination of habitual residence and identified a number of factors that should be evaluated. Among the factors courts may consider are changes in physical location, the location of personal possessions and pets, the passage of time, whether the family retained its prior residence or sold it before relocating, whether the child has enrolled in school, the parents' intentions at the time of a move, and whether the child has established relationships in the new location.[34] A circuit-by-circuit summary of selected case law follows. Many of the circuits apply similar, although not necessarily identical, methodologies in determining the habitual residence. As shown below, one particularly notable difference is that some circuits will consider the parents' intent as relevant to the habitual residence question, whereas other circuits will focus exclusively on the child's experiences.

District courts within the First Circuit have employed very fact-specific analyses in determining the habitual residence.[35] The consensus among many of these decisions has been that "a child's habitual residence is to be determined by examining the facts and circumstances at hand."[36] More recently, the First Circuit has begun to follow a more structured approach to

---

[33] Hague Convention, *supra* note 2, art. 3(a).

[34] *See generally* Scott M. Smith, Annotation, *Construction and Application of International Child Abduction Remedies Act*, 125 A.L.R. Fed. 217 (2006); *see also* *Zuker v. Andrews*, 2 F. Supp. 2d 134, 136–39 (D. Mass. 1998), *aff'd*, 181 F.3d 81 (Table), No. 98-1622, 1999 WL 525936 (1st Cir. Apr. 9, 1999).

[35] *Zuker*, 2 F. Supp. at 136-39.

[36] *Id.* at 136.

evaluate questions about habitual residence. For instance, in *Nicolson v. Pappalardo*,[37] the First Circuit adopted an approach similar to that of the Second Circuit, discussed below, that focuses on "the parents' shared intent or settled purpose regarding their child's residence."[38]

Gitter v. Gitter[39] afforded the Second Circuit its first occasion to interpret the phrase "habitually resident" within the meaning of the Hague Convention. The Second Circuit examined both parental intent and the child's degree of acclimation to the residence in establishing the habitual residence of the child. The court explained that an analysis of the habitual residence should begin by focusing on the intent of the persons entitled to fix the place of the child's residence, which is most frequently the parents.[40] The terms of the Convention make it seem logical to focus on the intent of the child, but the court found that children usually do not possess the "material and psychological wherewithal to decide where they will reside."[41] Parental intent is determined by actions as well as declarations.[42] For the second part of the inquiry, the court held that one must look into whether the child has become acclimated to his or her new surroundings such that their habitual residence has shifted.[43]

In *Poliero v. Centenaro*,[44] the Second Circuit again followed this two part analysis. With respect to the first prong, the court found that there was no "'settled intention to abandon' Italy as the children's habitual residence" in favor of New York. The court noted that the parties had

---

[37] 605 F.3d 100 (1st Cir. 2010).

[38] *Id.* at 104; *see also Zuker v. Andrews*, 181 F.3d 81 (Table), No. 98-1622, 1999 WL 525936, at *1 (1st Cir. Apr. 9, 1999).

[39] 396 F.3d 124, 132 (2d Cir. 2005).

[40] *Id.* (citing *Mozes*, 239 F.3d at 1074-77).

[41] *Id.*

[42] *Id.* at 134.

[43] *Id.* at 133.

[44] 373 F. App'x 102 (2d Cir. 2010).

not attempted to sell the family home in Italy, had maintained their personal belongings and furniture in Italy, merely leased and rented property in New York (but sent their children to school in New York), and had purchased tickets for the entire family to return to Italy with the intent to re-enroll the children in school there.[45] Turning to the second prong, the court found that the children had not become acclimated to New York, noting that although the children appeared to have "adjusted well" to New York and "expressed some preference for remaining," they also had maintained contact with friends and family in Italy.[46]

Earlier, the Third Circuit examined the term "habitually resident" in *Feder v. Evans-Feder*[47] and concluded that:

> [A] child's habitual residence is the place where he . . . has been physically present for a time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective . . . . [A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.[48]

However, in *Delvoye v. Lee*,[49] the Third Circuit found this test to be inadequate when applied to the unique context of a very young infant whose parents lacked a settled intention regarding their child's residence. Because infant children cannot acquire habitual residence apart from their caregivers, it often is difficult to make a distinction between the habitual residence of an infant child and that of his or her custodian.[50] Thus, the habitual residence of infant children most often is found to be the parental residence. However, the *Delvoye* court found that "where

---

[45] *Id.* at 105.

[46] *Id.* at 106.

[47] 63 F.3d 217, 223-24 (3d Cir. 1995).

[48] *Id.* at 224 (citing *Rydder v. Rydder*, 49 F. 3d 369, 373 (8th Cir. 1995).

[49] 329 F.3d 330, 333-34 (3d Cir. 2003).

[50] *Id.* at 333.

the [parental] conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence" for the child.[51] Accordingly, where the parents lack shared intentions about their child's presence in a country, the infant child does not become a habitual resident. In reaching its decision, the court quoted a Scottish commentator:

> A newborn child born in the country where his parents have their habitual residence could normally be regarded as habitually resident in that country. Where a child is born while his mother is temporarily present in a country other than that of her habitual residence it does seem, however, that the child will normally have no habitual residence until living in a country on a footing of some stability.[52]

In *Miller v. Miller*,[53] the Fourth Circuit opined that there is no real distinction between ordinary residence and habitual residence, and that a person can have only one habitual residence, which correlates to the child's residence prior to removal.[54] The court repeated that to properly engage in the inquiry, "[t]he court must look back in time, not forward."[55] Specifically, it found that parents cannot create a new habitual residence by wrongfully removing and sequestering a child.[56] To do so would violate the purpose of the Hague Convention. In *Maxwell v. Maxwell*,[57] the Fourth Circuit applied a two-part analysis similar to that of *Gitter v. Gitter*, examining both the intent of the parents and whether the children had become acclimated to their new residence.[58] In doing so, the court cited several factors relevant to the two prongs of

---

[51] *Id.*

[52] *Id.* at 334 (citing E.M. Clive, *The Concept of Habitual Residence*, 3 Jur. Rev. 138, 147 (1997)).

[53] 240 F.3d 392, 400-01 (4th Cir. 2001).

[54] *Id.* at 400.

[55] *Id.* (citing *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993)).

[56] *Id.* (citing *Diorinou v. Mezitis*, 237 F.3d 133, 141-42 (2d Cir. 2001)).

[57] 588 F.3d 245 (4th Cir. 2009).

[58] *Id.* at 252-54.

the test and provided a potentially useful list of fact-specific cases that may be helpful depending on the facts of the case at hand.[59]

In *Isaac v. Rice*,[60] a district court in the Fifth Circuit used the children's past experiences to determine habitual residence, but also recognized the necessity to consider "the shared intentions of the parents regarding the child's presence in that country."

The Sixth Circuit focused on the child's acclimation and past experiences in a specific location to establish habitual residence in *Friedrich v. Friedrich*.[61] In *Friedrich*, the child lived with his parents in Germany until the father forced the child and mother out of the apartment, whereupon the mother removed the child to the United States.[62] The mother argued that the child's habitual residence was the United States because she always intended to move there, but the court held that "to determine the habitual residence, the court must focus on the child, not the parents, and examine past experiences, not future intentions."[63] As a result, the court held that the child's habitual residence was Germany. In *Robert v. Tesson*,[64] the Sixth Circuit reiterated that the habitual residence analysis must focus on a child's past experiences, not the future intentions of the parents, recognizing that such an analysis diverged somewhat from other circuits.[65]

---

[59] *Id.*

[60] No. 1:97CV353, 1998 WL 527107, at *3 (N.D. Miss. July 30, 1998).

[61] 983 F.2d 1396 (6th Cir. 1993).

[62] *Id.*

[63] *Id.* at 1401.

[64] 507 F.3d 981 (6th Cir. 2007).

[65] *Id.* at 998.

The Seventh Circuit in *Koch v. Koch*[66] recognized that the purpose of habitual residence was "'to identify the place where the children are settled and where recent information about the quality of family life is available.'"[67] The court held that "a child will be found to be habitually resident in a country if he or she has been living there for a sufficient period of time. Where there is geographic stability and adequate duration, questions as to the purpose of the residence will usually be pushed into the background."[68]

In *Silverman v. Silverman*,[69] the Eighth Circuit held that habitual residence can be established only by focusing on both the settled purpose from the child's perspective and the parents' intent. The Ninth Circuit in *Mozes v. Mozes*[70] held that habitual residence is determined by the parents' intent regarding the child's residence and the child's perspective of where he or she is acclimated.[71]

The Tenth Circuit took a more fact-specific approach in *Kanth v. Kanth*,[72] holding that "a child's habitual residence is defined by examining the specific facts and circumstances" and "the conduct, intentions and agreements of the parents during the time preceding the abduction are important factors to be considered."[73]

---

[66] 450 F.3d 703, 709 (7th Cir. 2006).

[67] *Id.* (citing *Koch v. Koch*, 416 F. Supp. 2d 645, 653 (E.D. Wis. 2006)).

[68] *Id.* at *11.

[69] 338 F.3d 886 (8th Cir. 2003); *see also Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010); *Sorenson v. Sorenson*, 559 F.3d 871, 873 (8th Cir. 2009).

[70] 239 F.3d 1067, 1071 (9th Cir. 2001).

[71] *Id.* at 1079; *see also Papakosmas v. Papakosmas*, 483 F.3d 617, 622 (9th Cir. 2007).

[72] 232 F.3d (Table), 2000 WL 1644099 (10th Cir. Nov. 2, 2000).

[73] *Id.*, 2000 WL 1644099, at *1.

Finally, in *Ruiz v. Tenorio*,[74] the Eleventh Circuit interpreted "habitual residence" according to the "ordinary and natural meaning of the two words it contains, as a question of fact to be decided by reference to all the circumstances of a particular case."[75] To establish a new habitual residence, there must be a "settled intention to abandon the one left behind."[76] The "settled intention" does not have to be clear at the time of departure and can develop over time. The court explained that there must be an "actual change in geography and the passage of a sufficient length of time for the child to have become acclimatized."[77] However, in cases where the parents lacked a shared intent, the court cautioned against placing too much emphasis on the child's contacts in the new country to determine whether the child had become acclimated.[78] The court explained that "divining the significance of such contacts is extremely difficult," and that "children can be remarkably adaptable even in short periods without any significance with respect to habitual residence."[79]

B. REMOVAL OR RETENTION WAS WRONGFUL BECAUSE CUSTODY RIGHTS WERE BREACHED.

A valid petition must allege that removal or retention of the child was wrongful. As is true for all other elements of a *prima facie* case, the petitioner must prove this element by a preponderance of the evidence.[80]

---

[74] 392 F.3d 1247, 1252 (11th Cir. 2004).

[75] *Id.* (citing *Mozes*, 239 F.3d at 1071-73).

[76] *Id.* at 1253.

[77] *Id.*

[78] *Id.* at 1254.

[79] *Id.* at 1253 (quoting *Mozes*, 239 F.3d at 1079). *See also Mikovic v. Mikovic*, 541 F. Supp. 2d 1264, 1280 (M.D. Fla. 2007) (relying on *Ruiz*, the court held that the parents had no shared intent to abandon the United States as the habitual residence, and therefore, the court denied the father's petition to return the child to Wales).

[80] 42 U.S.C. § 11603(e).

Article 3 of the Hague Convention provides that removal or retention of the child is wrongful where it is in breach of custody rights attributed to a person, an institution, or another entity, either jointly or alone, under the law of the country in which the child was habitually resident immediately before the removal or retention.[81] The Hague Convention provides little guidance toward the determination of whether the petitioner has custody rights. However, Article 5(a) broadly states that "rights of custody" are "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Custody rights differ from "rights of access," which the Hague Convention defines as "the right to take a child for a limited period of time to a place other than the child's habitual residence."[82] The Hague Convention allows petitioners to seek the return of children if they have "custody rights" of the children as compared to "rights of access." *See* Section VI below for a detailed discussion on the issue of rights of access.

Custody rights may arise (a) by operation of law, or (b) by reason of a judicial or administrative decision or an agreement having legal effect under the law of the country of habitual residence.[83] Most cases discussing whether petitioners have custody rights involve custody rights that arise by operation of law. In cases where the parties have an agreement or a judicial decree, courts usually hold that the issue of custody rights is undisputed. The following section highlights recurring issues regarding rights of custody that arise by operation of law.

---

[81] Hague Convention, *supra* note 2, art. 3.

[82] *Id.* at art. 5(b).

[83] *Id.* at art. 3.

1. Breach Of Rights Arising By Operation Of Law.

In operation of law cases, courts usually assess the rights granted to the petitioner under the applicable civil code.[84] The Hague Convention expressly allows United States courts to take notice of the laws of foreign courts regarding custody determinations.[85]

The case of *Sealed Appellant v. Sealed Appellee*[86] discusses custody rights arising by operation of law. Under Australian law, in the absence of any orders of the court, each parent is a joint guardian and has custody rights over the child.[87] In *Sealed Appellant*, the father had not been stripped of his custody rights.[88] Therefore, the only issue for the court was whether the father had exercised his custody rights.[89] How to determine whether the left-behind parent was exercising custody rights at the time of the abduction is discussed further in Section II.C of this Manual.

A petitioner seeking to establish custody rights by operation of law may be able to rely on *patria potestas*[90] when the child's country of habitual residence recognizes such rights. *Patria potestas*, a concept of parental authority found in many civil law countries, is generally "the relationship of rights and obligations that are held reciprocally, on the one hand, by the father and the mother (or in some cases the grandparents) and, on the other hand, the minor children who are not emancipated."[91] Countries whose laws are based on civil codes are most likely to

---

[84] *See, e.g.*, *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 343-44 (5th Cir. 2004).

[85] Hague Convention, *supra* note 2, art. 14 (providing that a court "may take notice directly of the law of, and of judicial or administrative decisions" of courts from the country of the child's habitual residence).

[86] 394 F.3d at 343-44.

[87] *Id.* at 343.

[88] *Id.*

[89] *Id.* at 344.

[90] In some instances, *patria potestas* is written as *patria potestad*.

[91] *Whallon v. Lynn*, 230 F.3d 450, 457 (1st Cir. 2000) (citation omitted).

recognize *patria potestas* rights and often define these rights in the context of the parents' state of wedlock and exercise of physical custody.[92] United States courts generally have accepted custodial rights arising under *patria potestas* as sufficient to establish a left-behind parent's right to seek the return of the child. If parents have entered into a divorce decree that contains terms regarding the custody of the child, courts may seek to define the scope of custodial rights asserted under *patria potestas* in light of the decree.[93]

In *Whallon v. Lynn*,[94] the child's parents resided in Mexico and had never married. Mexico's Civil Code defines the doctrine of *patria potestas* and provides that where children are born out of wedlock, both parents exercise parental authority. It also distinguishes *patria potestas* from physical custody. The First Circuit examined Mexico's concept of *patria potestas* and held that these rights were more than mere visitation rights or rights of access because *patria potestas* rights imply a meaningful decision-making role in the life and care of a child.[95] The court found that the left-behind father/petitioner in Mexico had rights of custody and, therefore, that the removal of the child without the father's consent was wrongful.[96]

---

[92] *See, e.g.*, *Lalo v. Malca*, 318 F. Supp. 2d 1152, 1157 (S.D. Fla. 2004) (divorce decree under Panamanian law gave both parents *patria potestas* rights over the child; thus father/petitioner had rights of custody over child and could seek the return of the child); *Gil v. Rodriguez*, 184 F. Supp. 2d 1221, 1225 (M.D. Fla. 2002) (under Venezuelan law, father/petitioner had *patria potestas* rights over child born out of wedlock and thus had custody rights under the Hague Convention); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1358 (M.D. Fla. 2002) (married father/petitioner had *patria potestas* rights under Argentine law, and thus had rights of custody pursuant to the Hague Convention).

[93] *See Ibarra v. Garcia*, 476 F. Supp. 2d 630, 635 (S.D. Tex. 2007) (holding that while divorce decree recognized the parties' rights of *patria potestas*, the left-behind father could not seek the return of the child because the decree awarded custody of the child to the mother and only rights of visitation to the father); *Gonzalez v. Gutierrez*, 311 F.3d 942, 949 (9th Cir. 2002) (holding that *patria potestas* rights do not confer custody rights where a formal custody agreement was in existence).

[94] 230 F.3d 450, 452 (1st Cir. 2000).

[95] *Id.* at 458.

[96] *Id.* at 454.

Similarly, in *Giampaolo v. Erneta*,[97] the Eleventh Circuit found that the father/petitioner of an out-of-wedlock child had rights of custody because under Argentine law, if the parents had cohabitated, both had *patria potestas* rights. Argentine law "denotes the set of rights and duties belonging to the parents in respect to the person and property of their children, for their protection and integral education, from the moment of their conception and while under age and not emancipated."[98] An agreement granting the mother physical custody of the child did not vitiate the *patria potestas* rights of the father/petitioner; thus, the removal of the child from Argentina was wrongful.[99]

2. Breach Of Rights Arising By Judicial Or Administrative Decrees Or Agreement Of The Parties.

In addition to custody rights arising by operation of law, custody rights can be determined by judicial or administrative decree or by agreement of the parties. In determining the custodial rights of parents who have entered into a joint stipulated custody agreement, courts often make binding assessments regarding parents' custodial rights to their children. As with custodial rights arising under operation of law or *patria potestas*, the terms of a custody order are binding on parents and will serve as evidence of custodial rights in a Hague Convention case.[100]

Frequently, judicial decrees and custody orders contain *ne exeat* clauses, which are defined as writs mandating that the person to whom they are addressed not leave the country, the state, or the jurisdiction of the court.[101] The circuits originally were split over whether *ne exeat* clauses constituted custodial rights entitled to enforcement under the Hague Convention. The

---

[97] 390 F. Supp. 2d 1269, 1277-78 (N.D. Ga. 2004).

[98] *Id.* at 1277 (quoting Argentine Civil Code, art. 264).

[99] *Id.*

[100] *See, e.g.*, *Morrison-Dietz v. Dietz*, No. 07-1398, 2008 WL 4280030, at *6 (W.D. La. Sept. 17, 2008), *aff'd*, 349 F. App'x 930 (5th Cir. 2009).

[101] BLACK'S LAW DICTIONARY 1054 (8th ed. 2004).

Second, Fourth, and Ninth Circuits had held that *ne exeat* clauses were not custodial rights under the Hague Convention, reasoning that a *ne exeat* clause "confers only a veto, a power in reserve, which gives the non-custodial parent no say (except by leverage) about any child-rearing issue other than the child's geographical location in the broadest sense."[102] On the other hand, the Eleventh Circuit had held that *ne exeat* rights were custody rights within the meaning of the Hague Convention, reasoning that a *ne exeat* right gives the noncustodial parent a joint right to determine the child's place of residence.[103]

The Supreme Court resolved this circuit split in *Abbott v. Abbott*,[104] ruling that a *ne exeat* right is a right of custody under the Hague Convention.[105] In *Abbott*, a Chilean court had granted the mother "daily care and control of the child, while awarding the father 'direct and regular' visitation rights. . . ."[106] Chilean law also conferred on the father a *ne exeat* right.[107] In holding that the father's *ne exeat* right amounted to a right of custody under the Hague Convention, the Court noted that the Convention defines "rights of custody" to 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."[108] Similar to the Eleventh Circuit's analysis, the Supreme Court equated the *ne exeat* right to a joint right to determine the child's country of residence.[109] Justices Stevens, Thomas,

---

[102] *Croll v. Croll*, 229 F.3d 133, 140 (2d Cir. 2000); *see also* *Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942, 949 (9th Cir. 2002).

[103] *See* *Furnes v. Reeves*, 362 F.3d 702, 724 (11th Cir. 2004).

[104] 130 S. Ct. 1983, 1990 (2010).

[105] *Id.* at 1990.

[106] *Id.* at 1988.

[107] *Id.*

[108] *Id.* at 1990 (citation omitted).

[109] *Id.*

and Breyer dissented from the majority, contending that the father's rights amounted to only visitation rights.[110]

C. PETITIONERS MUST BE EXERCISING THEIR CUSTODY RIGHTS AT THE TIME OF REMOVAL.

In addition to possessing custody rights under the laws of the country where the child habitually resides, the petitioner also must exercise those rights.[111] The determination of whether a left-behind parent has exercised custody rights is another highly fact-specific analysis in a Hague Convention case. In *Friedrich v. Friedrich (Friedrich II)*,[112] the Sixth Circuit provided guidelines for determining whether a petitioner properly exercised custody rights. The Sixth Circuit held that courts should "liberally find 'exercise' [of custody rights] whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child,"[113] and that "as a general rule, any attempt to maintain a somewhat regular relationship with the child should constitute 'exercise.'"[114] The Sixth Circuit stated that:

> [I]f a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to "exercise" those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child. Once [the court] determines that the parent exercised custody rights in any manner, it should stop—completely avoiding

---

[110] *Id.* at 1997.

[111] Courts have required that the petitioner demonstrate, by a preponderance of the evidence, that he or she actually was exercising custody rights at the time of removal, *Krefter v. Wills*, 623 F. Supp. 2d 125, 135 (D. Mass. 2009), or immediately prior to the removal or retention, Hague Convention, art. 3, *Nicolson v. Pappalardo*, 674 F. Supp. 2d 295, 298 (D. Me. 2009); *cf. Olguin v. Cruz Santana*, No. 03 CV 6299(JG), 2004 WL 1752444, at *4 (E.D.N.Y. Aug. 5, 2004) (holding that the respondent bore the burden of proving by a preponderance of the evidence her claim that petitioners were not actually exercising custody rights at the time of the removal) and *Morrison-Dietz v. Dietz*, No. 07-1398, 2008 WL 4280030, at *6 (W.D. La. Sept. 17, 2008) (holding that "the party opposing the return has a burden of proving, by a preponderance of the evidence, that the other party was not actually exercising custody rights") (citations omitted), *aff'd*, 349 F. App'x 930 (5th Cir. 2009).

[112] 78 F.3d 1060 (6th Cir. 1996).

[113] *Id.* at 1065.

[114] *Id.* at 1066.

> 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 the federal courts.[115]

The *Friedrich II* court held that the father/petitioner exercised his *de jure* custody rights because in the short separation before the mother/respondent removed the child from Germany, the father/petitioner visited with the child and made arrangements for further visitation.[116]

Other courts have followed the reasoning of *Friedrich II*. In *Giampaolo*, the Eleventh Circuit found that the father/petitioner exercised his rights of custody because he picked up the child every morning to take her to school, chose the child's school, paid for some of the child's private school tuition, and saw the child the day before the mother/respondent left Argentina.

The First and Fifth Circuits also have followed the reasoning of *Friedrich II*. In the case of *Aldinger v. Segler*,[117] the court held that the father/petitioner exercised his custody rights because he lived at the same address as the children and actively participated in the lives of the children by providing for their basic needs. Similarly, in the case of *Sealed Appellant v. Sealed Appellee*,[118] the court held that the father/petitioner exercised his custody rights because he had visited the children about five times per year and paid child support to the mother/respondent.

D. THE CHILDREN MUST BE UNDER THE AGE OF SIXTEEN.

The Hague Convention states explicitly that it "shall cease to apply when the child attains the age of 16 years."[119] The drafters of the Hague Convention easily could have stated—as they did for the well-settled defense in Article 13—that the Convention would not apply unless "the

---

[115] *Id.*

[116] *Id.* at 1066-67.

[117] 263 F. Supp. 2d 284 (D.P.R. 2003).

[118] 394 F.3d 338 (5th Cir. 2004).

[119] Hague Convention, *supra* note 2, art. 4.

commencement of proceedings" occurred before the children is sixteen. However, they did not and instead stated flatly that the Convention "shall cease to apply" once the child is sixteen. The State Department's official commentary and legal analysis of the Convention explains that: "[t]he 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."[120] Legal commentators agree that this was the intent of the drafters of the Convention.[121]

Thus, once a child reaches the age of sixteen, the child cannot be returned under the Hague Convention, even if the child was less than sixteen years old at the time of wrongful removal and even if the petition was filed when the child was less than sixteen years old.[122] Accordingly, when seeking relief under the Hague Convention, it is imperative to account not only for the child's age at the time of filing the petition, but also for the probable length of the

---

[120] *See* Public Notice 957, *supra* note 6, at 10504 (citation omitted).

[121] *See* Perez-Vera Report, *supra* note 7, ¶ 77 (noting the Convention adopted the "most restrictive" of the various options regarding age limitations, and thus "no action or decision based upon the Convention's provisions can be taken with regard to a child after its sixteenth birthday").

[122] Note that while the Hague Convention cannot be used to order the return of a child who has reached the age of sixteen, other legal means can be employed. The State Department's official commentary states that:

> 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.

See Public Notice 957, *supra* note 6, at 10504.

proceedings to determine if the child will turn sixteen at any point during the process.[123] Counsel also should plead and offer proof during the hearing that the child is less than sixteen years old.

E. IF TRUE, PROVE THAT THE PETITION WAS FILED WITHIN ONE YEAR OF WRONGFUL REMOVAL.

As noted in the introduction of Section II of this Manual, proving that a petition was filed within one year of wrongful removal technically is not part of the petitioner's *prima facie* case. However, whether the petition was filed within one year of wrongful removal or retention is critically important and must be considered when drafting a petition. If the petition is filed less than one year from the date of the wrongful removal of the child, the respondent *cannot* use the "well-settled" defense set forth in Article 12 of the Hague Convention, and the child must be returned regardless of how acclimated the child has become to his or her new surroundings.[124] If the return proceedings are commenced one year or more after wrongful removal or retention, the court may still order the return of the child unless the respondent demonstrates that the child is "well-settled" in the new environment.[125]

---

[123] *See* *Mohamud v. Guuleed*, No. 09-C-146, 2009 WL 1229986 (E.D. Wis. May 4, 2009). The petitioner in *Mohamud* advised in a cover letter accompanying her Hague petition "that the convention suggests that a decision on a petition filed thereunder be reached within six weeks of the date of filing." *Id.*, 2009 WL 1229986, at *2. The hearing on the petition was not scheduled until nine weeks later, and the court's decision stated that "the cover letter was not docketed and the court was not made aware of the need for scheduling a hearing before [the child] turned sixteen. No objection was made at the time the hearing was scheduled." *Id.* The court declined to exercise jurisdiction because the Hague Convention clearly did not apply to children sixteen or older, but the petition would have been denied anyway because the petitioner, the child's aunt, did not have formal legal custody of the child, the mother's natural rights had not been terminated, and the "mature" child's wishes to stay with her mother would have been taken into account because she was fifteen when the petition was filed. *Id.*, 2009 WL 1229986, at *4-5.

[124] *See* Hague Convention, *supra* note 2, art. 12.

[125] *Id.* *See* *Falk v. Sinclair*, 692 F. Supp. 2d 147, 164 (D. Me. 2010) (citing *Duarte v. Bardales*, 526 F.3d 563, 569 (9th Cir. 2008) ("This one-year filing period is of particular importance under the Convention because the 'well[-]settled' affirmative defense is *only* available if the petition for return was filed more than a year from wrongful removal")).

Thus, as a practical matter, the court almost always will determine both (1) when the removal became wrongful, and (2) the date of the "commencement of the proceedings." These critical facts must be addressed in the petition if they favor the petitioner. Otherwise, the petitioner's counsel must be prepared to respond to a "well-settled" defense, as explained below. *See* Section III.A.

1. Determining When Removal Or Retention Became Wrongful.

Courts generally agree that wrongful retention or removal begins when the parent without physical possession asks for the return of the child or the ability to assert parental rights, and the parent with possession of the child refuses.[126] When this happens, "the date of retention is that point when the noncustodial parent knows the custodial parent will not return the child."[127] Note, however, that some courts do not require an explicit statement. Rather, "[w]rongful retention occurs when the noncustodial parent is on notice that the retaining parent does not intend to return with the child. This retention may occur before there is a definitive conversation between the parties about the child's return if the noncustodial parent knew, or should have known, before the conversation that the child would not be returning."[128] Furthermore, even where "notice of intent not to return a child" has been given, courts will consider whether there is

---

[126] *Zuker v. Andrews*, 2 F. Supp. 2d 134, 139 (D. Mass. 1998) (citing *Slagenweit v. Slagenweit*, 841 F. Supp. 264, 270 (N.D. Iowa 1993)).

[127] *Riley v. Gooch*, No. 09-1019-PA, 2010 WL 373993, at *8-9 (D. Or. Jan. 29, 2010) (finding that the date of retention, when Riley clearly knew Gooch would not return the child, was the date Gooch served Riley with a petition for dissolution of marriage). *See* *Blanc v. Morgan*, 721 F. Supp. 2d 749, 761-62 (W.D. Tenn. 2010) (finding the wrongful retention occurred when the mother "made explicit her intention to live with [the child] in the United States," thereby ending "any pretense by [the] [m]other that she intended to return to France. . . .").

[128] *Etienne v. Zuniga*, No. C10-5061BHS, 2010 WL 2262341, at *9-10 (W.D. Wash. June 2, 2010) (citation omitted) (finding that circumstances such as the removing parent's statement in July 2008 that "she was going to give the children a better life than he could give them," the fact that the children were not back in Mexico to start school in January 2009, and that the children were still enrolled in school in Washington in January 2009 indicated the plaintiff knew or should have known before February 2009 that they were not returning to Mexico).

an agreement in place between the parents as to a trip, a visit, or temporary or permanent residency.[129] Where there is an agreement, "wrongful retention begins when the agreed date [of return] passes, not when the earlier notice of intent is given."[130]

In *Slagenweit v. Slagenweit*,[131] the court determined that wrongful retention occurred when the parent without physical possession first asked that the child be returned and the custodial parent refused.[132] The court also noted that:

> Since the Convention is directed principally at protection of the child, it can certainly be argued that the one year should be measured from the date the child actually starts living with the parent from whom custody is sought since it is clear that the Convention is concerned about the interest of the child who has become "settled" in his or her new environment. On the other hand, the Convention speaks about one year from the "wrongful removal or retention." As in this case, there can be no wrongful retention when the child is residing with the parent from whom custody is sought pursuant to an agreement between the parents. The wrongful retention does not begin until the noncustodial parent . . . clearly communicates her desire to regain custody and asserts her parental right to have [the child] live with her.[133]

As a result, the *Slagenweit* court held that the one-year period did in fact begin when the "wrongful" element of removal or retention took place (*i.e.*, at the point when the parent without physical possession was denied her agreed-upon right to have the child live with her). The court reasoned:

> This reading gives effect to the literal wording of the Convention and comports with what this court believes to be the spirit of the Convention. In those cases where the child has become so settled in her new environment by mutual agreement of the parties, prior

---

[129] *Chechel v. Brignol*, No. 5:10-CV-164-OC-10GRJ, 2010 WL 2510391, at *7 (M.D. Fla. June 21, 2010).

[130] *Id.*

[131] 841 F. Supp. 264, 270 (N.D. Iowa 1993).

[132] *Id.* Likewise, in *Falls v. Downie*, the court stated that retention became wrongful when the child's mother asked that the child be returned and the father refused. 871 F. Supp. 100, 102 (D. Mass. 1994).

[133] 841 F. Supp. at 270.

> to the assertion of custodial rights, then the case should be analyzed under the question of whether a new habitual residency has been established for the child.[134]

The *Slagenweit* court also noted that, in cases where a change in custody had been previously mutually agreed upon but was followed by a demand for return, "the parent demanding the return will have a difficult time showing that the voluntary change of place of residence did not also result in change of habitual residency."[135] While the *Slagenweit* case was not determined specifically on this issue, it is instructive on when a removal takes place and when that removal becomes wrongful.[136]

The decision of the court in *Zuker v. Andrews*[137] offers a more thorough analysis about when wrongful retention occurs, holding that it occurs when the parent without physical possession is on notice that the custodial parent does not intend to return with the child.[138] In *Zuker*, the court had trouble determining when wrongful retention occurred because the mother who had possession of the child gave the father mixed messages, telling him in June 1996 that she and the child would return to Argentina from the United States for a visit, but later admitting that she lied to the father about her intentions.[139] In July 1997, she told the father that she did not want to have anything to do with him and would not return to Argentina or live with him in the United States.[140] The husband claimed that the retention occurred at that point, because until

---

[134] *Id.*

[135] *Id.*

[136] *See also Cabrera v. Lozano (In re Cabrera)*, 323 F. Supp. 2d 1303, 1313 (S.D. Fla. 2004) (finding that, for purposes of determining the year period under Article 12 of the Convention, mother's retention of child only became wrongful when child was not returned after close of school year and father realized that mother did not intend to return).

[137] 2 F. Supp. 2d 134 (D. Mass. 1998).

[138] *Id.* at 140.

[139] *Id.* at 139.

[140] *Id.*

then, he did not know that the mother was not going to return the child to Argentina.[141] The court, however, held that the retention occurred in February of 1997 when the mother moved into her own apartment, because at that point, the husband knew or should have known that the mother would not return with the child.[142]

2. Determining When Proceedings Were Commenced.

Proceedings commence upon "the filing of a civil petition for relief in any court which has jurisdiction in the place where the child is located at the time the petition is filed."[143] Thus, proceedings normally will commence upon the filing of the petition for return of the child. Merely contacting a country's Central Authority or law enforcement with a complaint does *not* constitute commencing an action for the purpose of defeating an Article 12 exception,[144] even though Article 8 states that a parent whose "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."[145]

3. Tolling Of The One-Year Period.

Courts have acknowledged that the "general rule is that a court shall order the return of a wrongfully-removed or retained child unless more than a year has elapsed between the date of the child's wrongful removal or retention and the date that the proceedings were commenced and

---

[141] *Id.* at 140.

[142] *Id.*

[143] 42 U.S.C. § 11603(b); *see also Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800, 814, 815 (N.D. Iowa 2003) (holding that a mother "should not ultimately benefit from the effects of her own actions and the barriers [the father] faced in bringing his petition . . . . [Her] actions are exactly what the Hague Convention seeks to remedy.").

[144] *See Wojcik v. Wojcik*, 959 F. Supp. 413, 418-19 (E.D. Mich. 1997) (finding that the father's filing of a request for the return of his children with the French Central Authority did not commence proceedings).

[145] *See* Hague Convention, *supra* note 2, art. 8.

the child has become settled in her new environment."[146] Courts have expressed that the abducting parents should not benefit from their actions. Courts also do not want to reward abducting parents for concealing children. Thus, courts have held, in some circumstances, that the one-year deadline may be extended if the abducting parent conceals the child from the left-behind parent.[147] This concept is referred to as equitable tolling. If a petition for return is filed after a year, the petitioner often provides lengthy fact-specific narratives to explain the reasons for the delay, such as the abducting parent's promise to return the child, difficulty in locating the abductor and child, or the left-behind parent's lack of knowledge or ability to file a Hague Convention case for return.[148] In cases where a return was denied based on the well-settled defense, the court noted that the left-behind parent made little effort to file the petition within one year and no extenuating circumstances were present.[149]

United States courts have reached a consensus allowing for equitable tolling of the one-year period required under Article 12, which conforms with the State Department's analysis on the topic:

> 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

---

[146] *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1276 (N.D. Ga. 2004) (citing *Furnes v. Reeves*, 362 F.3d 702, 710-11 (11th Cir. 2004).

[147] *See Antunez-Fernandes*, 259 F. Supp. 2d at 815 (finding that although the petition was filed more than one year after wrongful removal, "[e]stablishment of the 'well[-]settled' exception does not make refusal of a return order mandatory").

[148] *Giampaolo*, 390 F. Supp. 2d at 1281-82 (mother told father that she was awaiting paperwork to return the child); *Koc v. Koc (In re Koc)*, 181 F. Supp. 2d 136 (E.D.N.Y. 2001) (mother promised to return child, and father was denied a visa to see the child four times).

[149] *Wojcik v. Wojcik*, 959 F. Supp. 413, 415 (E.D. Mich. 1997) (father did not contact the French Central Authority until eight months after the wrongful retention, had not taken any other action during that time to have his children returned other than filing for divorce, and did not file a petition for return of the children until more than sixteen months after the retention); *Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 851 (S.D. Tex. 2006) (father made little effort to find the child and filed a Hague petition four years after the removal).

> applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.[150]

For example, in *Mendez Lynch v. Mendez Lynch*,[151] the court held that "[i]f equitable tolling does not apply to ICARA and the Hague Convention, a parent who abducts and conceals children for more than one year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available."[152]

The Eleventh Circuit was the first appellate court to analyze the question of equitable tolling under ICARA in cases where a parent wrongfully removed a child and then concealed the child's whereabouts to prevent the other parent from filing within one year of the removal. The Eleventh Circuit addressed the issue in *Lops v. Lops*[153] but did not reach a final conclusion.[154] The Eleventh Circuit later reexamined the issue in *Furnes v. Reeves*.[155] In *Furnes*, the court clearly held that "equitable tolling may apply to ICARA petitions for the return of a child where the parent removing the child has secreted the child from the parent seeking return."[156] A number of other district court cases within the Eleventh Circuit have extended the reasoning of

---

[150] Public Notice 957, *supra* note 6, at 10509.

[151] 220 F. Supp. 2d 1347 (M.D. Fla. 2002).

[152] *Id.* at 1363.

[153] 140 F.3d 927 (11th Cir. 1998).

[154] *See id.* at 946 ("[T]he district court found that it is difficult to 'conceive of a time period arising by a federal statute that is so woodenly applied that it is not subject to some tolling, interruption, or suspension, if it is shown or demonstrated clearly enough that the action of an alleged wrongdoer concealed the existence of the very act which initiates the running of the important time period.'").

[155] 362 F.3d 702 (11th Cir. 2004).

[156] *Id.* at 723.

Lops and *Furnes*.[157] Courts in other jurisdictions also have demonstrated their inclination to allow equitable tolling in concealment cases.[158]

On the other hand, at least two courts have expressed reservations about treating the one-year period in Article 12 as a statute of limitations. The court in *Toren v. Toren*[159] categorically denied equitable tolling, albeit without using the term expressly, when it held:

> The language of the Convention is unambiguous, measuring the one-year period from the "date of the wrongful . . . retention." It might have provided that the period should be measured from the date the offended-against party learned or had notice of the wrongful retention, but it does not. That is not surprising, since the evident import of the provision is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitations does, but rather to put some limit on the uprooting of a settled child.[160]

Meanwhile, the court in *Anderson v. Acree*[161] delivered what ultimately might be the middle ground between the *Toren* ruling and the progeny of *Lops*. In *Anderson*, when

---

[157] *See* *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1281 (N.D. Ga. 2004) (allowing equitable tolling where abducting parent refused to inform wronged parent of precise location of child and abducting parent changed residences several times); *Cabrera v. Lozano (In re Cabrera)*, 323 F. Supp. 2d 1303, 1313 (S.D. Fla. 2004) (citing *Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004) in finding that "equitable tolling may apply to ICARA petitions for the return of the child where the parent removing the child has secreted the child from the parent seeking return"); *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1348 (S.D. Fla. 2002) (allowing equitable tolling where abducting parent failed to prove lack of concealment by a preponderance of the evidence and further stating that even if there was no concealment, left-behind parent's inability to utilize Convention during first year because removed child was in a non-signatory country would create unjust bar); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) (allowing equitable tolling of one-year period due to abducting parent's concealment of wrongfully children's whereabouts and left-behind parent's repeated attempts at voluntary resolution).

[158] *See* *Belay v. Getachew*, 272 F. Supp. 2d 553, 563-64 (D. Md. 2003) (ordering return of child despite showing that child was well-settled because of concealment by abducting parent; noting that to do otherwise would create a "perverse incentive" for abducting parents to conceal wrongfully removed children for more than one year); *Gonzalez v. Nazor Lurashi*, No. Civ. 04-1276 (HL), 2004 WL 1202729, at *10 (D.P.R. May 20, 2004) (citing *Belay* in determining that perverse incentive to conceal abducted children required the flexibility allowed by equitable tolling).

[159] 26 F. Supp. 2d 240 (D. Mass. 1998).

[160] *Id.* at 244 (internal cites omitted), *vacated on other grounds*, 191 F.3d 23 (1st Cir. 1999).

[161] 250 F. Supp. 2d 872 (S.D. Ohio 2002).

considering the possibility of harm stemming from uprooting settled children, the court reasoned that:

> This potential of harm to the child remains regardless of whether the petitioner has a good reason for failing to file the petition sooner, such as where the respondent has concealed the child's whereabouts. There is nothing in the language of the Hague Convention which suggests that the fact that the child is settled in his or her new environment may not be considered if the petitioning parent has a good reason for failing to file the petition within one year.[162]

The synthesis of these disparate views might be best expressed in the words of the court in *Belay v. Getachew*,[163] which concluded:

> The court agrees with *Anderson* to the extent that it identifies the intentions of the drafters to allow courts to take into account the child's circumstances (after the passage of time) when deciding whether to order a return. The Court believes, however, that courts faced with the present situation, where the actions of the abductor in concealing the child may have abetted the child in forming roots in the new country, must have the flexibility to take into account those actions in determining the outcome of the case under Article 12.[164]

If the one-year deadline is read as a statute of limitations, then equitable tolling likely applies.[165] Further, when the taking parent has hidden the child, courts are more likely to toll or

---

[162] *Id.* at 875 (cited by the *Belay* and *Gonzalez* courts as supporting the proposition that Article 12 should be flexible enough to allow courts to consider a child's settlement after the one-year period, regardless of possible equitable tolling, while *also* allowing for equitable tolling where necessary).

[163] 272 F. Supp. 2d 553 (D. Md. 2003).

[164] *Belay*, 272 F. Supp. 2d at 563.

[165] *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998) (unless Congress states otherwise, equitable tolling should be read into every federal statute of limitations).

equitably estop the taking parent's use of the well-settled defense.[166] Additionally, some courts are lenient in determining the actual date of wrongful removal or retention.[167]

III. THE AFFIRMATIVE DEFENSES OF ARTICLES 12, 13, AND 20

If the petitioner establishes a *prima facie* case for the return of the abducted child, the court must order the return of the child unless the respondent can rebut that *prima facie* case or establish one of the five affirmative defenses provided under the Hague Convention.[168] The practical effect of the petitioner's establishment of a *prima facie* case is to shift the burden of proof to the respondent to establish one of the five affirmative defenses.[169]

The five affirmative defenses are set forth in Articles 12, 13, and 20 of the Hague Convention. Each defense is described briefly in the following paragraphs and is addressed in more detail in later sections of this Manual.

The first affirmative defense, which is enumerated in Article 12, is the well-settled defense.[170] As discussed above, if the petition is filed less than one year from the date of the wrongful removal of the child, the respondent *cannot* use the well-settled defense.[171] The well-settled defense must be proven by a preponderance of the evidence.[172]

Article 13 establishes three more affirmative defenses under the Hague Convention: (1) the consent or acquiescence defense, which involves the petitioner's consent to or

---

[166] *Belay v. Getachew*, 272 F. Supp. 2d 553, 560 (D. Md. 2003).

[167] *Cabrera v. Lozano (In re Cabrera)*, 323 F. Supp. 2d 1303, 1313 (S.D. Fla. 2004) (child was taken in February 2001, but court held date of wrongful removal or retention was June 2003, when father lost contact with child).

[168] *See* *Steffen F. v. Severina P.*, 966 F. Supp. 922, 925 (D. Ariz. 1997).

[169] *Id.*

[170] *See* Hague Convention, *supra* note 2, art. 12.

[171] *Id.*

[172] 42 U.S.C. § 11603(e)(2)(B).

acquiescence in the removal or retention of the child; (2) the grave risk defense, which arises when the respondent contends that returning the child would place the child at grave risk of physical or psychological harm or otherwise place the child in an intolerable situation; and (3) the mature child's objection defense, which arises when the child objects to being returned, and the court finds that the child has attained an age and degree of maturity at which it is appropriate to take the child's views into account.[173] The grave risk defense must be proven by clear and convincing evidence.[174] The consent or acquiescence defense and the mature child defense must be proven by a preponderance of the evidence.[175]

Article 20 of the Hague Convention establishes a fifth affirmative defense that rarely is used: the public policy defense. Like the grave risk defense, the public policy defense must be proven by clear and convincing evidence.[176]

In addition to these acceptable defenses, respondent's counsel also may raise a "best interests of the child" defense. This is not a legitimate defense under the Hague Convention. Although it is not an acceptable defense, counsel nonetheless should be prepared for it.

The affirmative defenses specified in the Hague Convention are construed narrowly. ICARA explicitly states that "[c]hildren who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set

---

[173] *See* Hague Convention, *supra* note 2, art 13.

[174] 42 U.S.C. § 11603(e)(2)(A).

[175] 42 U.S.C. § 11603(e)(2)(B).

[176] 42 U.S.C. § 11603(e)(2)(A).

forth in the Convention applies."[177] Courts have recognized that the exceptions to the Convention are "narrow."[178]

Even if one of the affirmative defenses applies, the ultimate power to return the child still remains in the discretion of the court. Article 18 of the Convention states that "[t]he 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."[179] In addition, the State Department has concluded that "[t]he courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies."[180] Thus, even if the respondents prove an affirmative defense, the trial court may exercise its discretion and order a return "if such order would further the aims of the Hague Convention."[181]

A. THE ARTICLE 12 WELL-SETTLED DEFENSE: THE CHILD HAS BECOME WELL-SETTLED IN THE NEW SURROUNDINGS.

The well-settled defense is an affirmative defense to the demand for return of a wrongfully-removed child and is enumerated in Article 12 of the Hague Convention. The well-settled defense provides that if proceedings are commenced more than one year after wrongful removal, the child should not be returned if he or she has become settled in and is accustomed to

---

[177] 42 U.S.C. § 11601(a)(4).

[178] *See, e.g.*, *Friedrich v. Friedrich (Friedrich II)*, 78 F.3d 1060, 1067 (6th Cir. 1996) ("All four of these exceptions are 'narrow.' They are not a basis for avoiding return of a child merely because an American court believes it can better or more quickly resolve a dispute.") (citation omitted); *Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir. 1995) ("We believe, however, that a court applying the Hague Convention should construe these exceptions narrowly."); *McManus v. McManus*, 354 F. Supp. 2d 62, 68 (D. Mass. 2005) ("'The Convention establishes a strong presumption favoring return of a wrongfully removed child,' and '[e]xceptions to the general rule of expedient return . . . are to be construed narrowly.'") (alterations in original) (quoting *Danaipour v. McLarey*, 286 F.3d 1, 13-14 (1st Cir. 2002)).

[179] Hague Convention, *supra* note 2, art. 18.

[180] Public Notice 957, *supra* note 6, at 10509; *see also Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800, 815 (N.D. Iowa 2003); *Moreno v. Martin*, No. 08-22432-CIV, 2008 WL 4716958, at *24 (S.D. Fla. Oct. 23, 2008); *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1347 (S.D. Fla. 2002).

[181] *In re Marriage of Jeffers*, 992 P.2d 686, 690 (Colo. Ct. App. 1999).

his or her new surroundings.[182] The well-settled defense is inapplicable if proceedings were commenced within one year of the wrongful removal.[183] Respondents opposing a child's return have the burden of establishing the well-settled defense through a preponderance of the evidence.[184] As discussed below, even if some factors militate in favor of the well-settled defense, other factors may weigh against it, and ultimately, the court has discretion to order the return of the child notwithstanding any defense.

Neither ICARA nor the Hague Convention provides much guidance on the factors that should be used to determine whether a child is "settled in [the] new environment." The State Department's Public Notice 957 states that "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" for an Article 12 defense.[185] Thus, courts will look beyond the passage of time and determine the degree to which the child is "in fact settled in or connected to the new environment so that, at least inferentially, return would be disruptive with likely harmful effects."[186]

The court in *Koc v. Koc (In re Koc)*[187] compiled a list of six factors to use in determining whether a child is settled in a new environment:

1) the age of the child;

2) the stability of the child's residence in the new environment;

3) whether the child attends school or day care consistently;

---

[182] Hague Convention, *supra* note 2, art. 12.

[183] *Id.*

[184] 42 U.S.C. § 11603(e)(2)(B).

[185] Public Notice 957, *supra* note 6, at 10509.

[186] *Anderson v. Acree*, 250 F. Supp. 2d 876, 880 (S.D. Ohio 2002) (quoting *In re Robinson*, 983 F. Supp. 1339, 1345 (D. Colo. 1997)); *see Zuker v. Andrews*, 2 F. Supp. 2d 134, 141 (D. Mass. 1998), *aff'd*, 181 F.3d 81 (Table), No. 98-1622, 1999 WL 525936 (1st Cir. Apr. 9, 1999).

[187] 181 F. Supp. 2d 136 (E.D.N.Y. 2001).

4) whether the child attends church regularly;

5) the stability of the abducting parent's employment; and

6) whether the child has friends and relatives in the new area.[188]

The *Koc* court also distinguished that a "comfortable material existence" does not mean that a child is well-settled.[189] The court went on to examine the mix of factors, including the child's attendance at three schools and living in three different homes in three years, the uncertain immigration status of the child and her mother and the unstable nature of the mother's employment history, before ultimately determining that the child was not settled.[190] Other courts have adopted the *Koc* factors when analyzing whether the child is well-settled. Generally, when these courts find the presence of most of the *Koc* factors, they will find the child to be settled.[191] For example, in *In re Robinson*, the court found that children were well-settled where the children had lived in the same area for 22 months prior to commencement of the action, had active involvement with extended family in the area, were doing well in school, had made

---

[188] *Id.* at 152.

[189] *Id.* (citing *Lops*, 140 F.3d at 946).

[190] *Id.* at 154.

[191] *Zuker v. Andrews*, 2 F. Supp. 2d at 141 (finding that four-year-old child was well-settled where the child had been enrolled in the same day care for over a year, had attended birthday parties and play dates at his home and at those of his friends, established relationships with other adults and children, and bonded with his grandmother, notwithstanding the fact that mother had changed residences once over course of 15 months); *Neng Nhia Yi Ly v. Heu*, 294 F. Supp. 2d 1062, 1066-67 (D. Minn. 2003) (finding that child was well-settled were child had spent over three years in Saint Paul continuously, child had attended only one school, child had participated in extracurricular and cultural activities, mother was studying to become nurse practitioner and had support of stepfather who had steady employment, and child had numerous relatives in area and no apparent ties to France beyond father); *Silvestri v. Oliva*, 403 F. Supp. 2d 378, 388 (D.N.J. 2005) (applying well-settled defense where the children's immigration status was certain, home life had been stable in two-and-a-half years with only one move and same school throughout, and no allegations that mother had sought to conceal children from father); *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).

friends, and were active participants in extracurricular activities.[192] Similarly, in *Wojcik v. Wojcik*,[193] the court held that children were well-settled where they had been in the United States for eighteen months and in their current residence for ten months, attended school or day care regularly, had friends and relatives in the new area, attended church regularly, the mother had stable employment, and the petitioning father was unable to show that the children had ties to their home country.[194]

In addition to the *Koc* factors, courts also consider other factors in determining whether children are well-settled. For example, courts have found that children are well-settled where the children speak English well[195] or their English language skills are improving.[196] Courts also may consider the health of the children.[197]

Courts are unlikely to find that the children are well-settled within the meaning of the Hague Convention in cases where the children are deemed too young to establish connections to

---

[192] 983 F. Supp. 1339, 1346 (D. Colo. 1997).

[193] 959 F. Supp. 413 (E.D. Mich. 1997).

[194] *Id.* at 421 (E.D. Mich. 1997).

[195] *Diaz Arboleda v. Arenas*, 311 F. Supp. 2d 336, 343 (E.D.N.Y. 2004) (finding children well-settled where children spoke English well, children had been in United States over 30 consecutive months and lived in New York area the entire period, children were in second year at same school, mother had stable employment, children had many friends, children had relatives in New York but missed relatives in Colombia, and children did not miss old friends or neighbors in Colombia).

[196] *Reyes Olguin v. Cruz Santana*, No. 03 CV 6299(JG), 2005 WL 67094, at *8-9 (E.D.N.Y. Jan. 13, 2005) (applying well-settled defense where children were either fluent or improving in English, had lived with mother in New York for over eighteen months, went to and performed well in school, and attended church, maintained contact with relatives in nearby area).

[197] *Mero v. Prieto*, 557 F. Supp. 2d 357, 372 (E.D.N.Y. 2008) (holding that the child was well-settled because, in the years that she lived in the United States, the child was "healthy," attended school and church, and "participate[d] in organized after-school activities).

the community,[198] where the abducting parents limit social exposure to a small group of friends and relatives,[199] where the immigration status of parents is uncertain,[200] where the children's ties to their habitual residence were considerably stronger than those to the new environment,[201] or

---

[198] *David S. v. Zamira S.*, 574 N.Y.S.2d 429, 433 (N.Y. Fam. Ct. 1991) (finding that children at ages three and one and one-half were not yet involved in school or other forms of social activities which might establish that children were settled); *Lachhman v. Lachhman*, No. 08-CV-04363 (CPS), 2008 WL 5054198, at *6, *10 (E.D.N.Y. Nov. 21, 2008) (holding that child was not well-settled because child was moved to several different locations in the United States at various times and evidence did not "unequivocally demonstrate" that child had acclimated to her new location); *Lutman v. Lutman*, No. 1:10-CV-1504, 2010 WL 3398985, at *5-6 (M.D. Pa. Aug. 26, 2010) (holding that because "substantial evidence" was necessary to apply the defense and respondent's efforts were lacking, the well-settled defense did not apply); *Blanc v. Morgan*, 721 F. Supp. 2d 749, 764-65 (W.D. Tenn. 2010) (holding that evidence was lacking with regards to whether child was involved in community activities or developed connections to community such that return to habitual residence would be unduly disruptive).

[199] *In re Coffield*, 644 N.E.2d 662, 666 (Ohio Ct. App. 1994) (holding that child was not well-settled where abducting father did not enroll child in school or any other activities and limited child's exposure to prior friends and relatives, "i.e., people whom [father] could trust").

[200] *See Cabrera v. Lozano (In re Cabrera)*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004) (requiring child to return where mother's immigration status and job stability were uncertain, there had been five residence changes and one school change in two-and-a-half years, and there was a lack of family support system beyond mother and aunt in United States, notwithstanding child's fluency in English, maintenance of friends, and participation in extracurricular activities); *Giampaolo v. Erneta*, 390 F. Supp. 2d, 1269, 1282 (N.D. Ga. 2004) (finding that child was not well-settled where mother and child were illegal immigrants and had lived in at least three different residences, child had attended three schools in two-and-a-half years, child had no ties to mother's family, father's family was in Argentina, and mother's husband was convicted felon). *But see Silvestri*, 403 F. Supp. 2d at 388 (arguing that immigration status need not be weighed as importantly as in *In re Cabrera)*; *cf. In re B. Del C.S.B.*, 559 F.3d 999, 1010 (9th Cir. 2009) (holding that the fact that child and her mother were not legal United States residents did not, by itself, mandate conclusion that child was not settled in United States, within meaning of Hague Convention, and thus child had to be returned to her father in Mexico for custody proceedings, absent showing that there was immediate, concrete threat of removal"). *See also* Catherine Norris, *Note: Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction*, 98 Calif. L. Rev. 159 (2010).

[201] *See Gonzalez v. Nazor Lurashi*, 2004 WL 1202729, at *9 (D.P.R. May 20, 2004) (finding that social ties to family and friends after twelve years in Argentina outweighed ties formed in sixteen months in Puerto Rico, that father's lack of marriage to girlfriend and history of unstable employment created unstable home environment, and child's actual home address was unclear); *see also Bocquet*, 225 F. Supp. 2d at 1349 (finding that child was not settled where there was a lack of evidence of child's social activity or family ties in new environment (as opposed to family and school ties to France) and father had unstable employment and several different living addresses).

where the children have lived in multiple locations in a short span of time.[202] Also, regardless of whether concealment of the children leads to equitable tolling of the one-year period, there is some indication that a court may consider the stresses and instabilities inherent in such concealment in determining whether the children are well-settled.[203] In *Antunez-Fernandes v. Connors-Fernandes*,[204] for example, the court exercised its discretion to return the children to their former habitual residence even after finding that the children were well-settled in order to prevent the abducting parent from benefiting from erecting multiple barriers to prevent the left-behind parent from recovering or further interacting with the children.[205]

Evidence that children have become well-settled also may be relevant to whether returning the children to their former residence could create a grave risk of psychological harm under Article 13(b). The Second Circuit has addressed this issue[206] and provided that, while the issue of settlement could be considered in determining whether a grave risk existed under 13(b), it could never be the sole element in making that determination.[207] Other courts have expressed

---

[202] *See Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363-64 (M.D. Fla. 2002) (finding the fact that children had lived in seven different locations, including a domestic violence shelter, with the longest time spent at any location being seven months, precluded determination that children were "well-settled").

[203] *See id.*; *see also Coffield*, 664 N.E.2d at 665-66.

[204] 259 F. Supp. 2d 800 (N.D. Iowa 2003).

[205] *Id.* at 815 (where parent "knowingly and successfully created language, cultural, distance and financial barriers" to parent's efforts to seek return of children, court exercised its discretion to return children despite their "well-settled" status).

[206] *See Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999), *aff'd*, 238 F.3d 153 (2d Cir. 2001) (court stated in dicta that it did not rule out the possibility of such a case but noted that the record at hand did not constitute such a case).

[207] *See Blondin v. Dubois*, 238 F.3d 153, 164 (2d Cir. 2001) (court stated that consideration of child's settlement into his or her new environment is only one factor in an Article 13(b) analysis).

hesitation about mixing the well-settled and grave risk defenses to avoid returning the children to their former residence.[208] *See* Section III.C.

B. THE ARTICLE 13 CONSENT OR ACQUIESCENCE DEFENSE: PETITIONERS CONSENTED TO OR ACQUIESCED IN THE REMOVAL OR RETENTION.

Under Article 13(a) of the Hague Convention, the court is not bound to return a child if the respondent establishes that the petitioner consented to or subsequently acquiesced in the removal or retention. Both defenses turn on the petitioner's subjective intent, but they are distinctly different. The defense of consent relates to the petitioner's conduct *before* the child's removal or retention, whereas the defense of acquiescence relates to "whether the petitioner *subsequently* agreed to or accepted the removal or retention."[209] The respondent must prove these defenses by a preponderance of the evidence;[210] however, even if one of these defenses is proven successfully, the court nonetheless retains discretion to order the child's return.[211]

Courts have expressed that such consent can be proved successfully with relatively informal statements or conduct.[212] Because consent requires little formality, courts will look beyond the words of the consent to the nature and scope of the consent, keeping in mind any conditions or limitations imposed by the petitioner.[213] Conversely, the *Friedrich v. Friedrich*

---

[208] *See, e.g.*, *Silverman v. Silverman*, 338 F.3d 886, 901 (8th Cir. 2003) ("A removing parent 'must not be allowed to abduct a child and then – when brought to court – complain that the child has grown used to the surroundings to which they were abducted.'") (quoting *Friedrich v. Friedrich (Friedrich II)*, 78 F.3d 1060, 1068 (6th Cir. 1996)); *McManus v. McManus*, 354 F. Supp. 2d 62, 69 (D. Mass. 2005) ("A grave risk of harm is not 'established by the mere fact that removal would unsettle the children who have now settled in the United States. That is an inevitable consequence of removal.'") (quoting *Walsh v. Walsh*, 221 F.3d 204, 220 n.14 (1st Cir. 2000)).

[209] *Baxter v. Baxter*, 423 F.3d 363, 371 (3d Cir. 2005).

[210] 42 U.S.C. § 11603(e)(2)(B).

[211] *Moreno v. Martin*, No. 08-22432-CIV, 2008 WL 4716958, at *10 (S.D. Fla. Oct. 23, 2008) (citing *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1347 (S.D. Fla. 2002)).

[212] *Nicolson v. Pappalardo*, 605 F.3d 100, 105 (1st Cir. 2010).

[213] *Id.*

(Friedrich II)[214] court held that acquiescence requires "an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time."[215] The following are some of the most common arguments and actions that parents use in their attempts to prove or disprove the defenses of consent and acquiescence.

1. Authorization To Travel.

Often, a respondent produces a signed "Authorization to Travel" document as evidence that the petitioner gave consent for the child to change residences.[216] Courts rarely accept this as evidence that the other parent consented to the child's removal. In *Mendez Lynch v. Mendez Lynch*,[217] the court held that an Authorization to Travel, which allowed the children to travel freely, did not indicate that the other parent gave up his legal rights of custody. There, a father signed a broad Authorization to Travel that allowed the mother of the children to take the children out of Argentina.[218] The court held that the "evidence [was] clear that the written

[214]78 F.3d 1060 (6th Cir. 1996).

[215]*Id.* at 1070.

[216]*See, e.g.*, *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1283 (N.D. Ga. 2004) (citing Argentine Civil Code, art. 264 where an Authorization to Travel agreement required both Respondent and Petitioner's consent for child to leave Argentina). Authorization to Travel agreements are typically executed under the guise of allowing the child to travel abroad either for a family emergency or vacation. They typically state that the child can travel to another country and then return home. As such, they normally will not show that the petitioner consented to a change of the child's residence.

[217]220 F. Supp. 2d 1347, 1358-59 (M.D. Fla. 2002).

[218]*Id.* at 1358.

consents to travel were given to facilitate family vacation-related travel, not as consent to unilaterally remove the children from Argentina at the sole discretion of Respondent."[219]

2. Words And Actions Of Left-Behind Parents.

Courts frequently echo the warning of the *Friedrich II* court that "[e]ach of the words and actions of a parent during the separation are not to be scrutinized for a possible waiver of custody rights."[220] Here, a third party claimed that Mr. Friedrich stated that he was not seeking custody of his child because he lacked the means to support the child.[221] The Sixth Circuit responded that, even if the statement was made, it is "insufficient evidence of subsequent acquiescence."[222] Additionally, "isolated statements to third parties are not sufficient to establish consent or acquiescence."[223]

3. Nature Of Children's Removal.

When the abducting parent removes the child in a secretive fashion – for example, during the night, while the other parent is away, or without informing the other parent[224] – a court is more likely to find that the other parent did not consent or acquiesce to the child's removal. In

---

[219] *Id.*; *see also* *Moreno v. Martin*, No. 08-22432-CIV, 2008 WL 4716958, at *11 (S.D. Fla. Oct. 23, 2008) (finding that the "Permission to Travel" signed by the father supported his claim that he did not consent to his daughter's removal to the United States because the document says nothing about the child permanently moving or relocating); *Asvesta v. Petroutsas*, 580 F.3d 1000, 1019 (9th Cir. 2009) (holding that the father's consent for the mother to travel with the child "directly contradict[ed]" a finding that the father consented to the child's indefinite stay in Greece).

[220] 78 F.3d at 1070.

[221] *Id.* at 1069.

[222] *Id.* at 1070; *see also* *Asvesta*, 580 F.3d at 1019 (declining to read only excerpted statement from an e-mail that might have suggested that the father consented to his child's removal, and instead considered the statement in the context of the entire e-mail, which suggested that he did not consent to his child's removal).

[223] *Moreno*, 2008 WL 4716958, at *15.

[224] *See, e.g.*, *Simcox v. Simcox*, 511 F.3d 594, 603 (6th Cir. 2007) (noting that the mother "left with the children at midnight after her husband had fallen asleep . . . [and had] taken his passport and identification papers to prevent his pursuit of the fleeing family, and . . . once he realized they were gone, he engaged in a 'desperate search' for the children").

Friedrich II, the Sixth Circuit stated that "[t]he deliberately secretive nature of [the mother's] actions is extremely strong evidence that [the father] would not have consented to the removal of [the child]."[225] One court referenced the abducting parent's "deception," which prevented any acquiescence by the left-behind parent.[226]

4. Filing Of Hague Convention Petition.

Several courts have identified the left-behind parent's filing of a Hague Convention petition in and of itself as evidence that the parent did not consent or acquiesce to the child's removal and retention. In *Moreno v. Martin*,[227] the Southern District of Florida specified that the father's filing of a request for his daughter's return was an "act inconsistent with consent."[228] Similarly, in *Tabacchi v. Harrison*,[229] the court identified the father's pursuit of a Hague Convention petition as the "most important[]" evidence that he had "been fighting to get his daughter back since the day she was taken from Italy," and did not consent or acquiesce to her removal.[230]

5. Other Considerations.

Courts have evaluated a multitude of other considerations and arguments in determining whether a parent consented or acquiesced to the child's removal. One court found that a father's assent to an order (issued in the U.S. after the child's arrival) that granted temporary parental

---

[225] 78 F.3d at 1069. *See also* *Moreno v. Martin*, No. 08-22432-CIV, 2008 WL 4716958, at *14 (S.D. Fla. Oct. 23, 2008) ("Rather, the secretive nature of [the abducting parent's] departure with [the child] suggests that [the left-behind parent] did not consent.")

[226] *Baran v. Beaty*, 479 F. Supp. 2d 1257, 1269 (S.D. Ala. 2007), *aff'd*, 526 F.3d 1340 (11th Cir. 2008).

[227] No. 08-22432-CIV, 2008 WL 4716958 (S.D. Fla. Oct. 23, 2008).

[228] *Id.*, 2008 WL 4716958, at *13.

[229] No. 99 C 4130, 2000 WL 190576 (N.D. Ill. Feb. 10, 2000).

[230] *Id.* at *11; *see also* *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1350 (S.D. Fla. 2002) ("Ms. Bocquet's application for Noe's return under the Hague Convention is further evidence that she did not consent to his removal.").

rights and responsibilities to the mother did not amount to acquiescence because it was not a clear and unequivocal renunciation of parental rights by the father.[231] Another court held that, where the respondent had removed and concealed the child from the petitioner for an extended period of time, the petitioner's failure to exercise his parental rights over the child did not indicate that he acquiesced to the child's removal and retention, because his failure to do so was involuntary.[232]

As illustrated above, successfully establishing either defense is a difficult feat. However, in *Gonzalez-Caballero v. Mena*,[233] the respondent successfully proved that the petitioner consented to the child's removal from Panama to the United States. There, the court reasoned that the petitioner did not object to the child becoming a United States citizen and had told the respondent that she could no longer care for the child.[234] No witnesses testified that they understood the child's visit to the United States to be temporary, and the petitioner provided the respondent with all of the child's paperwork and helped obtain exit papers for the child.[235]

C. THE ARTICLE 13 GRAVE RISK DEFENSE: THERE IS A GRAVE RISK THAT THE CHILD WOULD BE EXPOSED TO PHYSICAL OR PSYCHOLOGICAL HARM OR AN INTOLERABLE SITUATION IF RETURNED.

Under Article 13, a respondent may raise the defense that the child should not be returned due to the grave risk of either "physical or psychological harm" or the existence of an

---

[231] *Nicolson*, 605 F.3d at 108-09.

[232] *Stirzaker v. Beltran*, No. CV09-667-N-EJL, 2010 WL 1418388, at *7 (D. Idaho Apr. 6, 2010).

[233] 251 F.3d 789 (9th Cir. 2001).

[234] *Id.* at 793.

[235] *Id.* (indicating that other relevant factors in the analysis included: father paid for a round-trip ticket for himself and a one-way ticket for child to come to the United States; mother testified that she regretted her decision to let father take the child; a witness testified that mother told her that she regretted turning over custody of child to the father; and father tried to help mother come to the United States).

"intolerable situation."[236] Either prong of this defense must be established by clear and convincing evidence.[237] As with other exceptions, courts consider the grave risk defense to be a narrowly drawn exception.[238] Indeed, at least one court has cautioned that "[t]he exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest."[239]

1. Grave Risk Of Physical Or Psychological Harm.

As a preliminary matter, courts often struggle with the distinction between a "risk of harm" and a "*grave* risk of harm." This requires a subjective judgment by the fact finder. The Seventh Circuit opined that "[t]he gravity of a risk involves not only the *probability* of harm, but also the *magnitude* of the harm if the probability materializes."[240] Thus, a court may not only consider the probability of the threat of harm, but also the nature of the possible harm to the child.

Concepts of "magnitude" and "probability" of harm are relative and abstract, but courts have provided more concrete definitions. In *Friedrich v. Friedrich (Friedrich II)*,[241] the court characterized grave risk as placing the child in imminent danger before the custody dispute was resolved in the country of habitual residence or at grave risk for serious abuse, neglect or "extraordinary emotional dependence" where the country of habitual residence could provide the

---

[236] Hague Convention, *supra* note 2, art. 13.

[237] 42 U.S.C. § 11603(e)(2).

[238] *See In re Application of Adan*, 437 F.3d 381, 395 (3d Cir. 2006) (explaining that the defense is drawn narrowly because to do otherwise would "frustrate" the intent of the Convention); *In re D.D.*, 440 F. Supp. 2d 1283, 1298-99 (M.D. Fla. 2006) (same).

[239] *Friedrich v. Friedrich (Friedrich II)*, 78 F.3d 1060, 1068 (6th Cir. 1996); *see also Gaudin v. Remis*, 415 F.3d 1028, 1035 (9th Cir. 2005) (quoting *Friedrich II*).

[240] *Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005) (emphasis added).

[241] 78 F.3d 1060 (6th Cir. 1996).

child with adequate protection.[242] In *Gaudin v. Remis*,[243] the Ninth Circuit stated that an analysis of the grave risk defense "should be concerned only with the degree of harm that could occur in the immediate future."[244] However, in *Walsh v. Walsh*,[245] the First Circuit rejected the requirement that danger be imminent in order to establish the defense.[246]

The "physical or psychological harm" exception requires that the alleged harm be "a great deal more than minimal."[247] Courts will deny return of a child only when the child's danger is "grave" or "severe" and not just "serious." "The harm must be greater than what is normally expected when taking a child away from one parent and passing the child to another parent," and normal adjustment problems are not sufficient.[248] "[E]ven incontrovertible proof of a risk of harm will not satisfy" this defense if the "risk of harm proven lacks gravity."[249] In addition, the removing parent cannot complain that a child has grown used to the surroundings to which he or she was abducted and use those circumstances to deny return: "Under the logic of the Convention, it is the *abduction* that causes the pangs of subsequent return."[250]

---

[242] *Id.* at 1069.

[243] 415 F.3d 1028 (9th Cir. 2005).

[244] *Id.* at 1037; *see also Sullivan v. Sullivan*, No. CV-09-545-S-BLW, 2010 WL 227924, at *7 (D. Idaho Jan. 13, 2010) (fact that parent had engaged in prostitution did not demonstrate harm in the immediate future, in absence of other factors).

[245] 221 F.3d 204 (1st Cir. 2000).

[246] *Id.* at 218.

[247] *In re D.D.*, 440 F. Supp. 2d 1283, 1298 (M.D. Fla. 2006); *Gaudin*, 415 F.3d at 1035; *see also Karpenko v. Leendert*, No. 09-03207, 2010 WL 831269, at *8 (E.D. Pa. Mar. 4, 2010) ("'Concern' that the child would be permanently alienated from her father if returned to the Netherlands simply does not constitute clear and convincing evidence of the 'grave risk' standard.").

[248] *Id.*

[249] *Laguna v. Avila*, No. 07-CV-5136 (ENV), 2008 WL 1986253, at *8 (E.D.N.Y. May 7, 2008) (citing *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001)). The court concluded that the abducting parent did not prove with clear and convincing evidence the existence of a "grave risk" if the child was returned to Colombia. *Id.*

[250] *Friedrich v. Friedrich (Friedrich II)*, 78 F.3d 1060, 1068 (6th Cir. 1996) (emphasis added).

The prospect of sexual abuse generally will qualify as a "grave risk" of physical or psychological harm.[251] It also will qualify as an "intolerable situation."[252] With respect to other types of abuse, the result will depend on the facts of the case.

In *Reyes Olguin v. Cruz Santana*,[253] the court held that there was a great risk of "severe" psychological harm upon the child's return to Mexico.[254] Based on the testimony of a child psychologist, the court concluded that if repatriated, the child would experience "suicidal impulses generated by his prior trauma" of witnessing his father beat his mother, as well as his own experience of abuse.[255] However, in *McManus v. McManus*,[256] the court concluded that the psychological harm to the children if returned would be "serious," but not "grave" under Article 13(b), because any previous abuse to the children was sporadic.[257] In *In re Application of Adan*, the court held that a totality of circumstances test may apply in determining the credibility of child abuse allegations.[258] In the end, even if the child may be exposed to psychological harm if repatriated, the court may nonetheless order the child's return if the psychological harm would not be grave.

---

[251] *Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007). *But see* *Seaman v. Peterson*, 762 F. Supp. 2d 1363 (M.D. Ga. 2011) (denying grave risk defense on grounds that allegations of potential sexual abuse, including petitioner's membership in a cult that allegedly tolerated child sexual abuse and alleged possession of child pornography by maternal family member, was too far removed to be a credible risk).

[252] *See infra* Section III.C.2.

[253] No. 03 CV 6299(JG), 2005 WL 67094 (E.D.N.Y. Jan. 13, 2005).

[254] 2005 WL 67094, at *7.

[255] *Id.*

[256] 354 F. Supp. 2d 62, 70 (D. Mass. 2005).

[257] *Id.* at 70; *see also* *Blanc v. Morgan*, 721 F. Supp. 2d 749, 766 (W.D. Tenn. 2010) (citation to one prior instance of overconsumption of alcohol was not enough to trigger grave risk defense).

[258] *See* *In re Application of Adan*, 437 F.3d 381, 398 (3d Cir. 2006) (remanding case to district court because the court "explained away [child abuse allegations] in isolation" rather than examining the totality of the circumstances).

Although a clear judicial consensus has not emerged, the issue of domestic and family violence as it relates to the grave risk defense has been raised repeatedly in recent years. There are not yet any specific comprehensive statistics on how often respondents are fleeing domestic violence or raising allegations of domestic violence,[259] but statistics indicate that the incidence of successful grave risk defenses has increased globally[260] and in the United States.[261] Scholars and advocates have highlighted the difference between the stereotypical abductor envisioned by the drafters of the Hague Convention and the reality that abductors are most commonly women who act as primary caretakers for the children.[262] In alleging grave risk to the children, litigants are increasingly raising the issue of domestic abuse,[263] in addition to emphasizing the decades of

[259]*See* Hague Permanent Bureau, Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper (May 2011), page 4, http://www.hcch.net/upload/wop/abduct2011pd09e.pdf.

[260]*See* 2011 Hague Global Statistical Analysis, page 30, http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf (studying year 2008 and noting that the Article 13(b) defense has remained, globally, the most common reason for courts to refuse a return).

[261]2011 Hague Statistical Analysis National Reports, page 205, http://www.hcch.net/upload/wop/abduct2011pd08c.pdf (indicating that U.S. courts have higher than average judicial return rates and fall below the global average in applying the grave risk defense as a basis for refusing a return).

[262]Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000), *but see* 2011 Hague Statistical Analysis National Reports, *supra* note 251, p. 199 (indicating that for incoming cases to the United States the percentage of abducting mothers has decreased from 67% in 1999, to 64% in 2003, to 59% in 2008, and overall remains less pronounced than the global average).

[263]*See* *Charalambous v. Charalambous*, 627 F.3d 462, 468-69 (1st Cir. 2010) (respondent waived other factual claims to her grave risk defense on appeal and focused solely on the spousal abuse she suffered and was likely to face in the future).

scholarship addressing the harmful effects of domestic violence on children in the home.[264] Counsel on both sides of a case must be prepared to address this issue when litigating a Hague Convention case.

In assessing grave risk, some courts examine whether the country of habitual residence has the means to protect the child from potential abuse.[265] However, in 2008, the Eleventh Circuit concluded that neither the Hague Convention, ICARA nor the Perez-Vera Report require a court to review evidence of whether the habitual residence can protect at-risk children.[266] The court noted that such an analysis requires evidence of the habitual residence's "legal and social service systems" which can lead to "difficult problems of proof" since the respondent left the habitual residence.[267] Consequently, the Eleventh Circuit declined 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."[268]

---

[264] *See* Hague Permanent Bureau, *supra* note 249, at 3 notes 4-5 (citing Miranda Kaye, *The Hague Convention and the Flight From Domestic Violence: How Women and Children are Being Returned By Coach and Four*, 13 INT'L J. L. POL'Y FAM. 191 (1999); Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000-2001); Jeanine Lewis, Comment, *The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity*, 13 TRANSNAT'L LAW. 391(2000); Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Cases*, 38 FAM. L.Q. 529 (2004-2005); Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, 11 VIOLENCE AGAINST WOMEN 115 (2005); Jeffrey L. Edleson et al., *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the United States for Safety: A Study of Hague Convention Cases* (Nat'l Inst. for Just., Working Paper No. #2006-WG-BX-0006, 2010), *available at* http://www.haguedv.org/reports/finalreport.pdf (last visited May 2011)).

[265] *Walsh*, 221 F.3d at 221-22.

[266] *Baran v. Beaty*, 526 F.3d 1340, 1347-48 (11th Cir. 2008) (affirming district court's decision not to return child due to a grave risk of harm).

[267] *Id.* at 1348.

[268] *Id.*

2. Intolerable Situations.

In addition to providing a defense where grave risk of harm is shown, Article 13 provides a defense where it is shown that return would place the child in an "intolerable situation." Courts give greater scrutiny to cases where an "intolerable situation" may exist. An "intolerable situation" requires "more than a cursory evaluation of [the home country's] civil stability."[269] The court should conduct a robust evaluation of the people and circumstances awaiting the child in the country of habitual residence.[270] For instance, an "intolerable situation" does not "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."[271] Using this approach, the Middle District of Florida reasoned that, even though there was great economic and governmental turmoil in the home country of Argentina, the home country would be tolerable because:

> there were no demonstrations in the streets near [the petitioner's home] . . . or closed schools due to strikes. . . . [T]his alone or in combination with the other credible evidence in this case does not come within the grave risk exception.[272]

Other courts have established a bright line example of an "intolerable situation" as one in which the custodial parent sexually abuses the child and the other parent removes the child as a safeguard against further abuse.[273] In those instances, repatriation to the abusing parent would constitute return to an "intolerable situation." If there is serious abuse or neglect, a court must

---

[269] *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1364 (M.D. Fla. 2002).

[270] *See In re D.D.*, 440 F. Supp. 2d 1283, 1299 (M.D. Fla. 2006) (evaluating not only the country involved but also the children's expected caregivers).

[271] *Friedrich v. Friedrich (Friedrich II)*, 78 F.3d 1060, 1068-69 (6th Cir. 1996).

[272] *Mendez Lynch*, 220 F. Supp. 2d at 1365-66.

[273] *See, e.g., In re Application of Adan*, 437 F.3d 381, 395 (3d Cir. 2006); *Friedrich II*, 78 F.3d at 1069; *see also Simcox v. Simcox*, 511 F.3d at 607-08 (stating that credible evidence of sexual abuse will qualify as "grave risk").

consider whether the "court[s] in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."[274]

3. Undertakings.

Courts citing potential psychological harm to the child upon return often rely on child psychologists as well as guardians *ad litem*.[275] *See also* Section IV.A.2.iii. The courts will weigh the testimony of these individuals to determine the severity of the harm to the child and whether any measures can be taken to mitigate the risk of psychological or physical harm to the child.[276] If the court determines that ameliorative measures (commonly referred to as "undertakings") can be taken that will allow the child to return safely to the home country, the court will order the child's repatriation to their home country.[277] Whether undertakings can be implemented requires a realistic inquiry into the abilities of the court in the country to which the child is returned.

In *Simcox v. Simcox*,[278] the Sixth Circuit has outlined three "broad categories [of] cases" and the role of undertakings in analyzing the grave risk defense.[279] First, there are "cases in

---

[274] *In re Application of Adan*, 437 F.3d at 395 (alteration in original).

[275] *See Reyes Olguin v. Cruz Santana*, No. 03 CV 6299(JG), 2005 WL 67094, at *1 (E.D.N.Y. Jan. 13, 2005) (court appointed a guardian *ad litem* to advise the court of any potential psychological harm).

[276] *Id.* at *7; *see Van De Sande v. Van De Sande*, 431 F.3d 567, 572 (7th Cir. 2005) (remanding decision to district court to determine whether any conditions could be applied to protect the children if ordered to return to their home country); *In re Tsarbopoulos*, 243 F.3d 550 (Table), No. 00-35393, 2000 WL 1721800, at *2 (9th Cir. Nov. 17, 2000) (remanding the decision to district court to determine whether respondent can prove a "grave risk" defense and whether district court could impose "appropriate protective measures as a condition of the children['s] return").

[277] *Reyes Olguin*, 2005 WL 67094, at *7. Some courts do not consider such a determination to be dispositive in cases of child abuse. *See Van De Sande*, 431 F.3d at 572 ("[I]n cases of child abuse the balance may shift against [undertakings] . . . it would seem less appropriate for the court to enter extensive undertakings than to deny the return request.").

[278] 511 F.3d 594 (6th Cir. 2007).

[279] *Id.* at 607-08.

which the abuse is relatively minor."[280] In such cases, a grave risk of harm is unlikely, and undertakings will be "largely irrelevant."[281] Second, in cases where there is evidence of a "clearly grave" risk of harm, undertakings likely will be insufficient.[282] Finally, there are cases that "fall somewhere in the middle," where the abuse is "substantially more than minor, but is less obviously intolerable."[283] These cases will involve a fact-intensive inquiry with a focus on (a) "the nature and frequency of the abuse," (b) "the likelihood of its recurrence," and (c) "whether there are any enforceable undertakings that would sufficiently ameliorate the risk of harm to the child[ren] caused by [their] return."[284] The court should satisfy itself that the parties are likely to obey the undertakings.[285]

Some of examples of the first category include *McManus v. McManus*,[286] where the court held that two incidents of a mother hitting her children and a generally chaotic home

---

[280] *Id.*

[281] *Id.* at 607.

[282] *Id.*

[283] *Id.* at 608.

[284] *Id.*

[285] Case law suggests that a court can order undertakings to protect the child's return without a proven grave risk defense under Article 13. In *Kufner v. Kufner*, 519 F.3d 33, 40 (1st Cir. 2008), the First Circuit affirmed the district court's granting of the father's petition to return the children to Germany and the lower court's conclusion that the mother did not prove the children would experience a grave risk of harm if returned. However, the First Circuit further affirmed the district court's undertakings "even in the absence of a grave risk of harm," including the ordering of the father to dismiss the German criminal charges against the mother, to obtain medical care for one of the children and to allow the mother access and visitation until a German court ordered otherwise. A mother in *Krefter v. Wills*, 623 F. Supp. 2d 125, 137 (D. Mass. 2009), was unable to prove a grave risk of harm to her child; however, the court ordered the father to pay for the airplane tickets to Germany for the child and mother; provide the mother three months of child support for the child; and procure "suitable housing" for the mother and child in Germany. *Id.* The court explained that after these undertakings were satisfied by the father, the mother must return to Germany with the child. *Id.* The court further ordered both parents to "use reasonable efforts to schedule court proceedings" in Germany to "require minimal disruption" to the child's schooling. *Id.*

[286] 354 F. Supp. 2d 62 (D. Mass. 2005).

environment were not enough to satisfy the grave risk defense.[287] In *Whallon v. Lynn*,[288] a shoving incident and verbal abuse were not enough.[289] In *In re D.D.*,[290] evidence of verbal abuse was insufficient to trigger the defense.[291]

On the opposite end of the spectrum are cases where the abuse is so severe as to make undertakings insufficient. *Blondin v. Dubois*[292] is an example of such a case. There, the court faced uncontroverted testimony that the child, if returned to France, would most certainly suffer a recurrence of post-traumatic stress disorder caused by their father's abusive treatment of them while in France.[293] The Second Circuit determined that no undertakings could ameliorate the danger to the children and thus affirmed the district court's finding of the intolerable situation defense.[294] In *Danaipour v. McLarey*,[295] the First Circuit affirmed the district court's finding that the mere return of the child to the father's country, where he had sexually abused the child, would cause grave harm and held that the district court was not required to explore the availability of ameliorative actions in that country to protect the child.[296] The court found that proposed undertakings would protect the child for only a very limited time and thus were not sufficient to defeat the grave risk defense.[297]

---

[287] *Id.* at 69.

[288] 230 F.3d 450 (1st Cir. 2000).

[289] *Id.* at 460.

[290] 440 F. Supp. 2d 1283 (M.D. Fla. 2006).

[291] *Id.* at 1299.

[292] 238 F.3d 153 (2d Cir. 2001).

[293] *Id.* at 161- 63.

[294] *Id.*

[295] 386 F.3d 289 (1st Cir. 2004).

[296] *Id.* at 301-03.

[297] *Id.* at 303.

The *Simcox* case itself is an example of the third category. The court found the abuse to be serious in nature, both physically and psychologically. The incidents were not "isolated or sporadic," but happened with "extreme frequency." Additionally, there was a "reasonable likelihood" that the abuse would happen again without sufficient protection. The court found undertakings to be relevant, but found that the undertakings fashioned by the district court were "unworkable."[298]

Even in "middle cases," in order to find that the undertakings are sufficient to overcome the grave risk defense, courts often will assess the potential effectiveness of the undertakings. Not all courts assume that a country's laws will be sufficient to protect the child.[299] In *Walsh v. Walsh*,[300] the First Circuit suggested that the undertakings approach enables the court to explore the options available in the country of habitual residence in order to ensure sufficient guarantees of performance of the undertakings. In that case, however, the Court found that the left-behind father's past acts and violation of court orders provided the Court "every reason to believe" that he would violate the undertakings as well, and thus allowed the 13(b) grave risk defense and refused to return the child.[301] In *Simcox v. Simcox*,[302] the court observed that a court may find undertakings insufficient where they are difficult to enforce.[303]

If confronted with a grave risk defense, the petitioner should assemble as much information as possible about the foreign country's child protective services and other

---

[298] *Simcox v. Simcox*, 511 F.3d 594, 609-10 (6th Cir. 2007).

[299] *Van De Sande v. Van De Sande*, 431 F.3d 567, 572 (7th Cir. 2005) (rejecting the *Friedrich II* assumption that the views of the abducted-from country would protect the children in such a situation). *Cf. Friedrich v. Friedrich (Friedrich II)*, 78 F.3d 1060, 1069 (6th Cir. 1996) (assuming in dicta that a receiving country's courts would be capable of protecting the returning children).

[300] 221 F.3d 204, 221 (1st Cir. 2001).

[301] *Id.*

[302] 511 F.3d 594 (6th Cir. 2007).

[303] *Id.* at 610.

organizations that could assist the taking parent's and child's safe return to the country. The petitioner should be prepared to present proposed undertakings to the court, especially if the respondent submits credible evidence of grave risk of harm to the child. Finally, a petitioner also should be prepared to present information about the enforceability of the undertakings.

D. THE ARTICLE 13 MATURE CHILD OBJECTION TO REMOVAL DEFENSE.

Article 13 of the Hague Convention specifically provides that the court may 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."[304] The Convention does not specify what it considers to be an appropriate age. Therefore, some courts have determined that the child's objection will be considered regardless of age:

> The Convention did not establish a specific age that must be reached before a court could find that the child's objection was sufficient in and of itself to decline repatriation. Even if a child is not old enough so that his objection could be dispositive, a court may consider his testimony as part of the broader analysis under Article 13(b).[305]

Because the inquiry concerning the mature child objection is "fact-intensive" and "idiosyncratic," decisions applying this exception are "understandably disparate."[306] In *Diaz Arboleda v. Arenas*,[307] the court held that twelve- and fourteen-year-old children sufficiently objected to return where they expressed preference for staying with their mother and believed they would have better opportunities in the United States.[308] In *Man v. Cummings*,[309] after an in-

---

[304] Hague Convention, *supra* note 2, art. 13.

[305] *Reyes Olguin v. Cruz Santana*, No. 03 CV 6299(JG), 2005 WL 67094, at *8 n.19 (E.D.N.Y. Jan. 13, 2005).

[306] *de Silva v. Pitts*, 481 F.3d 1279, 1287 (10th Cir. 2007); *see also Laguna v. Avila*, No. 07-CV-5136, 2008 WL 1986253, at *9 (E.D.N.Y. May 7, 2008) (the "child's maturity is a question for the district court to be determined upon the specific facts of each case").

[307] 311 F. Supp. 2d 336 (E.D.N.Y. 2004).

[308] *Id.* at 336.

camera interview, the court honored the wishes of a thirteen-year-old girl to remain with her mother in the United States.[310] In *de Silva v. Pitts*,[311] the Tenth Circuit affirmed a district court's decision that a thirteen-year-old had satisfied the objection defense when the child stated that he had made friends in the United States, described his house as "really big" and "a great place" where he has a computer and everything he needs for school, and indicated that he thought the school was better here.[312] Conversely, in *Simcox v. Simcox*,[313] the Sixth Circuit stated that "simply because other eight-year[-]olds have been found to be sufficiently mature does not mean that the district court erred in not finding the same with regard to [the child]."[314] Similarly, in *Dietz v. Dietz*,[315] the Fifth Circuit found that the district court did not err in holding that children aged nine and thirteen had not attained the age and degree of maturity at which it was appropriate to take account of their view in deciding whether to return them to Mexico.[316]

These decisions demonstrate that there is no hard-and-fast rule regarding the age at which it is appropriate for a court to take into account a child's views. For example, although the *Simcox* court refused to deny return of an objecting eight-year-old, at least one court has denied a petition for return where five- and eight-year-old children objected to being returned.[317] On the

---

[309]No. CV 08-15-PA, 2008 WL 803005 (D. Or. Mar. 21, 2008).

[310]*Id.*, 2008 WL 803005, at *2.

[311]481 F.3d 1279 (10th Cir. 2007).

[312]*Id.* at 1287.

[313]511 F.3d 594 (6th Cir. 2007).

[314]*Id.* at 604.

[315]349 Fed. App'x 930 (5th Cir. 2009).

[316]*Id.* at 1.

[317]*Reyes Olguin v. Cruz Santana*, No. 03 CV 6299(JG), 2005 WL 67094, at *10 (E.D.N.Y. Jan. 13, 2005).

other hand, at least one court has ordered return of a fifteen-year-old child, despite the child's "expressed preference to remain in the United States."[318]

It is important to note that the mature child objection defense requires a different evidentiary standard than the grave risk defense and therefore must be raised separately.[319] The mature child objection defense must be proven only by a preponderance of the evidence, and not by clear and convincing evidence.[320] The *McManus* court recognized that:

> Congress has added to the Convention's endorsement of the exception the codicil that the factual predicate for finding that a mature objection has been made need only be established by the customary civil action standard of a preponderance of the evidence. In contrast to . . . the prospect of a "grave risk" of physical or psychological harm to the child if returned, establishing the "objection" exception to return is not subject to a stringent burden of proof, and thus a court may more readily find a valid objection than it could find the existence of a grave risk. This difference in stringency of examination is expressly mandated by ICARA, 42 U.S.C. § 11603(e)(2).[321]

Nevertheless, the defense is "meant to be narrow."[322]

In *McManus*, the court held that the respondent's retention of the children was wrongful under the Convention. However, the court denied the petition to return the four children to

---

[318] *Casimiro v. Chavez*, No. Civ.A.1:06CV1889-ODE, 2006 WL 2938713, at *6 (N.D. Ga. Oct. 13, 2006).

[319] *See Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001) ("We agree with the government that the unnumbered provision of Article 13 provides a *separate* ground for repatriation and that, under this provision, a court may refuse repatriation *solely* on the basis of a considered objection to returning by a sufficiently mature child.").

[320] 42 U.S.C. § 11603(e)(2) provides:

(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.

[321] *McManus v. McManus*, 354 F. Supp. 2d 62, 72 (D. Mass. 2005).

[322] *Laguna v. Avila*, No. 07-CV-5136, 2008 WL 1986253, at *9 (E.D.N.Y. May 7, 2008).

Northern Ireland because the fourteen-year-old twins objected to their return.[323] The court relied heavily on the advice of the guardian *ad litem*, a clinical psychologist.[324] The psychologist, among other things, testified that the children were emotionally and cognitively mature, a factor the court seemed to weigh heavily when determining the children's ability to object coherently to their return.[325]

Because this defense involves the child's testimony, there often is an issue of whether this testimony is the product of undue influence by the abducting parents.[326] A court may not afford much weight to the child's objection if the court considers the testimony to be tainted or unduly influenced.[327] Because there is a tendency for a child to be influenced by the preferences of the parent with whom he or she lives, courts "caution[] that an abducting parent should not be rewarded, in effect, for wrongfully retaining the child for an extensive period of time."[328] In *Robinson v. Robinson*,[329] the court held that a ten-year-old child's objection was the "product of the abductor parent's undue influence," and therefore was not dispositive.[330]

---

[323]The court also denied the return of the younger children in the family based on the guardian *ad litem's* opinion that they would be impacted negatively if they were returned without their older siblings. *McManus*, 354 F. Supp. 2d at 71-72.

[324]*Id.* at 71-73.

[325]*Id.*

[326]*Laguna*, 2008 WL 1986253, at *10; *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 279 (3d Cir. 2007).

[327]*See Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1285 (N.D. Ga. 2004) (concluding that child's objection was not determinative because child "appear[ed] to have internalized Respondent's views about the possibility of being returned to Argentina and being around Petitioner").

[328]*Laguna*, 2008 WL 1986253, at *10 (citing *Giampaolo*, 390 F. Supp. 2d 1269). In *Giampaolo*, the court ordered the return of the child where the child lived exclusively with the respondent in the United States for over two years. 390 F. Supp. 2d at 1285.

[329]983 F. Supp. 1339 (D. Colo. 1997).

[330]*Id.* at 1343-44.

Courts also may find that other considerations will overcome the mature child's preferences. In *Casimiro v. Chavez*,[331] the court found the uncertain immigration status of the child "troubling" and noted that "[o]ther courts have cited illegal or uncertain immigration status among their reasons for refusing to recognize an exception under the Hague Convention or for sending a child back to her state of habitual residence despite her preference to remain in the United States."[332]

E. THE ARTICLE 20 PUBLIC POLICY DEFENSE: RETURNING THE CHILD WOULD VIOLATE PUBLIC POLICY.

Article 20 of the Hague Convention allows a court to refuse to return a child "if doing so would violate fundamental principles relating to the protection of human rights and fundamental freedoms."[333] An Article 20 defense must be proven by clear and convincing evidence.[334]

Article 20 is almost never invoked. *Hazbun Escaf v. Rodriquez*[335] is one of the only reported decisions in which a court conducted an analysis of Article 20. That court noted 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":

> The parties have not cited, nor has the Court found, any authority applying the Article 20 exception to return based on "fundamental principles of the [United States] relating to the protection of human rights and fundamental freedoms." This seldom cited and somewhat obscure provision was adopted as a compromise between those countries that wanted a public policy exception in the Convention and those that did not. It was meant to be "restrictively interpreted and applied . . . on the rare occasion that

[331] No. Civ.A.1:06CV1889-ODE, 2006 WL 2938713 (N.D. Ga. Oct. 13, 2006).

[332] *Id.*, 2006 WL 2938713, at *6.

[333] Hague Convention, *supra* note 2, art. 20.

[334] 42 U.S.C. § 11603(e)(2)(A).

[335] 200 F. Supp. 2d 603 (E.D. Va. 2002), *aff'd*, 52 F. App'x 207 (4th Cir. 2002).

> return of a child would utterly shock the conscience of the court or offend all notions of due process."[336]

The Article 20 defense must be proven by clear and convincing evidence and never has been invoked successfully in the United States; it has been invoked successfully in only a handful of cases internationally where the constitutionality of the Convention itself was challenged.[337] One commentator has noted that Article 20 has "nearly faded without a trace,"[338] apparently because Article 20 and Article 13(b) appear to be redundant in that, if returning the child would violate fundamental United States principles related to human rights, returning the children also would place them in an intolerable situation.[339]

F. THE OFTEN-USED BUT INVALID DEFENSE: BEST INTERESTS OF THE CHILD.

As discussed previously, an action under the Hague Convention is purely jurisdictional. Article 19 of the Convention states that "[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." The implementing statute, ICARA, mirrors this: "[t]he 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."[340]

Despite the clear purpose of the Hague Convention, counsel may approach the defense of a client as if the case were a "typical" custody dispute, in part due to lack of familiarity with the Hague Convention and in part because traditional custody arguments may be beneficial to their

---

[336] *Id.* at 614 (quoting Public Notice 957, *supra* note 6, at 10510); *see also Aldinger v. Segler*, 263 F. Supp. 2d 284, 290 (D.P.R. 2003) (rejecting the Article 20 defense and noting that Article 20 is to be "restrictively interpreted and applied").

[337] *Id.* at 614 n.36.

[338] *Id.* at n.37.

[339] *Id.*

[340] 42 U.S.C. § 11601(b)(4).

client's positions. In the United States, the "best interests of the child" is the fundamental principle courts apply when determining custody of children. The respondent likely will advance arguments that advocate the child's best interests, particularly if the hearing is in state court. A petitioner also may make implicit best interests arguments by presenting evidence of the abducting parent's bad actions. It is paramount to preserve objections regarding a best interests defense because a best interests defense is not permitted by the Hague Convention.

In Public Notice 957,[341] the State Department made clear its view that the best interests of the child, beyond the narrow provisions of the Convention's affirmative defenses, are not to influence a court's determination of whether a child should be returned to his or her country of habitual residence. The State Department reasoned that "[t]he 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."[342]

The State Department also addressed the "best interests" argument when examining Article 13(b)'s "grave risk of harm/intolerable situation" affirmative defense to a return action. The State Department found that:

> 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.[343]

---

[341] Public Notice 957, *supra* note 6.

[342] *Id.* at 10505.

[343] *Id.* at 10510.

When apprised of the purpose and goals of the Hague Convention, most courts will follow closely, with the understanding that "[i]n determining whether an affirmative defense applies, the Court must resist the temptation to engage in a custody determination under the traditional 'best interests' test."[344] The Sixth Circuit stated that courts applying the Convention have "jurisdiction to decide the merits of an abduction claim, but not the merits of the underlying custody dispute,"[345] and further noted that "the Hague Convention is generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court."[346] United States courts also have held that "it is not relevant . . . who is the better parent in the long run, or whether the absconding parent had good reason to leave[.]"[347]

However, while courts reject broad "best interests" analyses as a means of avoiding returns under the Hague Convention, they recognize that certain affirmative defenses – as provided by the Convention – may well overlap with the child's best interests. Consider the following excerpt from the district court's opinion in *McManus v. McManus*:[348]

> It may be objected that this is simply a "best interests of the child" analysis masquerading as a "mature child's objection" analysis. The answer to that objection is that while the former is forbidden in proceedings under the Convention, the latter is invited. The Convention clearly contemplates that the objections of a mature child should be taken account of and can be relied on to override the return that would otherwise be mandated. Obviously, there may be some overlap between the two inquiries. One can easily appreciate that giving effect to the mature objection may in any given case also be thought to be in the child's best interest. But that coincidence surely should not defeat application of the Article 13 "objection" exception. It would be absurd to conclude that the

[344] *Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 403 (E.D.N.Y. 2005) (citations omitted).

[345] *Friedrich v. Friedrich (Friedrich II)*, 78 F.3d 1060, 1063 (6th Cir. 1996).

[346] *Id.* at 1064.

[347] *Elyashiv*, 353 F. Supp. 2d at 403 (citations and quotations omitted).

[348] 354 F. Supp. 2d 62 (D. Mass. 2005).

> child's mature objection should be honored *unless* it is in the child's best interest.[349]

However, keep in mind that these two defenses are analytically distinct: The mature child's objection is a legitimate defense enumerated under the Hague Convention, whereas the best interests of the child defense should not be considered by the court.

IV. PROCEDURAL ISSUES

A. PROCEDURES FOR FILING AND LITIGATING A HAGUE CONVENTION RETURN CASE.

1. Choice Of Court - Whether To File In Federal Or State Court.

The procedures that apply to a Hague Convention case are determined by the choice between federal or state court.[350] Of course, the Federal Rules of Civil Procedure apply to cases filed in federal court. For cases filed in state court, state procedural rules will apply. Counsel also must be familiar with the local rules applicable to the particular court in which the Hague Convention case will be filed.

Many practitioners recommend that Hague Convention return cases be filed in federal district court, not state court, for the simple reason that a Hague Convention return case is not supposed to focus on the best interests of the child but on the proper forum in which such a

---

[349] *Id.* at 72.

[350] *See* 42 U.S.C. § 11603(a) ("The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention."); *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005) (explaining that "[t]he Hague Convention proceedings can in fact be held in either state or federal court. ICARA vests concurrent jurisdiction over Hague Convention Petitions in both court systems. 42 U.S.C. § 11603(a). Thus, a state court custody proceeding can include consideration of a Hague Convention Petition. But the petitioner is free to choose between state or federal court.").

decision should be made.[351] Federal judges are considered by many to be better equipped to analyze that issue, as opposed to state court judges, who are accustomed to making best interests of the child determinations and who may be more inclined to do so in Hague Convention cases.[352] Accordingly, the discussion below focuses primarily on federal procedure.

For a comprehensive review of the procedures that apply in federal court in a Hague Convention case, review the orders entered in *Robles Antonio v. Barrios Bello*,[353] a case litigated in the Northern District of Georgia and the Eleventh Circuit Court of Appeals. These orders, attached as Exhibit G, detail each important procedural step in a Hague Convention case, from

[351]*See, e.g.*, *Asvesta v. Petroutsas*, 580 F.3d 1000, 1015 (9th Cir. 2009) (holding that "the Convention is clear that a court considering a Hague petition should not consider matters relevant to the merits of the underlying custody dispute such as the best interests of the child, as these considerations are reserved for the courts of the child's habitual residence"); *Kufner v. Kufner*, 519 F.3d 33, 40 (1st Cir. 2008) (stating, in dicta, that "the best interests of the child standard applies in custody matters and, as we previously noted, custody is not the issue in a Hague Convention case"); *Simcox v. Simcox*, 511 F.3d 594, 607 (6th Cir. 2007) (ruling that "an inquiry that focuses on too lengthy a period of time runs the risk of turning into a 'child's best interests' analysis, which is not the proper standard under the Convention"); *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005) (clarifying that "[c]ustody litigation in state court revolves around findings regarding the best interest of the child, relying on the domestic relations law of the state court. An adjudication of a Hague Convention Petition focuses on findings of where the child was habitually located and whether one parent wrongfully removed or retained the child.").

[352]Other considerations may lead to the opposite choice of court, and the practitioner should take into account all relevant factors (*e.g.*, client's needs, docketing speed, familiarity, and knowledge of local rules) when making this decision.

[353]No. Civ. A.1:04-CV-1555-T, 2004 WL 1895125 (N.D. Ga. June 2, 2004).

the initial grant of an ex parte temporary restraining order through the disposition of an emergency appeal.[354]

A litigant in a Hague Convention dispute may not be afforded all the discovery tools and procedures that are provided by the Federal Rules of Civil Procedure. Neither ICARA nor the Hague Convention require discovery or an evidentiary hearing.[355] As one court stated, the purpose behind this denial is that "[t]he rules of procedure applicable to ordinary civil cases would seem to be at odds with the Convention and ICARA's premium on expedited decision-making."[356] The court concluded that discovery devices, including interrogatories and depositions, are "at cross-purposes to the [Hague Convention] objective of prompt disposition."[357] The court treated the Hague petition as a petition for writ of *habeas corpus* and ordered the respondent to show cause as to why the child should not be returned.[358]

2. The Petition For Relief Under The Hague Convention.

(a) Preparation Of The Complaint.

Federal Rule of Civil Procedure 8 requires a "short and plain statement" of the Hague Convention claim. However, if the petitioner seeks emergency equitable relief, he or she will

---

[354] *Id.*, 2004 WL 1895125, at *3 (N.D. Ga. June 2, 2004) (granting *ex parte* TRO and emergency equitable relief) ("*Robles I*"); *Robles Antonio v. Barrios Bello*, No. Civ. A.1:04-CV-1555-T, 2004 WL 1895124, at *2 (N.D. Ga. June 4, 2004) (granting order placing child in temporary custody of Hague petitioner, imposing necessary conditions, and appointing guardian *ad litem* ("*Robles II*"); *Robles Antonio v. Barrios Bello*, No. Civ. A.1:04-CV-1555-T, 2004 WL 1895126, at *1 (N.D. Ga. June 7, 2004) (granting final relief under the Hague Convention and the International Child Abduction Remedies Act, including findings of fact and conclusions of law) ("*Robles III*"); *Robles Antonio v. Barrios Bello*, No. Civ. A.1:04-CV-1555-T, 2004 WL 1895127, at *2 (N.D. Ga. June 7, 2004) (granting order denying respondent's motion to stay the district court's order granting relief) ("*Robles IV*"); *Robles Antonio v. Barrios Bello*, No. 04-12794-GG, 2004 WL 1895123, at *1 (11th Cir. June 10, 2004) (denying respondent's emergency motion for stay pending appeal) ("*Robles V*").

[355] *See March v. Levine*, 136 F. Supp. 2d 831, 834 (M.D. Tenn. 2000) (granting father's petition for the return of his children to Mexico based on cross-motions for summary judgment).

[356] *See Zajaczkowski v. Zajaczkowska*, 932 F. Supp. 128, 130 (D. Md. 1996).

[357] *Id.*

[358] *See id.; see also Miller v. Miller*, 240 F.3d 392 (4th Cir. 2001).

need to submit evidence to support a grant of injunctive relief. Such requests generally are governed by Federal Rule of Civil Procedure 65. All local rules governing emergency motions also must be considered.

A verified complaint is a useful vehicle for presenting evidence to support a request for emergency relief; it may be styled as a "Verified Complaint/Petition Under the Hague Convention." The factual statements in a complaint may be verified in accordance with 28 U.S.C. § 1746 without the need of obtaining an affidavit, which must be sworn before a notary public. The ability to submit a verified statement without needing to obtain an executed affidavit can be very helpful, especially if the left-behind parent is in a foreign country when counsel is preparing the complaint.

Counsel should consider attaching the following types of documents to the verified complaint: (1) a copy of the Hague Convention Application;[359] (2) a copy of the marriage certificate (if applicable); (3) a copy of the child's birth certificate; (4) any report of the abduction from the child's country of habitual residence, including police reports, INTERPOL notices or other foreign documents that could support the occurrence of an abduction; (5) copies of documents showing divorce or custody proceedings in other countries including, importantly, custody orders; (6) copies of relevant family law codes in the foreign country that establish custodial rights and/or that prohibit removal of the child from the foreign country; and (7) any other documents, such as photographs and correspondence or sworn statements from family members, neighbors, teachers, clergy members, and the like that support the material assertions in the verified complaint.

[359]Counsel should verify the completeness and accuracy of all statements in the Hague Application prior to submitting it as part of the verified complaint. If the Hague Application is incomplete or additional information should be included, the petitioner may need to complete a separate sworn statement.

(b) Provisional Remedies.

Article 7(b) of the Hague Convention requires Central Authorities (or their intermediaries) to "take all appropriate measures . . . to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures."[360] A court's authority to grant provisional relief pending the final disposition of a Hague Convention case is codified in ICARA, which provides:

> any court exercising jurisdiction of an action brought under section 11603(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.[361]

This section of ICARA has been interpreted to allow a broad range of provisional measures, including issuance of temporary restraining orders, orders directing law enforcement to locate and immediately pick up the child, orders requiring the surrender of passports for both the child and abducting parents, and interim visitation orders for the left-behind parent.

(i) Temporary Restraining Orders/Preliminary Injunctions.

As noted above, in federal court, the granting of injunctive relief is governed by Federal Rule of Civil Procedure 65. As a general matter, counsel will need to present a motion and supporting brief, as well as evidence supporting the request for injunctive relief. The evidence can be in the form of a verified complaint, declarations pursuant to 28 U.S.C. § 1746 or affidavits, or all of the above. Again, counsel should ensure that pleadings comply with the district court's rules governing the presentation of emergency motions.

The circumstances governing Hague Convention cases sometimes demand requests for *ex parte* emergency relief. The standards governing such extraordinary requests are set out in

---

[360] *See* Hague Convention, *supra* note 2, art. 7(b).

[361] 42 U.S.C. § 11604(a).

Federal Rule of Civil Procedure 65(b). In *Robles I*, *ex parte* emergency relief was granted to prevent irreparable harm where: (1) the respondent already had abducted the child from the familial home in Mexico and smuggled the child into the United States; (2) the respondent faced the risk of apprehension in the United States; and (3) there was the possibility if the child was not removed from the respondent's custody that the respondent would further secret the child and herself.[362]

Requests for emergency relief must be presented to and resolved by the trial court on an expedited basis. As a general matter, counsel will need to file a proper emergency motion with the court before an emergency hearing can be scheduled. Some courts, however, will schedule emergency hearings on the representation of counsel that the emergency motion will be filed in advance of the hearing. As noted above, the main procedural vehicles for presenting an emergency motion are either a motion for an *ex parte* TRO (a restraining order entered without notice to the adverse party) or a motion for a TRO or preliminary injunction (emergency injunctive relief entered with notice to the adverse party). In some courts, the procedure for obtaining *ex parte* relief is referred to as an "order to show cause" or "rule nisi." Whatever the label, counsel must be familiar with the proper vehicle through which to present a request for emergency relief before attempting to schedule an emergency hearing with the trial court.

Regarding preliminary injunctions, keep in mind that the court can be asked to consolidate the hearing on the preliminary injunction motion with a hearing on the merits of the case pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. The district court did so in *Robles Antonio v. Barrios Bello*.[363]

---

[362] *Robles I*, 2004 WL 1895125, at *3 ("*Robles I*").

[363] *Id.*

(ii) Obtaining Custody of the Child.

The decision whether to seek emergency custody of the child often is a difficult and important aspect of an emergency Hague Convention case. Courts are usually very hesitant to order the immediate location and pick up of child absent credible evidence that the child is in danger or may be removed from the jurisdiction. ICARA states that "[n]o court exercising jurisdiction of [a Hague action] . . . may . . . order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied."[364] Federal and state judges usually look to the provisions of their state's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[365] for authority to request emergency relief and specifically for the ability to issue a warrant for the pick up of the child. The provisions of the UCCJEA vary from state to state, but typically require a showing that the child will suffer imminent physical harm or will be removed from the state immediately.[366] For more information about the UCCJEA, *see* Section V.

Generally, the United States Marshals Service is the agency that executes federal warrants and is accustomed to taking people into custody and presenting them to federal judges in federal district court proceedings.[367] They are not, however, in the business of caring for children. Ideally, the petitioner will be present to care for the child after the child is taken into custody. In practice, however, this is not always possible. Counsel for the petitioner should plan for this possibility by proposing to the court several alternative persons or entities to whom law

---

[364] 42 U.S.C. § 11604(b).

[365] UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, 9(1A) U.L.A. 657 (1999).

[366] *Id.* at § 311(a) ("Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this State.").

[367] *E.g.*, *Fawcett v. McRoberts*, 168 F. Supp. 2d 595, 597 (W.D. Va. 2001) (following an *ex parte* hearing, the court ordered the United States Marshals to locate the child and abducting parent, take them into custody and present them to the Court for an initial hearing).

enforcement can turn over the child. In the event that no family members are available, the petitioner may propose appropriate friends or adults who have a pre-existing relationship with the child. If no other options exist, law enforcement may need to place the child in the care of the appropriate child protective services agency. In that situation, counsel should propose orders clearly indicating that the placement is temporary and lasts only until the petitioner or one of the above named persons is available to care for the child. Child protective service agencies are accustomed to providing temporary care to children when a parent or guardian is unavailable. It is important for the practitioner to use advance communication and provide clear judicial instructions in the context of a pending Hague petition, where there may not be traditional facts requiring the agency to take protective custody (*e.g.*, abandonment, abuse, or neglect) to help prevent the situation from becoming a full-blown dependency proceeding. *See* Section IV.C.6 for additional information.

In *Robles Antonio v. Barrios Bello*, the relief was structured in a way consistent with the function of the United States Marshals Service. The district court ordered the Marshals to take physical custody of the child and bring the child to the magistrate judge. The magistrate judge then was required to arrange for the child to be placed in the temporary physical custody of the petitioner (the biological father) under appropriate conditions.[368] The magistrate judge required the petitioner to surrender his passport, make the minor child available for a private interview with the appointed guardian *ad litem*, and appear at the preliminary injunction hearing with the child on pain of contempt.[369]

---

[368] *Robles I*, 2004 WL 1895125, at *3.

[369] *Id.*

(iii) Guardian *Ad Litem* Appointments.

Frequently, the abducting parent will ask the court to appoint a guardian *ad litem* to safeguard the interests of the child during the pendency of the litigation, or the court will make such appointment *sua sponte*. State court judges, who regularly hear contested custody matters, often rely on guardians *ad litem* to provide the court with an independent and unbiased source of information about the child so that they can determine how the child's best interests will be served. Federal court judges, who are unaccustomed to hearing parental disputes over children, often are even more inclined to seek the advice of someone who is not beholden to either parent. The lawyer representing the left-behind parent is placed in the position of either opposing such an appointment and seeming insensitive to the child's needs or addressing a guardian *ad litem's* recommendation that may encompass best interests factors or other issues pertaining to the child that are outside the scope of a Hague Convention case.

There are many factors that make this a valid concern. Often, the child's country of habitual residence cannot provide the child with a standard of living comparable to that in the United States. There may be greater political unrest in the child's home country than here. The abducting parent may not have the resources to return to the habitual residence to see the child or to litigate custody there. The child's state of mind about return to the home country and relationship to the left-behind parent may be affected by the separation and/or influenced by the abducting parent. Unless instructed otherwise, these issues naturally will concern a guardian *ad litem*.

There are few cases that discuss the propriety of appointing a guardian *ad litem*. The case of *Hasan v. Hasan*[370] is helpful when seeking to oppose such an appointment. In that case,

[370]No. Civ. A. 03-11960-GAO, 2004 WL 57073 (D. Mass. Jan. 13, 2004).

the court refused to designate a guardian *ad litem*, finding that "it would be inappropriate for this court to litigate the best interests of the children or to decide the merits of any underlying custody dispute."[371]

Although there is a real possibility that a guardian *ad litem* recommendation will include best interests factors, it may be a better practice not to oppose such appointments, particularly if the judges in the jurisdiction are likely to appoint a guardian *ad litem* anyway. Instead, counsel may assist the court with narrowly defining the role of the guardian *ad litem* to focus on specific appropriate inquiries within the context of the Hague Convention. Even with appropriate direction and focus, a guardian *ad litem's* opinion is likely to have a powerful influence on a judge's decision and may or may not be beneficial to the client's case.

In *McManus v. McManus*,[372] the court relied upon the guardian *ad litem's* assessment of the children's maturity in deciding whether to consider their wishes to remain in the United States. Where the defense included the mature children's objection, the guardian *ad litem* found the two older children (ages fourteen and fifteen) to be "cognitively and emotionally mature" and "capable of independent thought," which the court relied upon in refusing to return the children to their country of habitual residence.[373] The court also denied the return of the younger children in reliance upon the guardian *ad litem's* opinion that the younger children in the family would be impacted negatively if they were returned without their older siblings.[374] In *Casimiro v. Chavez*,[375] the guardian *ad litem* was asked to evaluate a fifteen-year-old's capability for mature decision-making. Although the guardian *ad litem* and the court both found the teen to be

[371] *Id.* at *4.

[372] 354 F. Supp. 2d 62 (D. Mass. 2005).

[373] *See id.* at 70-71.

[374] *See id.* at 71-72.

[375] No. Civ. A. 1:06CV1889-ODE, 2006 WL 2938713 (N.D. Ga. Oct. 13, 2006).

sufficiently mature, the court returned her after finding that the abducting family had influenced her.[376]

The guardian *ad litem* can be a powerful ally for the petitioner or can complicate the petitioner's position. A guardian *ad litem* in a Hague Convention case is working at an accelerated rate, and it is important to provide that person with as much information as quickly as possible so that they can understand the petitioner's and the child's positions. If an unfavorable recommendation based on the best interests of the child is made, careful cross-examination designed to elicit an impermissible focus may help mitigate that influence.

(c) Notice and Service of the Hague Convention Petition.

Notice and service of Hague Convention petitions are governed by the normal rules for service of process.[377] While proper service of process is necessary for a court to obtain personal jurisdiction over the respondent and requires the respondent to answer the complaint, keep in mind that, as a general matter, it is not necessary that a complaint be formally served before a trial court can order injunctive relief.[378]

In emergency situations, counsel can ask the district court to order the United States Marshals Service to serve the complaint and emergency papers, as was done in *Robles*. As mentioned previously, this service can be simultaneous to or following the pick-up of the children. However, ideally, pick up should occur just prior to service to prevent confrontation or flight.

---

[376] *See id.* at *5-7.

[377] *See* Fed. R. Civ. P. 4.

[378] *See* Fed. R. Civ. P. 65(a)(1)("The court may issue a preliminary injunction only on notice to the adverse party.").

(d) Discovery.

The normal discovery rules apply in Hague Convention cases; however, if discovery is necessary, the petitioners or the respondents may need to request expedited discovery.[379] Federal district courts have the discretion to order expedited discovery.[380] Expedited discovery is particularly appropriate in cases involving requests for emergency equitable relief, such as preliminary injunctions.[381] As a general matter, the standard for obtaining expedited discovery is the showing of good cause.[382] In seeking expedited discovery in a Hague Convention case, counsel should cite to language in the Hague Convention directing the prompt resolution of these matters as well as similar language in Hague Convention cases. Expedited discovery is appropriate where it would "better enable the court to judge the parties' interests and respective chances for success on the merits" at a preliminary injunction hearing.[383]

---

[379] As discussed earlier in this Manual, litigants in Hague Conventions disputes often are not permitted to engage in a full discovery process. *See supra*, p. 68.

[380] *See* *Fimab-Finanziaria Maglificio Biellese Fratelli Fila S.p.A. v. Helio Import/Export, Inc.*, 601 F. Supp. 1, 3 (S.D. Fla. 1983) ("Expedited discovery should be granted when some unusual circumstances or conditions exist that would likely prejudice the party if he were required to wait the normal time.").

[381] *See* Fed. R. Civ. P. 26 Adv. Comm. Note ("Discovery can begin earlier if authorized . . . This will be appropriate in some cases, such as those involving requests for a preliminary injunction. . . ."); *see also* *Pod-Ners LLC v. N. Feed & Bean of Lucerne LLC*, 204 F.R.D. 675, 676 (D. Colo. 2002) (stating that expedited discovery may be appropriate in cases where the plaintiff seeks a preliminary injunction); *Ellsworth Assoc., Inc. v. United States*, 917 F. Supp. 841, 844 (D.D.C. 1996) (stating that "expedited discovery is particularly appropriate when a plaintiff seeks injunctive relief because of the expedited nature of injunctive proceedings"); *Ga. Gazette Publ'g Co. v. U.S. Dep't of Def.*, 562 F. Supp. 1000, 1004 (S.D. Ga. 1983) (granting plaintiff's request for expedited discovery to prepare evidence in support of motion for injunctive relief).

[382] *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275 (N.D. Cal. 2002).

[383] *Edudata Corp. v. Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn. 1984) (granting a motion for expedited discovery allowing depositions of corporate officers and the production of affidavits, documents, and exhibits for further development of the record before a preliminary injunction hearing).

Aside from requests for expedited discovery, Hague Convention requests might make it appropriate to seek more non-typical forms of discovery, such as telephonic depositions. Telephone depositions may be taken pursuant to a stipulation of the parties or a court order.[384]

(e) Evidentiary Issues.

The normal rules of evidence apply in Hague Convention cases, even though the overall objective of the Hague Convention and ICARA – to return abducted children to their habitual residence as soon as practicable – is not typical litigation.[385] In fact, the Sixth Circuit has gone so far as to uphold a trial court's decision that:

> [t]here is no requirement under the Hague Convention or under the ICARA that discovery be allowed or that an evidentiary hearing be conducted. Thus, under the guidance of the Convention and the statutory scheme, the court is given the authority to resolve these cases without resorting to a full trial on the merits or a plenary evidentiary hearing.[386]

Going one step further, the Sixth Circuit held that the Convention "provides that a court may order return of a child at any time, notwithstanding proof of treaty defenses."[387]

The Hague Convention and ICARA have a number of provisions ensuring that return proceedings are handled in the most efficient manner possible. For example, the Hague

---

[384] *See* Fed. R. Civ. P. 30(b)(7).

[385] To ensure that judges have as much information as possible regarding procedural issues arising in Hague Convention cases, both the U.S. State Department and the Hague Permanent Bureau offer articles, fact sheets, best practice guides, and other judicial guidance regarding Hague Convention cases. *See* State Department Information for Attorneys and Judges (http://travel.state.gov/abduction/attorneysjudges/attorneysjudges_4306.html) and Hague Permanent Bureau Child Abduction Section Information (http://www.hcch.net/index_en.php?act=text.display&tid=21). The Hague Permanent Bureau also maintains up-to-date listings of the members of the International Hague Network of Judges who are available to assist in judicial communications regarding Hague Convention cases (http://www.hcch.net/upload/haguenetwork.pdf), as well as publishing the quarterly Judge's Newsletter on International Child Protection (http://www.hcch.net/index_en.php?act=publications.listing&sub=5).

[386] *See* *March v. Levine*, 136 F. Supp. 2d 831, 833-34 (M.D. Tenn. 2000).

[387] *See* *March v. Levine*, 249 F.3d 462, 475 (6th Cir. 2001) (citing Hague Convention, art. 18 ("The provisions of this Chapter [pertaining to return of children] do not limit the power of a judicial or administrative authority to order the return of the child at any time.")).

Convention provides flexible rules regarding authentication of documents and judicial notice.[388] The implementing legislation also provides a generous authentication rule.[389] These provisions serve to expedite rulings on petitions and return wrongfully removed or retained children to their habitual residence.[390] Many courts attempt to resolve evidentiary issues that arise in Hague Convention cases pragmatically.[391] It is not uncommon for a magistrate judge to handle the evidentiary hearing in an effort to expedite the calendaring of the hearing and resolution of the case.[392]

(f) Witnesses (Including Experts).

As a factual matter, the showing that petitioners must make to establish a case of wrongful removal is straightforward.[393] The showing that respondents are required to make, however, might require the introduction of expert testimony, such as establishing that the return of children would "expose [them] to physical or psychological harm or otherwise place [them] in an intolerable situation."[394] Under the Federal Rules, parties are required to disclose the identity

---

[388] *See* Hague Convention, *supra* note 2, art. 14.

[389] *See* 42 U.S.C. § 11605 ("[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.").

[390] *March v. Levine*, 249 F.3d at 474-75.

[391] *Holder v. Holder*, No. C001927C, 2003 WL 24091906, at *1 (W.D. Wash. June 13, 2003) (holding that an evidentiary hearing would best reconcile the need for presentation of live testimony with the Hague Convention's objective of speedy review of petitions).

[392] *See Bekier v. Bekier*, 248 F.3d 1051, 1054 (11th Cir. 2001) (noting that district court adopted magistrate's recommendation to grant Hague petition); *see also Aldinger v. Segler*, 263 F. Supp. 2d 284 (D.P.R. 2003) (adopting magistrate's recommendation to grant the Hague petition).

[393] *Robles III*, 2004 WL 1895126, at *1-2 (granting final relief under the Hague Convention and the International Child Abduction Remedies Act, including findings of fact and conclusions of law).

[394] *Id.* at *2 (citation omitted).

of expert witnesses, such as expert psychiatrists and psychologists, and disclose the nature of the anticipated testimony.[395]

In terms of securing the testimony of witnesses, the normal rules apply. Depositions of witnesses may be taken and used in accordance with Federal Rule of Civil Procedure 32(a). For live testimony, whether at a live hearing, such as a hearing on a preliminary injunction motion, or at trial, it might be necessary to serve witnesses with a subpoena to compel their attendance. As a practical matter, testimony often extends the length of the trial and can place an extra burden on the petitioner to produce rebuttal witnesses, which often can be costly and difficult to procure in a short period of time, especially if supporting witnesses reside in the foreign country. The court should be reminded that the introduction of expert witnesses may undermine the goal of expeditious litigation of Hague Convention disputes and may be unnecessary and irrelevant, depending on the scope of the witnesses' testimony.

3. Article 16 Stay Of Pending State Court Action.

Article 16 supplements and reinforces the basic mandate of the Hague Convention: custody disputes should be decided in the country of habitual residence only after a Hague petition is decided.[396] Article 16 explicitly provides, among other things, that once a court receives notice of a potential wrongful removal or pending Hague application, "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 is has been determined that the child is not to be returned under this Convention."[397] For purposes of this

---

[395] *See* Fed. R. Civ. P. 26(a)(2).

[396] *See* *Ruiz v. Tenorio*, 392 F.3d 1247, 1250 (11th Cir. 2004) (holding that "[t]he court's inquiry is limited to the merits of the abduction claim and not the merits of the underlying custody battle.").

[397] Hague Convention, *supra* note 2, art. 16.

Manual, this issue most often arises when Hague Convention Applications are filed during the pendency of state court custody proceedings.[398]

In cases where federal Hague Convention proceedings and state custody proceedings are concurrent, it is the state court, not federal court, proceedings that should "be held in abeyance."[399] Even assuming, *arguendo*, the state court moves forward and issues a custody determination, it is of no import to a pending federal court Hague Convention case.[400] As a practical matter, state court custody cases often do not reach the merits or render decisions on critical elements of any Hague Convention case, such as whether a removal was "wrongful."[401]

At least one court has held, however, that federal jurisdiction over Hague Convention proceedings does not translate into the power to enjoin concurrent state court custody proceedings.[402] In short, the plain language of Article 16 provides enough authority for a state court *sua sponte* to suspend any custody determination pending a Hague Convention hearing.

---

[398]More often than not, cases involving concurrent state and federal proceedings result in detailed analyses involving abstention doctrines or preclusion principles. We do not explore these issues in this Manual.

[399]*See* *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005); *Griffin v. Sebuliba*, No. 08c0952, 2009 WL 972862, at *1 (E.D. Wis. Apr. 9, 2009) ("[P]laintiff cites to Article 16 of the Convention as legal authority for me to stay the state court decision. However, Article 16 applies to custody determinations made by courts in the state to which a child was wrongfully removed or is wrongfully retained, not the state of habitual residence. Here, the custody determination was made by a Wisconsin state court, the United States is alleged to be the state of habitual residence for purposes of the Convention, and therefore Article 16 is inapplicable.").

[400]*Silverman v. Silverman*, 338 F.3d 886, 894-95 (8th Cir. 2003) (rejecting application of *Rooker-Feldman* doctrine to Hague state court custody interplay); *Holder v. Holder*, 305 F.3d 854, 864-65 (9th Cir. 2002) (federal courts have power to vacate state custody orders); *Rigby v. Damant*, No. 07-10179, 2007 WL 1417437, at *4 (D. Mass. May 15, 2007) (holding that state court custody determinations are not binding on federal court); *Lockhart v. Smith*, No. 06-CV-160, 2006 WL 3091295, at *2 (D. Me. Oct. 20, 2006) (stating that "ex parte [custody] order [is of] no consequence in light of Article 16").

[401]*See* *Silverman*, 338 F.3d at 895; *Yang*, 416 F.3d at 203-04.

[402]*Rigby*, 2007 WL 1417437, at *3-5 (ruling that the Anti-Injunction Act forbids issuance of federal injunction). *But see* *Friedrich v. Thompson*, No. 00772, 1999 WL 33954819, at *3 (M.D.N.C. Nov. 26, 1999) (ordering state court proceeding be stayed).

Even in the absence of the exercise of that restraint, federal courts are not bound by any state court custody determination.[403]

4. Checklist Of Activities.

Counsel should consider the following items in preparing for the first hearing:

(1) Obtain copies of the following documents:

(a) the Hague Application or petition;

(b) the Hague Convention;

(c) ICARA;

(d) the child's birth certificates;

(e) any marriage, divorce, and custody documents;

(f) any relevant civil code documents pertaining to custody (certified documentation is preferable);

(g) an abduction report from the child's country of habitual residence, if one exists;

(h) all supporting documents if the complaint is verified, including photographs and school and medical records for the child;

(i) proof of service; and

(j) financial information to support a waiver of court fees.

(2) If filing for emergency relief, file the petition as an emergency motion and schedule an emergency hearing, which requires: an *ex parte* TRO or motion for a TRO for a preliminary injunction and a supporting brief with evidence supporting the need for a TRO, *e.g.*, an affidavit. Consider requesting that the TRO be

[403] *Rigby*, 2007 WL 1417437, at *3-5.

consolidated with a hearing on the merits. Samples of common pleadings and filings in Hague cases, including sample TRO motions and briefs, are attached as Exhibit H.

(3) To obtain physical custody of the children:

(a) file a motion for the court to order the United States Marshals Service (or other law enforcement agency, if filing in state court) to take physical custody of the child and bring the child before the court to arrange for temporary custody; and

(b) file a motion to oppose or limit the appointment of a guardian *ad litem* (*see* Section IV.A.2.(b)(iii)).

(4) If applicable, file the following motions:

(a) motion requesting waiver of court fees based on indigency of client;

(b) motion requesting expedited discovery;

(c) motion requesting telephonic depositions/testimony;

(d) motion opposing expert witnesses;

(e) motion requesting interim visitation with the child; and

(f) motion to stay a custody action filed by respondent.

(5) File a sample return order for the court. Include specific timelines for return and purchase of airline tickets to ensure that the abducting parent does not flee with the child following the issuance of the return order.

B. APPEALS.

Article 11 of the Hague Convention instructs judicial authorities to "act expeditiously in proceedings for the return of children."[404] As applied to appellate practice, the Judges' Seminar on the 1980 Convention on the Civil Aspects of International Child Abduction concluded that "[t]he obligation to process return applications expeditiously extends also to appeal procedures" and "appellate courts should set and adhere to timetables that ensure a speedy determination of return applications."[405] Accordingly, appellate courts are charged expressly with expediting the appeals process.

1. Standard Of Review.

Appellate courts review the lower court's factual findings for clear error and the lower court's interpretation of the Hague Convention and application of the Hague Convention to the facts *de novo*.[406]

2. If The Trial Court Stays Its Order Returning The Child.

If the trial judge issues an order granting the return of the child, the respondent likely will appeal the order in open court and move for an emergency order staying the judgment pending appeal. This is necessary both to prevent the child from leaving the country and to preserve the party's right to move the appellate court for a stay of the judgment pursuant to Rule 8 of the Federal Rules of Appellate Procedure.[407] Obtaining a stay of the lower court's judgment is essential for the respondent because, unless otherwise provided by the court, the order granting

---

[404] Hague Convention, *supra* note 2, art. 11.

[405] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, CONCLUSIONS, JUDGES' SEMINAR ON THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, NOORDWIJK (Oct. 30, 2003), *available at* http://www.hcch.net/upload/nwk2003e.pdf.

[406] *Danaipour v. McLarey*, 286 F.3d 1, 13 (1st Cir. 2002); *Gitter v. Gitter*, 396 F.3d 124, 129 (2d Cir. 2005).

[407] *Walsh v. Walsh*, 221 F.3d 204, 213 (1st Cir. 2000).

the return of a child is effective immediately, with no ten-day automatic stay pursuant to Rule 62 of the Federal Rules of Civil Procedure.[408] According to the Sixth Circuit, "staying the return of a child in an action under the [Hague] Convention should hardly be a matter of course" because "[t]he aim of the Convention is to secure prompt return of the child to the correct jurisdiction and any unnecessary delay renders the subsequent return more difficult for the child, and subsequent adjudication more difficult for the foreign court."[409]

If the trial court denies the motion to stay the order to return the child, the respondent might file an emergency motion for stay pending appeal with the appellate court to prevent the child from being removed. A stay pending appeal has been described as an "exceptional" remedy and will be granted only upon evaluating the following factors on a sliding scale: (1) the movant is likely to prevail on the merits on appeal; (2) absent a stay, the movant will suffer irreparable damage; (3) the nonmovant will suffer no substantial harm from the issuance of the stay; and (4) the public interest will be served by issuing the stay.[410] The first factor necessarily places the court in a difficult position because a court "'would not have ruled as [it] did in the first place'" if it believed an appeal would be successful.[411] Therefore, the party seeking an appeal can satisfy this factor by showing that it has "a substantial case on the merits."[412] The second factor, irreparable harm, can be shown by demonstrating that the child could be at risk of being harmed physically, or that the movant will suffer irreparable harm because the court likely

---

[408] *March v. Levine*, 136 F. Supp. 2d 831, 861 (M.D. Tenn. 2000).

[409] *Friedrich v. Friedrich (Friedrich II)*, 78 F.3d 1060, 1063 (6th Cir. 1996).

[410] *Robles V*, 2004 WL 1895123, at *1 (citing *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)).

[411] *Vale v. Avila*, No. 06-1246, 2008 WL 2246929, at *2 (C.D. Ill. May 29, 2008) (quoting *Thomas v. City of Evanston*, 636 F. Supp. 587, 590 (N.D. Ill. 1986)).

[412] *Id.* (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977)).

would find that the return of the child moots the appeal. The third factor merely requires the moving party to demonstrate that no other party will suffer substantial injury should the court decide to issue a stay. The final factor, which relates to the public interest, is perhaps the most difficult to overcome, because "[a]llowing for a stay pending appeal would run contrary to the public interest of securing the prompt return of wrongfully removed children."[413] In spite of the difficulty of demonstrating any of the four factors, if an appellate court grants such a motion, it may enter an order temporarily granting the motion for stay and temporarily enjoining the removal of the child pending its review of the trial court's order.[414]

3. Appeals May Be Mooted By The Child's Return.

The appellate courts are in disagreement regarding an appeal's mootness once the child has been returned to the country of his or her habitual residence. This analysis is linked closely with "irreparable injury," one of the factors courts use to weigh the appropriateness of granting a stay.

If the case is in a circuit following the rule that return of the child does not moot an appeal, the petitioner should argue that a stay of the trial court's order is unnecessary to preserve the appeal because a return of the child will not moot the appeal. If the case is in a circuit following the rule that return of the child moots an appeal, the respondent may argue that he or she would suffer irreparable harm if the request for a stay is denied, since a refusal to stay the case will effectively end the case if the child is returned. Such an analysis is closely linked with "irreparable injury," factor number two above. The petitioner should respond by arguing that the respondent will not succeed on the merits on appeal, and thus the return should be prolonged by granting a stay.

---

[413] *Id.* at *3.

[414] *Id.*

Below is a discussion of the split among the appellate courts regarding whether return of the child moots appeal.

(a) Return of the Child Moots an Appeal.

In *Bekier v. Bekier*,[415] the Eleventh Circuit ruled that the removal of the child from the court's jurisdiction mooted the appeal, thus requiring that the appeal be dismissed. The court explained that a reversal of the district court's order would not provide the petitioning party with actual affirmative relief because the child already had been returned to the country of habitual residence.[416] Therefore, the *Bekier* court found that to avoid dismissal of an appeal as moot, the party appealing a judgment ordering the return of a child must obtain a stay of that judgment.

Making a slight departure from the Eleventh Circuit's analysis, the Tenth Circuit also held that an appeal was rendered moot after a child was returned to England in *Navani v. Shahani*.[417] However, the Tenth Circuit emphasized that the appeal was moot not only because the child had been returned to England, but also, and perhaps more importantly, because the English court – which maintained jurisdiction to decide the custody matter – subsequently issued a new custody order.[418] The court's reasoning leads the reader to believe that the appeal might not have been considered moot had the English court failed to decide the custody matter on the merits.

While not directly answering the question of whether the child's return moots an appeal, the decision to order a brief stay occasionally suggests that the return of the child would moot an

[415] 248 F.3d 1051 (11th Cir. 2001).

[416] *Id.* at 1054-55 (citation omitted).

[417] 496 F.3d 1121 (10th Cir. 2007).

[418] *Id.* at 1127-29.

appeal. For example, in *Haimdas v. Haimdas*,[419] the court stated that it was "inclined to *deny* a stay pending appeal" just prior to staying the enforcement of the judgment for a month, in an effort to enable the respondent to request an emergency stay and expedited treatment of his appeal.[420] Similarly, the court in *Olesen-Frayne v. Olesen*[421] found that a stay was inappropriate just prior to granting a limited, week-long stay "in order to give respondent the opportunity to seek a stay from the appropriate appellate court, should he choose to do so."[422] Both of these courts failed to specify expressly that the children's returns, which already had been ordered, would moot the appeals; however, both courts recognized the need for the appealing parents to take action prior to the children's returns.

(b) Return of the Child *does not* Moot an Appeal.

In trying to decipher which way the courts are shifting in the "moot" or "not moot" debate, the past few years have illustrated a slight shift toward holding that the return of the child *does not* moot an appeal. For example, in *Whiting v. Krassner*,[423] the Third Circuit held that where a father failed to win a stay pending appeal and his child was returned to her mother in Canada, the appeal was not moot. The court explained "nothing [had] occurred during the pendency of this appeal that [made] it impossible for the court to grant any effectual relief what[so]ever."[424] This sentiment was echoed by the court in *Wasniewski v. Grzelak-Johannsen*,[425] where it stated that "[a]n appeal from a decision under the Hague Convention does

[419]720 F. Supp. 2d 183 (E.D.N.Y. 2010).

[420]*Id.* at *23-24 (emphasis added).

[421]No. 2:09-CV-49-FTM-29DNF, 2009 WL 1184686 (M.D. Fla. May 1, 2009).

[422]*Id.* at *2.

[423]391 F.3d 540, 542 (3d Cir. 2004).

[424]*Id.* at 545.

[425]No. 5:06-CV-2548, 2007 WL 2462643 (N.D. Ohio Aug. 27, 2007).

not become moot merely because a child is returned to the custody of the petitioner in a foreign country…Rather, the appeal may proceed as any other appeal. Because [Respondent] may proceed with her appeal absent a stay, Respondent, as the movant, faces no irreparable harm absent a stay."[426]

4. Post-Appeal Considerations.

Most importantly, once an order for return has been entered, the party requesting the child's return should begin making travel arrangements so that the client and the child can leave the country as soon as possible. Even if the appeal technically is not mooted by the return of the child, it would be significantly more difficult to enforce an order from an appellate court reversing the lower court's judgment once the child has been returned to a foreign country. Practitioners in this situation must be mindful of their professional duties to the court when a client willfully disregards an appellate court's reversal of an order to return the child. If a client is held in contempt for violating an appellate court order, the practitioner may have to move to withdraw or consider other measures regarding their representation.

C. THE LOGISTICS OF HANDLING A HAGUE CONVENTION CASE.

1. Introduction.

The logistics of handling a Hague Convention case can be as complex, challenging and time-consuming as analyzing the legal aspects. This Section provides insight on how to

[426] *Id.* at *7 (internal citations omitted); *see also* *Kufner v. Kufner*, 519 F.3d 33, 38 (1st Cir. 2008) (rejecting father's motion to dismiss mother's appeal as moot because "the appeal presents a live controversy"); *Vale*, 2008 WL 2246929, at *3 ("there is no basis for this Court to conclude that Respondent's appeal would be moot after the children were returned to Venezuela"). Also, in *Sasson v. Shenhar*, the Supreme Court of Virginia dismissed a father's appeal of the denial of his Hague Convention petition because the father absconded to Spain with the child and refused to return the child to the United States. 667 S.E.2d 555 (Va. 2008). The court dismissed the appeal, relying on the Fugitive Disentitlement Doctrine.

anticipate, prepare for, and resolve common logistical issues that arise in both return and access cases.

2. The Investigation.

The top priority is locating the child. After the Office of Children's Issues of the State Department receives a Hague Application, a case officer is assigned to help the left-behind parent with locating the child. The State Department collaborates with various entities and agencies to help with the process, including Non-Governmental Organizations ("NGOs") such as International Social Service ("ISS"), the Federal Bureau of Investigation, the International Criminal Police Organization ("INTERPOL"), and individual states' missing-child clearinghouses. The State Department also works with The National Center for Missing and Exploited Children to create media awareness that can be highly useful in locating abducted children. The left-behind parent must provide the Office of Children's Issues with as much helpful information as possible, such as whereabouts of relatives and places of employment, business connections, etc. regarding the abducting parent. The accuracy of the information regarding the potential location(s) of a missing child or an abducting parent is dependent upon many factors. Information regarding a potential location can become stale due to the passage of time between the State Department's location of the abducting parent and missing child and the retention of counsel by the left-behind parent. The abducting parent also may move frequently due to a lack of resources, have transitory living accommodations with relatives and friends, have difficulty enrolling children in school, have illegal immigration status, and have a general fear of detection by law enforcement. These are additional factors that counsel should consider.

Judges faced with the unique circumstances of Hague Convention cases may demand verification of the parents' and child's presence within the court's jurisdiction. It therefore is best to conduct an independent investigation in anticipation of the court's questions. At a

minimum, counsel should verify the identification of the abducting parent, the presence of the child in the jurisdiction, any school or day care attended by the child, and the existence of any public records confirming their presence in the jurisdiction (such as criminal or property records).

Private investigators may be a valuable resource as well. Larger law firms frequently have private investigators with law enforcement experience in their employ or under contract. They may be able to tap into their contacts to locate the child quickly, although law enforcement agencies and NGOs may have limitations on the information they are able to share with private investigators. Local law enforcement officers also can be a great asset to such an investigation, as they have in-depth knowledge of the community, the power of the badge, subpoena power to obtain public records, and ultimately wield arrest authority. However, the benefits of law enforcement assistance should always be balanced against the possibility of alerting the abducting parents that law enforcement is interested in the child.

3. Initial Conversation/Interview With Clients.

Before helping prospective clients to find an affordable or a *pro bono* attorney, the State Department tries to achieve a voluntary return of the child. If that fails, the State Department sends outreach letters to attorneys who have agreed to consider representation. The outreach letters contain basic information, such as the country involved, the gender of the parent seeking representation, and whether the particular case is an access or return case. Generally, the State Department does not provide attorneys with additional information about cases before the attorneys speak to the potential client. However, if attorneys request additional information before speaking to a potential client, the State Department will release additional information from the file if the Application expressly permits such a release. Next, the left-behind parent is

walked through the legal process in the United States and provided with a list of potential attorneys who have agreed to speak to him or her and the attorneys' contact information.

The first communication with the left-behind parent will be the opportunity to establish an attorney-client relationship. If the client does not speak English, it is essential to have a translator present during that initial phone conversation between counsel and the prospective client. The translator can be anyone who is fluent in both languages and does not have to be certified or sanctioned by the court. The State Department also will aid in coordinating the initial call through the Language Line, a telephonic interpretation service.

Counsel should aim to provide the parent with concise but clear information regarding the Hague Convention and the legal process, setting aside two hours for the first communication with the left-behind client. This may need to occur outside of normal business hours so that the client can have the conversation privately and away from co-workers. It is critical however, to obtain a detailed timeline of events and identify the existence of any supporting documents during the very first call. This will help both counsel and the client become familiar with the specifics of the case and required efforts. Counsel also should explain the best and worst case scenarios, as well as the available remedies. It is essential to inquire about the child's birth certificate and any court documents concerning parentage or custody. Also consider whether any court documents will need to be translated. Discuss gathering documentation of the child's habitual residence in that country, including school and doctor records, photographs and videos of the child with family and friends, and evidence of any involvement in extracurricular activities.

It is important to gain an understanding of the relationship between the parents, between the clients and the child, and amongst the relatives. It is important to probe the client about the

likely substance of the respondent's case. Inquire about criminal records, domestic violence, immigration issues, and other legal issues that may be raised. Request any documents that may be relevant to these issues. Counsel should take an opportunity during the follow-up call to prepare the client for the potentially explosive allegations that the abductor may make at trial. Although these issues may not be relevant to a Hague Convention case, the abductor may allege them nonetheless.

Counsel also should address the petitioner's ability to travel to the United States for a hearing. Does the client have a passport? Are there visa requirements? Are there any immigration-related impediments to the client's ability to travel to the hearing? Is the client financially able to travel? Does the client have work or family obligations that affect the ability to travel on short notice? Efforts to expedite the visa process for the left-behind parent once a hearing is scheduled may be necessary. Consulates and Embassies become key players and can provide significant help to resolve these issues in a prompt manner. If the client cannot travel, are there relatives or other persons who can travel instead? These persons must have detailed knowledge of the family, authority to act on the petitioner's behalf, and must be familiar to the child for their presence to be effective.

Counsel also should discuss the petitioner's ability to pay for their travel or that of a substituting relative and for the return of the child. Does the client have relatives or friends in the jurisdiction, or will a hotel be needed? Are there any special medical, work-related, or other issues that will impact the client's travel?

After the initial call, the State Department will provide additional case information to counsel so that counsel can decide whether to accept the representation. Generally, the State Department provides the Hague Application and custody documents such as the custody order.

If the State Department sent a return letter on behalf of the left-behind parent, the State Department will provide counsel with the return letter and any response received. Counsel also may request additional information such as a birth certificate or marriage certificate.

Once counsel is retained and the engagement letter is signed, the State Department provides counsel with the entire file.

4. Checklist Of Items To Discuss During The Client Call For Retention Of Counsel.

Counsel should consider the following items relating to the first client call:

(1) Get an interpreter, if necessary.

(2) Explain the following:

(a) characteristics of the court procedures of a Hague Convention case so the client is aware of the general timeline;

(b) best and worst case scenarios;

(c) lack of service;

(d) civil and criminal remedies; and

(e) the jurisdictional, not custodial, focus of the Hague Convention case.

(3) Ask the client if he or she has emotional support and consider offering referrals to support services in the United States such as NCMEC's Team HOPE (Help Offering Parents Empowerment)[427] and referrals to reunification specialists, and other non-profit organizations. Check with NCMEC and the State Department for up-to-date information on this matter.

[427]The official website for NCMEC's Team HOPE is http://www.teamhope.org. NCMEC's Team HOPE may be contacted at 1-866-305-HOPE.

(4) Ask the left-behind parent for a detailed timeline of events and a summary leading up to the abduction, including:

(a) a timeline of the child's previous residences from birth to present;

(b) all contact the client has had with the child;

(c) the relationship among the parents, child, and other relatives;

(d) any law enforcement or social services intervention with the family, including any complaints made by the taking parent relating to abuse, neglect or domestic violence;

(e) the immigration status and other legal issues;

(f) supporting documents, including: the child's birth certificates, the parents' divorce and/or marriage certificates (if applicable); and any custody orders, mediated agreements, or civil codes relating to custodial rights.

(5) Ask the client for all documents supporting a habitual residence determination, including travel authorizations or other signed agreements, school and medical records, photos and/or videos of the child, and evidence of participation in extracurricular activities including day care, sports and church activities.

(6) If the child may be in danger or the taking parent is a flight risk, ask the client if emergency relief should be sought to take the child from the taking parent; gather substantiating information of flight risk (*i.e.*, emails with taking parent or relatives indicating plans to move, log of phone calls, or text messages threatening the same).

(7) Ask the client if he or she can travel to the United States for court hearings.

(8) Ask the client if he or she have or can obtain a passport/visa for travel to the United States.

(9) Give the client a comprehensive list of all contacts at the firm and, if possible, include anyone who speaks the native language of the left-behind parent.

(10) Obtain all available contact information for the client, including relatives' contact information.

5. Filing The Petition/Communicating With The Court.

If the petition will be filed in a jurisdiction with a single judge, it is helpful to contact chambers before filing to discuss the logistics. In a jurisdiction with more than one judge, contact chambers after the judge is assigned. Advise the law clerk about the nature of Hague Convention cases and the referral from the State Department, if applicable. Offer collaboration, as these are unusual cases. Consider e-mailing drafts of pleadings to a receptive clerk. Inform the court of judges in the same or nearby jurisdictions who previously have presided over Hague Convention cases. Consider filing all papers under seal to protect the safety of the child until the case is resolved.

Discuss the need for an official translator, if necessary. Inquire about the Court's preference for a particular translator or determine if there is an approved list of translators from which a translator must be selected. Try to coordinate the preliminary hearing with the client's anticipated arrival into the jurisdiction. If the client has low income, advise the court of this and request a very short turnaround for the second hearing to conserve resources. Address the need for a hearing by phone or video conference if the client is not able to travel to the initial hearing.[428] This is not ideal, but it should be sought as a last resort.

[428]It may be possible for a client to access a video conferencing system via a United States embassy or a local law firm that is willing to provide its video conferencing system *pro bono*.

The State Department will send a letter to the judge (with a copy to all counsel) that explains the State Department's role as U.S. Central Authority for the Hague Convention and refers to key provisions of the Hague Petition and documents regarding the history of the Hague Convention (*i.e.*, the Perez-Vera Report). The judge's letter also clarifies that the letter should not be construed by the court as constituting an opinion of the United States or the Department of State regarding the merits of the case.

Judges who have not presided over Hague Convention cases previously also have other resources available. The State Department will provide the names of other judges in the same or nearby jurisdictions who have presided over Hague Convention cases and who would be willing to provide basic information to judges regarding the Hague Convention process. Additionally, the International Hague Network of Judges facilitates collaboration between judges in Hague signatory countries. Judges from the United States who are members of the International Hague Network of Judges are called U.S. Network Judges, and may be able to offer advice to judges presiding over Hague Convention Cases. The State Department has contact information for U.S. Network Judges. Additionally, the State Department's judge's letter referenced in the preceding paragraph will contain information regarding the International Hague Network of Judges.

6. Perfecting Service On The Abducting Parent.

The critical decision in this process is whether the court will be asked to take custody of the child when the abducting parent is served (or before). Expect that a judge will be uncomfortable with ordering law enforcement to take custody of the child, and that counsel will need to make a compelling case to persuade a judge to do so. It is important to assess the likelihood that the abducting parent will flee the jurisdiction prior to the second hearing. The left-behind parent's testimony about the abducting parent's lack of ties to the jurisdiction, history of flight, or avoidance of prosecution will be pivotal, along with any information that the State

Department has gathered in its search for the abducting parent and the child. The abducting parent's illegal immigration status may lend support to the argument that the child's presence should be secured by the court. Counsel should fashion the request in a manner that will be familiar to the court, such as having a United States Marshal seize the child and bring the child before the judge.

If clients (or family members) will be present in the jurisdiction to testify at the preliminary hearing and can take custody of the child pending the second hearing, and the child will feel safe with those persons, it may be compelling to ask the court for the seizure of the child prior to the initial hearing. Consequently, after the initial hearing, the client or family members immediately can take custody of the child until the second hearing on the merits of the petition. If this is not possible, taking possession of the child and placing him or her in the custody of social services is also an alternative, albeit not preferable, when there is no one to take custody of the child, the child is in danger, and/or there is a flight risk.

If the court is persuaded to order recovery of the child, collaboration with the United States Marshals Service and/or law enforcement is essential. There should be an order specifically directing the United States Marshals or other appropriate law enforcement agency to pick up the child. Suggest that the Marshals be present in court or chambers to discuss this procedure. Address any fees that will be charged for this service. If the child attends school or daycare, the order should specify where and how the Marshals should pick up the child. This should occur before service upon the abducting parent to avoid a confrontation or flight. Local law enforcement can bridge the gap between school officials and the court.

In order to minimize trauma to the child, suggest that a Marshal who is specifically-trained to deal with children participate in the service. Involve local law enforcement

departments, many of whom have a section, squad or individual officer who deals with matters involving children. Have the client nearby to minimize the time between the pick up of the child and placement with the designated adults who will care for him or her pending the court's further order. Bring toys or appropriate distractions for the child. Have warm clothes or a blanket for the child if the weather is cold.

After the child is taken into custody, the Marshals generally are instructed to bring the child and the client back to the courthouse for an appearance before a federal judge. Suggesting this procedure in advance may reassure the court that it will have an opportunity to assess the child's comfort with the client. The client should be prepared to surrender to the court all travel documents for himself or herself and the child pending the outcome of the case.

7. Travel And Accommodations.

Counsel should expect to assist the client in arranging travel to the United States for hearings. Accommodations must be sought on a case-by-case basis. Consolidators often provide airfares on major airlines at vastly-reduced prices. Seek donations of frequent flyer miles from colleagues, which have the added advantage of flexibility. Unless frequent flyer miles are used, anticipate a higher-than-usual ticket price due to the last-minute booking, the one-way fare for the child's return, and the need for a flexible return schedule, as well as Consulate fees for passports, visas, and other travel requirements depending on the country of which the client and child are nationals. In *pro bono* cases, law firms frequently bear the cost of the client's travel.

If the client does not have relatives in the vicinity of the court's jurisdiction, he or she will rely upon counsel to recommend or make hotel arrangements (and in *pro bono* cases, to pay the expense). When making reservations, direct contact with the hotel rather than using a national reservations system may result in greater discount flexibility. Hotels used by firms for housing recruits often will provide a greatly reduced rate under the circumstances. In some

cities, social service or religious agencies might assist the client in locating or paying for inexpensive housing.

The hotel management should be advised of the client's situation to ensure a friendly reception. It also is advisable to remind the client of security issues, such as not disclosing information to anyone unless strictly necessary, to prevent the taking parent from finding the client's location. Choose a hotel that offers a free breakfast and accommodations such as a microwave or small refrigerator if possible. Collect donations of snacks from colleagues. Ideally, the hotel should be near a grocery store and public transportation. Select a location appropriate for children, with proximity to a park or mall and affordable (and if possible, appropriately ethnic) food.

Discuss with the client the necessary travel documents for him or her and the child. Check that no documents will expire during the expected stay in the United States. Recommend that the client gather telephone numbers for family members, employer, and co-workers back home in case of emergencies and contact information for relatives in the United States in the event that the child has been moved. Remind the client to refill all prescriptions and to bring an adequate supply for longer than is expected. The client should bring a credit card (if possible) and cash (to be changed into United States currency before arrival).

Advise the client about expected weather and appropriate clothing for court and out-of-court time for them and the child. Suggest that the client bring toys, pictures, and other favorite items that will make the child feel safe and familiar. It will be helpful for the child to have objects that evoke good memories and happy moments, given the change of circumstances and situation he or she will be facing. Photos of other family members and friends will be reassuring

to the child and evidence of family and the home environment. A collapsible suitcase or duffel should be brought to transport the child's items upon return.

Counsel should consider purchasing a disposable cell phone for the client's use while in the United States. This ensures that counsel can reach their client at all times, particularly because service on the abducting parent and court dates are fluid in these cases. The client should have an international calling card for communication with family and employers at home.

Provide the client with a comprehensive list of contacts at counsel's law firm, along with phone numbers. Identify, if possible, a liaison to coordinate miscellaneous logistics – preferably someone who speaks the client's language. Advise the client who will pick up him or her at the airport and, if possible, send a picture of that person in advance. Plan to provide transportation to and from court.

8. Pending The Second Hearing.

If the child is not recovered when the abducting parent is served with the petition, consider trying to arrange visitation for the client and child in a public place prior to the second hearing. While not ideal, the courthouse might serve as a central location. Other potential locations would include a park or a fast-food restaurant. This will reassure the client and will give the child an opportunity to re-familiarize themselves with the left-behind parent. The value of this cannot be underestimated. Children often are told untrue stories about the left-behind parent, sometimes rising to the level of brainwashing and alienation, causing children to fear returning with those parents. Depending on the age of the child at abduction, the child may not have clear memories of the other parent or speak the left-behind parent's language. If the child is an appropriate age, the court may hear their wishes regarding return to his or her home country, and the opportunity to reconnect with the left-behind parent will assist in a positive resolution.

NCMEC or the State Department also can arrange referrals for reunification specialists who can assist in reuniting the left-behind parent and the child.

During this time, it is important that the client understand the timetable and what to expect from the process. This is particularly difficult when the client has no family or friends nearby while the case is pending in court. To the extent that there are cultural, religious, or other communities in which the client might feel comfortable, consider making the appropriate introduction.

9. Court Order.

Counsel should provide the court with an order for return immediately or as soon as possible after the hearing. The order should provide specific information for the child to travel internationally with his or her parent – this will be sufficient in most circumstances. NCMEC or the State Department can provide sample orders that counsel can review. It may be helpful to get an apostille (an international recognition) from the court in English and the client's foreign language. Regardless of whether the jurisdiction considers the return of the child to the foreign country to moot a subsequent appeal, it always makes sense to move quickly to get the client and the child out of the United States. Be aware that several abducting parents have absconded with the children a second time after the court issued a return order. Take precautions to secure the child leading up to his or her return to the home country.

10. Mediation.

Mediation is another option to resolve the dispute between the abducting and left-behind parents. An objective mediation, even after an international abduction, can lead to a quick resolution that benefits both the parents and the child. An effective mediation is:

(1) Expedient;

(2) Inexpensive;

(3) Less invasive for the child and the parents; and

(4) Effective because the results are tailored to the situation and circumstances affecting the child.

Disadvantages of a mediation occur when a mediation is used as a tactic to delay or prevent parents' access to the United States courts or when parents fail to receive a court order binding the parties to the mediation.

Upon a request of the parties or based on the jurisdiction's local rules, a court could order the parties to participate in a mediation. This option ensures that, if the mediation is successful, the court will issue an order binding the parties to the resolution. If the court asks the parties to provide a list of suggested mediators, NCMEC or the State Department are resources to provide information concerning attorneys or judges who are familiar with Hague Convention cases. If clients decide to participate in a mediation, be sure to set or request a time limit for the discussions to avoid any delay tactics by the abducting parent. If the mediation is not successful, the client needs to rely on the judicial process.

In light of the potential advantages, it is not surprising that research and interest in international child abduction mediation has been expanding in recent years. Although the U.S. does not yet have a nationwide mediation mechanism in place, a number of academics and practitioners have explored the topic of mediating Hague Convention cases. The U.S. State Department also has explored mediation at length and, among other helpful guidance, recommends that parties seeking a long-term solution take special efforts to create an agreement that is enforceable in each country of residence.

V. THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT.

Although the Hague Convention provides a well-established civil legal process for international child abduction cases, practitioners also should be aware of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"),[429] which can supplement the Hague Convention and provide alternative options for responding to family abductions into the United States. Drafted in 1997[430] to address the practical inconsistencies of its predecessor statute,[431] the UCCJEA[432] also reconciled the overlapping federal PKPA[433] and provided a substantial enforcement mechanism for interstate custody decrees. Most importantly for the purposes of this guide, the UCCJEA expressly applies to international cases by mandating that a foreign country shall be treated as if it were a state of the United States for all general and jurisdictional purposes (UCCJEA Articles 1 and 2).[434] For enforcement purposes (UCCJEA Article 3), a foreign child custody order that substantially conforms to the UCCJEA's jurisdictional standards shall be recognized and enforced in the same manner as if issued by a U.S. state.[435] Finally, the UCCJEA

[429]UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT (1997), 9(1A) U.L.A. 657 (1999).

[430]The UCCJEA has been enacted by all states, with the exception of Massachusetts where adopting legislation is pending, and also has been enacted in Guam, USVI, and DC. Adopting legislation is pending in Puerto Rico.

[431]For a discussion of the UCCJEA's relationship to prior statutes see Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child Custody Practice Under the New Act*, 32 Fam. L. Q. 267 (1998).

[432]For the specific location and citation of the UCCJEA as adopted by each state, refer to the legal appendix in NCMEC's Guidebook, Patricia M. Hoff, FAMILY ABDUCTION: PREVENTION AND RESPONSE (6th ed. 2009), http://www.missingkids.com/en_US/publications/NC75.pdf.

[433] 28 U.S.C. § 1738A.

[434]UCCJEA § 105(a).

[435]*Id.* at § 105(b).

contains an "escape clause" that allows a court to refuse to apply the Act if the child custody law of the foreign country in question "violates fundamental principles of human rights."[436]

The UCCJEA's international component makes it applicable to several common factual scenarios faced by attorneys in Hague Convention cases, including:

1) The UCCJEA as an alternative mechanism when the Hague Convention may not fully apply.

2) The UCCJEA as a strategic alternative mechanism, even when the Hague Convention does apply.

3) The UCCJEA as a supplement to the Hague Convention's remedies, especially for pick-up remedies.

A. WHEN THE HAGUE CONVENTION DOES NOT APPLY.

The preceding sections described many of the limits of the Hague Convention but, in some situations, the UCCJEA's provisions may allow a left-behind parent to seek relief beyond these limits. For example, a left-behind parent may have a custody decree that was issued *after* the child was taken (a "chasing order"), which grants them substantial custody rights. As discussed previously, the rights of custody protected by the Hague Convention do not include those obtained after the abduction took place. The parent still may have a remedy under the Convention based upon his or her operation of law custody rights, but the UCCJEA provides an alternative method to enforce the complete range of a left-behind parent's custody rights.

Article 3 of the UCCJEA lays out the process for registering and seeking enforcement of a foreign child custody order. To register an out-of-state custody determination, a party simply

[436] *Id.* at § 105(c). For a lengthy discussion and comment on the merits of this provision see Marianne D. Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 Fam. L.Q. 547 (2004).

files a request for registration with a court in the receiving state along with certified copies of the foreign child custody determination and other verified information. Typically, the court then files the order as a foreign judgment and serves notice on any parent or person who is awarded custody or visitation in the order, or otherwise entitled to notice. Any parent who opposes the registration then has twenty days to request a hearing to contest the order. If the parent does not timely request a hearing, then the order is confirmed as a matter of law, and the registered order may be enforced by any means available to enforce a domestic order.

If the registration is contested, only three defenses are available:

1. The issuing court lacked jurisdiction;
2. The underlying custody order has been vacated, stayed or modified; and
3. Lack of notice.[437]

For appropriate circumstances, the UCCJEA also provides an expedited enforcement process.[438] In addition, if the child is in imminent danger of serious physical harm or is imminently likely to be removed from the jurisdiction, the UCCJEA provides a mechanism for petitioning parents to apply for a warrant authorizing law enforcement to take physical custody of the child simultaneously or prior to service upon the taking parent.[439]

B. STRATEGIC ALTERNATIVE TO THE HAGUE CONVENTION.

There may be situations where parents fully entitled to relief under the Hague Convention choose instead to pursue action in state court under the UCCJEA. For example, the UCCJEA provides a vehicle for enforcement of a pre-existing custody order held by a left-behind parent if that custody order resulted from an agreement between the parties or a judicial proceeding in

[437]UCCJEA § 305.

[438]*Id.* at § 308.

[439]*Id.* at § 311.

which all parties were served and had an opportunity to be heard. A standard or expedited UCCJEA proceeding also may provide a more speedy resolution than a Hague Convention return case in federal court. Additionally, the affirmative defenses available to abducting parents in Hague Convention return cases are not available under the UCCJEA. With one exception, only challenges regarding the providence of the foreign custody order may be raised by the taking parent during the UCCJEA registration process; challenges regarding the substance of the order itself or other factual issues may not be raised.[440] As noted above, however, a court can decline to recognize or grant enforcement assistance to a foreign order that was issued in a jurisdiction whose child custody laws violate "fundamental principles of human rights."[441]

C. SUPPLEMENT TO THE HAGUE CONVENTION.

In addition to providing alternative remedies to the Hague Convention, the UCCJEA also was designed to complement the Hague Convention by allowing state courts to assist with enforcement of a Hague return order as if it were a child custody order subject to the UCCJEA's usual enforcement provisions. [442] The UCCJEA, as drafted and adopted in some states,[443] gives prosecutors the power to enforce custody or visitation orders and gives law enforcement officers the power to locate children and follow instructions from prosecutors.[444] Section 315 of the UCCJEA grants prosecutors statutory authority to take action to locate children or see that children are returned or enforce a child custody determination. A prosecutor may act if one of the following exists:

---

[440] *Id.* at § 105(c).

[441] *Id.* at § 105(b).

[442] *Id.* at § 302.

[443] Not every state has adopted the "Prosecutor or Public Official" portion of the UCCJEA. For a listing and statutory citation for any states that have adopted this section, refer to the legal appendix in NCMEC's Guidebook, *supra* note 433.

[444] UCCJEA § 315.

1. A prior custody determination has been made;

2. A request for such action from a court in a pending child custody proceeding has been made;

3. A reasonable belief exists that a criminal statute has been violated; or

4. A reasonable belief exists that the children have been wrongfully removed or retained in violation of the Hague Convention.[445]

The UCCJEA gives a prosecutor the power to act in cases arising under either the UCCJEA or the Hague Convention.[446] At the request of a prosecutor acting under this section, the UCCJEA enables law enforcement to take "any lawful action reasonably necessary" to locate a child, locate a parent, or assist the prosecutor in fulfilling their responsibilities.[447]

When Hague Convention proceedings end—because the treaty no longer applies to a child who has reached 16 years old or an order denying the return is issued, for instance—one or both parents may wish to seek a custody determination from a U.S. court. In this situation, the UCCJEA will pick up where the treaty ends and control the content and jurisdictional elements of the child custody case in state court. Finally, as discussed in the following Section VI, the UCCJEA takes center-stage when a request for access is made under the Hague Convention. A petition for access may be filed independently or after a Hague return petition has been denied.

[445] *Id.*

[446] *Id.*

[447] *Id.* at § 316.

VI. RIGHTS OF ACCESS

In wrongful removal cases, the question of parental rights of access—as opposed to custody and return—is an area ripe with confusion for parents and their legal counsel.[448] This confusion stems from the scope of the Hague Convention itself and the federal courts' interpretation of it. Article 21 of the Convention and the International Child Abduction Remedies Act (ICARA) seem to provide for certain rights of access, but the weight of authority from the federal courts is that Article 21 and ICARA offer no tangible remedy. As a result, the federal courts are left with very little power to address and remedy access cases.[449] Accordingly, access issues are best resolved by the state courts that traditionally deal with this relatively specialized area of the law. Counsel for parents seeking only access rights should proceed in the state courts to avoid a potential dismissal of the action by a federal court. State courts also are most familiar with the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which is a powerful option to use in access cases.[450]

One of the most instructive decisions addressing "rights of access" in the context of the Hague Convention is *Bromley v. Bromley*.[451] A primary issue addressed in *Bromley* was whether the court possessed the authority to enforce rights of access under the Convention. Petitioner argued that both his access and visitation rights were governed by Article 21 of the Convention. The court declined to address the right of access issue, holding that the rights of the petitioner

---

[448]The Hague Convention provides that "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." Hague Convention, *supra* note 2, art. 5(b).

[449]*Jenkins v. Jenkins*, 569 F.3d 549, 555 (6th Cir. 2009) (holding that "[u]nder the Convention, the remedy of return is available for a wrongful removal or retention but not for a breach of the right to access.").

[450]*See, e.g.*, *Paillier v. Pence*, 50 Cal. Rptr. 3d 459, 461 (Cal. Ct. App. 2006) (holding that California trial court lacked jurisdiction under the UCCJEA to enforce or modify child French visitation order).

[451]30 F. Supp. 2d 857 (E.D. Pa. 1998).

"may not be addressed by this court because there is no *remedy* under the Convention for obstacles to rights of access absent a 'wrongful' removal of a child."[452]The court reasoned that because Article 21 is limited to filing an application with the Central Authorities for access rights, it "does not provide the courts with independent authority to remedy such a situation."[453]

In *Bromley*, the court drew a clear distinction between Article 21 access rights and the Convention's Article 21 return language. According to the court, the "silence of the Convention as to any remedy for access rights is in sharp contrast to Article 21 which clearly provides authority for judicial authorities to order the return of a child 'wrongfully' removed."[454]In support, the *Bromley* court cited the State Department's legal analysis of the Convention (Public Notice 957) addressing remedies for breach of access rights. The State Department found that:

> "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.[455]

As the *Bromley* court noted, state and foreign courts have reached similar results. For example, in *Viragh v. Foldes*,[456] the Massachusetts Supreme Judicial Court held that "the Convention does not mandate any specific remedy when a parent without physical possession has established interference with rights of access."[457] Without a breach of custody rights, the

---

[452]*Id.* at 860.

[453]*Id.*

[454]*Id.*

[455]Public Notice 957, *supra* note 6, at 10513.

[456]612 N.E.2d 241, 247 (Mass. 1993).

[457]*Id.* at 247.

Convention cannot be invoked because removal cannot be considered "wrongful."[458] Similarly, in the United Kingdom, Article 21 has been described as toothless because it fails to confer jurisdiction on the British courts to determine matters relating to access.[459]

After the *Bromley* decision and its progeny, advocates turned to the plain language of ICARA, thinking that it would permit a federal cause of action over access cases. That hope was dashed by the Fourth Circuit in *Cantor v. Cohen*.[460] In holding that ICARA did not confer jurisdiction upon federal courts to hear access cases, the Fourth Circuit began its analysis with the implementing language of section 11601, in which Congress declared that:

> [t]he 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.
>
> 42 U.S.C. § 11601(b)(4) (emphasis added).[461]

In turning to the Convention, the *Cantor* court noted that Article 21 of the Convention permitted an application seeking access to be made to the Central Authority of a country, which in the case of the United States, was the State Department and not a court. The court further turned to the language of section 11603(b), which provided that a party seeking relief *under the Convention* for access may commence a proceeding in a court which has jurisdiction over that matter and concluded that, under the Convention, a federal court has no such jurisdiction. Thus, in directing applicants for access to the appropriate state court, the Fourth Circuit makes clear

---

[458] *Id.*; *see also* *Wiezel v. Wiezel-Tyrnauer*, 388 F. Supp. 2d 206, 211 (S.D.N.Y. 2005) (ruling that even where a petitioner appropriately seeks to enforce its custodial rights, the federal courts will not have jurisdiction under the Convention if the ultimate relief sought is an order of visitation, *i.e.*, a right of access).

[459] *See* *Re G (A Minor) (Enforcement of Access Abroad)*, [1993] All E.R. 657 (stating that "[t]here are no teeth to be found in article 21 and its provisions have no part to play in the decision to be made by the judge").

[460] 442 F.3d 196 (4th Cir. 2006).

[461] *Id.* at 199.

that it considers issues of access to be included in the umbrella of "underlying child custody claims" and distinguishable from return cases, which may not address these custody claims.[462]

In *Viragh v. Foldes*,[463] the court interpreted Article 21 as instructing the court "to 'promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject,' as well as to 'take steps to remove, as far as possible, all obstacles to the exercise of such rights.'"[464] The *Foldes* court recognized that:

> A major purpose of the Convention is to protect the access rights of the parent without physical possession when the children reside in a contracting nation other than where the parent without physical possession resides. The Convention provides that the parent who has removed the children from their habitual residence, and made the exercise of access rights more difficult, may be ordered to pay the necessary expenses incurred by the parent without physical possession effectively to exercise rights of access."[465]

The court went on to craft a visitation schedule in the United States to facilitate the petitioner's exercise of his access rights, given the financial burdens associated with travel between the United States and Hungary.[466]

In *Abbott v. Abbott*,[467] the United States Supreme Court held that the *ne exeat* right is a custodial right, and therefore, the remedy of return of the child to his or her country of habitual residence is available to the left-behind parent.[468] In its analysis, the Supreme Court distinguished between the remedies available to a parent with a *ne exeat* right and those available

---

[462] *See Krehbiel v. Cooper*, No. 1:08CV276, 2008 WL 5120622, at *4 (M.D.N.C. Dec. 4, 2008).

[463] 612 N.E.2d 241 (Mass. 1993).

[464] *Id.* at 247.

[465] *Id.* at 249.

[466] *Id.*

[467] 130 S.Ct. 1983 (2010).

[468] *Id.* at 1992.

to a parent who merely had rights of access or visitation.[469] In doing so, *Abbott v. Abbott* reaffirmed that the United States courts have no authority under the Convention to order abducted children returned to their left-behind country when a taking parent has violated a right of access.

An application for access rights is fundamentally different from an application for return because it requires the petitioner to acknowledge that the child will remain in the United States and hence be subject to the jurisdiction of a United States court. A court therefore is permitted to consider the best interests of the child when crafting an appropriate visitation schedule, and as a practical matter, a United States court has continuing jurisdiction to make any modifications to that visitation agreement at a later date.

VII. PRACTITIONERS' CONCLUDING THOUGHTS: WHAT ABOUT THE IMPACT ON THE CHILD?

This Manual was designed to provide a road map for the representation of left-behind parents whose children were brought to or retained in the United States wrongfully by the other parent. The job of counsel for the left-behind parent (in most cases) is to achieve the safe return of the child to the client's country, and we have recommended courses of action to achieve that goal first and foremost. As a matter of law, the child's best interests are not at issue.

Yet, while forbidding an analysis of the child's best interests, the Hague Convention does look to the impact of the abduction and related legal proceedings on the child. The well-settled defense recognizes the potential harm in uprooting a child who has made this country home in a significant way, balancing that against the interests of the parent who did not choose to be separated from his or her child. The mature child objection provides a voice to some children. The grave risk defense protects a child who would be subjected to intolerable abusive

[469] *Id.*

circumstances upon return, but the practitioners' experience shows that this defense can be narrowly interpreted by courts to return a child even when the abducting parent has been subjected to domestic violence in the presence of the child. Counsel for the left-behind parent are responsible for advocating to defeat these defenses.

Practitioners have recognized that in their advocacy and avoidance of a "best interests" analysis, they sometimes lost focus on the impact of the proceeding on the child. A child, caught in the middle of the parents' dispute, cannot help being affected by the adversarial nature of the conflict. The child's state of mind and perception of the respective roles of the parents in his or her life may have been influenced, intentionally or otherwise, by the abducting parent. This is especially true when the child has been separated from the left-behind parent for many months or years. It is very difficult to judge what effect this estrangement may have on an impressionable child, who may believe that the left-behind parent has abandoned or does not love him or her.

When law enforcement picks up a child at school, it ensures that the child does not disappear from the jurisdiction, but this could cause some anxiety for the child. A child is often kept out of the courtroom to avoid exposure to the parents' dispute, but the seclusion also can be stressful. It often is recommended to rush clients and children to the airport and through security once a return order is entered because lingering presents a danger that an appeal will be filed and a stay will be entered. Yet in doing so, as often occurs with the initial abduction, the child may not have a chance to say goodbye to the other parent or friends or collect cherished possessions.

It can be difficult for counsel to balance their responsibility to argue for the safe and efficient return of the child while trying to minimize the negative impact on the child. There are no easy answers, but there are options. Mediation, addressed in Section IV.C.10 of this Manual, is increasingly available, and an agreed-upon resolution may be preferable in some

circumstances.[470] Counsel can advise their clients about the impact their past and future actions have on their children and suggest ways to ease the transition. Counsel can ask the court to permit the children to say goodbye to the other parent in a private, supervised location. Counseling for the children and clients can be facilitated.[471] Practitioners can offer to send the children's belongings to them after their return if the taking parent will allow it. Also, practitioners can suggest that clients strive to keep lines of communication open between the other parent and the children after the return. By offering this guidance and discussing the pros and cons of any course of action, counsel empower their clients to make informed decisions for themselves and their children.

This Manual is the product of a collaborative effort by The National Center for Missing and Exploited Children and Kilpatrick Townsend & Stockton LLP. Our goal is to familiarize advocates with the Hague Convention, its purposes, and the case law interpreting it. If you have any suggestions for corrections or improvements to the Manual, please forward them to the authors so that we can incorporate them in future editions of this Manual.

[470]Through its attorney network or other resources, NCMEC may be able to provide information and referrals for parents who are interested in mediating a resolution.

[471]NCMEC's Family Advocacy Division can provide referrals for reunification services, family support, and counseling services, including the services offered by NCMEC's Team HOPE.

EXHIBITS

Exhibit A: List of Cited Cases by Circuit of Origin

Exhibit B: Hague Convention

Exhibit C: Signatory Countries to Hague Convention

Exhibit D: ICARA

Exhibit E: Public Notice 957

Exhibit F: Perez-Vera Report

Exhibit G: *Robles Antonio v. Barrios Bello* Orders

Exhibit H: Samples of Common Hague Case Pleadings and Filings

EXHIBIT A— LIST OF CITED CASES BY CIRCUIT OF ORIGIN

UNITED STATES SUPREME COURT

Abbott v. Abbott,
130 S. Ct. 1983 (2010)
Removal/Retention Breached Custody Rights
Rights of Access

FIRST CIRCUIT

Aldinger v. Segler,
263 F. Supp. 2d 284 (D.P.R. 2003)
Article 20 Public Policy Affimative Defense
Evidentiary Issues in Hague Cases
Exercising Custody Rights at Removal

Charalambous v. Charalambous,
627 F.3d 462, 468-69 (1st Cir. 2010)
Article 13 Grave Risk Affirmative Defense

Currier v. Currier,
845 F. Supp. 916 (D.N.H. 1994)
Exercising Custody Rights at Removal

Danaipour v. McLarey,
286 F.3d 1 (1st Cir. 2002)
Affirmative Defenses of Articles 12, 13 and 20 Generally
Article 13 Grave Risk Affirmative Defense

Danaipour v. McLarey,
386 F.3d 289 (1st Cir. 2004)
Article 13 Grave Risk Affirmative Defense

Falk v. Sinclair,
692 F. Supp. 2d 147 (D. Me. 2010)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
Petition Filed Within One Year

Falls v. Downie,
871 F. Supp. 100 (D. Mass. 1994)
Habitual Residence
When Removal/Retention Became Wrongful

Gonzalez Locicero v. Nazor Lurashi,
321 F. Supp. 2d 295 (D.P.R. 2004)

Article 13 Mature Children Affimative Defense
Tolling the One-Year Period

Gonzalez v. Nazor Lurashi,
No. Civ. 04-1276 (HL), 2004 WL 1202729 (D.P.R. May 20, 2004)
Article 12 Well-Settled Affirmative Defense
Tolling the One-Year Period

Hasan v. Hasan,
No. Civ. A. 03-11960-GAO, 2004 WL 57073 (D. Mass. Jan. 13, 2004)
Guardian *Ad Litem* Issues

Krefter v. Wills,
623 F. Supp. 2d 125 (D. Mass. 2009)
Exercising Custody Rights at Removal

Kufner v. Kufner,
480 F. Supp. 2d 491 (D.R.I. 2007),
aff'd, 519 F.3d 33 (1st Cir. 2008)
Exercising Custody Rights at Removal

Kufner v. Kufner,
519 F.3d 33 (1st Cir. 2008)
Article 13 Grave Risk Affirmative Defense
Article 13 Mature Children Affimative Defense
Invalid Best Interests Defense

Lockhart v. Smith,
No. 06-CV-160, 2006 WL 3091295 (D. Me. Oct. 20, 2006)
Article 16 Stay of Pending State Court Action

McManus v. McManus,
354 F. Supp. 2d 62 (D. Mass. 2005)
Affirmative Defenses of Articles 12, 13 and 20 Generally
Article 12 Well-Settled Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Article 13 Mature Children Affimative Defense
Exercising Custody Rights at Removal
Guardian *Ad Litem* Issues
Invalid Best Interests Defense

Nicolson v. Pappalardo,
605 F.3d 100 (1st Cir. 2010)
Article 13 Consent/Acquiescence Affirmative Defense
Habitual Residence

Nicolson v. Pappalardo,
674 F. Supp. 2d 295 (D. Me. 2009)
Exercising Custody Rights at Removal

Rigby v. Damant,
486 F. Supp. 2d 222 (D. Mass. May 15, 2007)
Article 16 Stay of Pending State Court Action

Toren v. Toren,
191 F.3d 23 (1st Cir. 1999)
Tolling the One-Year Period

Toren v. Toren,
26 F. Supp. 2d 240 (D. Mass. 1998)
vacated on other grounds, 191 F.3d 23 (1st Cir. 1999)
Tolling the One-Year Period

Viragh v. Foldes,
612 N.E.2d 241 (Mass. 1993)
Rights of Access

Walsh v. Walsh,
221 F.3d 204 (1st Cir. 2000)
Article 13 Grave Risk Affirmative Defense
Stay of Trial Court's Order Returning the Children

Wanninger v. Wanninger,
850 F. Supp. 78 (D. Mass. 1994)
Exercising Custody Rights at Removal

Whallon v. Lynn,
230 F.3d 450 (1st Cir. 2000)
Article 13 Grave Risk Affirmative Defense
Article 16 – No Consideration of Merits of Underlying Custody Dispute
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

Zuker v. Andrews,
2 F. Supp. 2d 134 (D. Mass. 1998)
Article 12 Well-Settled Affirmative Defense
Habitual Residence
When Removal/Retention Became Wrongful

Zuker v. Andrews,
181 F.3d 81 (Table), No. 98-1622, 1999 WL 525936 (1st Cir. Apr. 9, 1999)
Habitual Residence

SECOND CIRCUIT

Armiliato v. Zaric-Armiliato,
169 F. Supp. 2d 230 (S.D.N.Y. 2001)
Exercising Custody Rights at Removal

Blondin v. Dubois,
189 F.3d 240 (2d Cir. 1999),
aff'd, 238 F.3d 153 (2d Cir. 2001)
Article 12 Well-Settled Affirmative Defense

Blondin v. Dubois,
238 F.3d 153 (2d Cir. 2001)
Article 12 Well-Settled Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Article 13 Mature Children Affimative Defense

Brooke v. Willis,
907 F. Supp. 57 (S.D.N.Y. 1995)
Exercising Custody Rights at Removal

Croll v. Croll,
229 F.3d 133 (2d Cir. 2000)
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

David S. v. Zamira S.,
151 Misc. 2d 630, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991)
Article 12 Well-Settled Affirmative Defense

Diaz Arboleda v. Arenas,
311 F. Supp. 2d 336 (E.D.N.Y. 2004)
Article 12 Well-Settled Affirmative Defense
Article 13 Mature Children Affimative Defense

Diorinou v. Mezitis,
237 F.3d 133 (2d Cir. 2001)
Article 16 – No Consideration of Merits of Underlying Custody Dispute
Habitual Residence

Elyashiv v. Elyashiv,
353 F. Supp. 2d 394 (E.D.N.Y. 2005)
Invalid Best Interests Defense

Gitter v. Gitter,
396 F.3d 124 (2d Cir. 2005)
Habitual Residence
Signatory Countries

Haimdas v. Haimdas,
720 F. Supp. 2d 183 (E.D.N.Y. 2010)
Removal/Retention Breached Custody Rights
Exercising Custody Rights at Removal
Return Moots Appeal

Koc v. Koc (*In re Koc*),
181 F. Supp. 2d 136 (E.D.N.Y. 2001)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
Tolling the One-Year Period

Lachhman v. Lachhman,
No. 08-CV-04363 (CPS), 2008 WL 5054198 (E.D.N.Y. Nov. 21, 2008)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal

Laguna v. Avila,
No. 07-CV-5136 (ENV), 2008 WL 1986253 (E.D.N.Y. May 7, 2008)
Article 13 Grave Risk Affirmative Defense
Article 13 Mature Children Affimative Defense

Matovski v. Matovski,
No. 06 Civ. 4259(PKC), 2007 WL 2600862 (S.D.N.Y. Aug. 31, 2007)
Article 12 Well-Settled Affirmative Defense

Mero v. Prieto,
557 F. Supp. 2d 357 (E.D.N.Y. 2008)
Article 12 Well-Settled Affirmative Defense

Norden-Powers v. Beveridge,
125 F. Supp. 2d 634 (E.D.N.Y. 2000)
Exercising Custody Rights at Removal

Olguin v. Cruz Santana,
No. 03 CV 6299(JG), 2004 WL 1752444 (E.D.N.Y. Aug. 5, 2004)
Article 13 Grave Risk Affirmative Defense
Article 13 Mature Children Affimative Defense
Exercising Custody Rights at Removal

Poliero v. Centenaro,
373 F. App'x 102 (2d Cir. 2010)
Habitual Residence

Reyes Olguin v. Cruz Santana,
No. 03 CV 6299(JG), 2005 WL 67094 (E.D.N.Y. Jan. 13, 2005)
Article 12 Well-Settled Affirmative Defense

Article 13 Grave Risk Affirmative Defense
Article 13 Mature Children Affimative Defense

Skrodzki v. Skrodzki (*In re Skrodzki*),
642 F. Supp. 2d 108 (E.D.N.Y. 2007)
Exercising Custody Rights at Removal

Wiezel v. Wiezel-Tyrnauer,
388 F. Supp. 2d 206 (S.D.N.Y. 2005)
Rights of Access

THIRD CIRCUIT

Baxter v. Baxter,
423 F.3d 363 (3d Cir. 2005)
Article 13 Consent/Acquiescence Affirmative Defense
Exercising Custody Rights at Removal

Bromley v. Bromley,
30 F. Supp. 2d 857 (E.D. Pa. 1998)
Access Cases-Jurisdiction
Rights of Access

Carrascosa v. McGuire,
No. 07-0355 (DRD), 2007 WL 496459 (D.N.J. Feb. 8, 2007)
Exercising Custody Rights at Removal

Castillo v. Castillo,
597 F. Supp. 2d 432 (D. Del. 2009)
Article 12 Well-Settled Affirmative Defense
Article 13 Mature Children Affimative Defense

Delvoye v. Lee,
329 F.3d 330 (3d Cir. 2003)
Habitual Residence

Distler v. Distler,
26 F. Supp. 2d 723 (D.N.J. 1998)
ICARA

Feder v. Evans-Feder,
63 F.3d 217 (3d Cir. 1995)
Exercising Custody Rights at Removal
Habitual Residence

Harris v. Harris,
No. Civ. A. 03-5952, 2003 WL 23162326 (E.D. Pa. Dec. 12, 2003)
Exercising Custody Rights at Removal

In re Application of Adan,
437 F.3d 381 (3d Cir. 2006)
Article 13 Grave Risk Affirmative Defense

Karpenko v. Leendertz,
619 F.3d 259 (3d Cir. 2010)
Removal/Retention Breached Custody Rights

Karpenko v. Leendertz,
No. 09-03207, 2010 WL 831269 (E.D. Pa. Mar. 4, 2010)
Article 13 Grave Risk Affirmative Defense

Lutman v. Lutman,
No. 1:10-CV-1504, 2010 WL 3398985 (M.D. Pa. Aug. 26, 2010)
Article 12 Well-Settled Affirmative Defense

Miltiadous v. Tetervak,
686 F. Supp. 2d 544 (E.D. Pa. 2010)
Exercising Custody Rights at Removal

Silvestri v. Oliva,
403 F. Supp. 2d 378 (D.N.J. 2005)
Article 12 Well-Settled Affirmative Defense

Tsai-Yi Yang v. Fu-Chiang Tsui,
499 F.3d 259 (3d Cir. 2007)
Article 13 Mature Children Affimative Defense
Exercising Custody Rights at Removal
Habitual Residence
Invalid Best Interests Defense

Whiting v. Krassner,
391 F.3d 540 (3d Cir. 2004)
Return Does Not Moot Appeal

Yang v. Tsui,
416 F.3d 199 (3d Cir. 2005)
Article 16 Stay of Pending State Court Action
Invalid Best Interests Defense

FOURTH CIRCUIT

Bader v. Kramer,
484 F.3d 666 (4th Cir. 2007)
Exercising Custody Rights at Removal

Belay v. Getachew,
272 F. Supp. 2d 553 (D. Md. 2003)
Article 12 Well-Settled Affirmative Defense
Tolling the One-Year Period

Cantor v. Cohen,
442 F.3d 196 (4th Cir. 2006)
Rights of Access

Fawcett v. McRoberts,
326 F.3d 491 (4th Cir. 2003)
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights
Return Moots Appeal

Friedrich v. Thompson,
No. 00772, 1999 WL 33954819 (M.D.N.C. Nov. 26, 1999)
Article 16 Stay of Pending State Court Action

Hazbun Escaf v. Rodriquez,
200 F. Supp. 2d 603 (E.D. Va. 2002),
aff'd, 52 F. App'x 207 (4th Cir. 2002)
Article 20 Public Policy Affimative Defense
Exercising Custody Rights at Removal

Krehbiel v. Cooper,
No. 1:08CV276, 2008 WL 5120622 (M.D.N.C. Dec. 4, 2008)
Rights of Access

Maxwell v. Maxwell,
588 F.3d 245 (4th Cir. 2009)
Habitual Residence

Miller v. Miller,
240 F.3d 392 (4th Cir. 2001)
Article 16 – No Consideration of Merits of Underlying Custody Dispute
Discovery in Hague Cases
Habitual Residence

Sasson v. Shenhar,
667 S.E.2d 555 (Va. 2008)
Return Does Not Moot Appeal

Wiggill v. Janicki,
262 F. Supp. 2d 687 (S.D. W.Va. 2003)
Access Cases-Jurisdiction

Zajaczkowski v. Zajaczkowska,
932 F. Supp 128 (D. Md. 1996)
Discovery in Hague Cases

FIFTH CIRCUIT

Dietz v. Dietz,
349 Fed. App'x 930 (5th Cir. 2009)
Article 13 Mature Children Affimative Defense

Edoho v. Edoho,
No. H-10-1881, 2010 WL 3257480 (S.D. Tex. Aug. 17, 2010)
Article 12 Well-Settled Affirmative Defense

England v. England,
234 F.3d 268 (5th Cir. 2000)
Article 16 – No Consideration of Merits of Underlying Custody Dispute

Ibarra v. Quintanilla Garcia,
476 F. Supp. 2d 630 (S.D. Tex. 2007)
Removal/Retention Breached Custody Rights

Isaac v. Rice,
No. 1:97CV353, 1998 WL 527107 (N.D. Miss. July 30, 1998)
Habitual Residence

Morrison-Dietz v. Dietz,
No. 07-1398, 2008 WL 4280030 (W.D. La. Sept. 17, 2008),
aff'd, 349 F. App'x 930 (5th Cir. 2009)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

Sealed Appellant v. Sealed Appellee,
394 F.3d 338 (5th Cir. 2004)
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

Stewart v. Marrun,
No. 4:09CV141, 2009 WL 1530820 (E.D. Tex. May 29, 2009)
Exercising Custody Rights at Removal

Van Driessche v. Ohio-Esezeoboh,
466 F. Supp. 2d 828 (S.D. Tex. 2006)

Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
Tolling the One-Year Period

Wilchynski v. Wilchynski,
No. 3:10-CV-63-FKB, 2010 WL 1068070 (S.D. Miss. Mar. 18, 2010)
Exercising Custody Rights at Removal

SIXTH CIRCUIT

Anderson v. Acree,
250 F. Supp. 2d 876 (S.D. Ohio 2002)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
Tolling the One-Year Period

Blanc v. Morgan,
721 F. Supp. 2d 749 (W.D. Tenn. 2010)
Article 12 Well-Settled Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Exercising Custody Rights at Removal
When Removal/Retention Became Wrongful

Freier v. Freier,
969 F. Supp. 436 (E.D. Mich. 1996)
Exercising Custody Rights at Removal

Friedrich v. Friedrich,
78 F.3d 1060 (6th Cir. 1996)
Affirmative Defenses of Articles 12, 13 and 20 Generally
Article 12 Well-Settled Affirmative Defense
Article 13 Consent/Acquiescence Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Exercising Custody Rights at Removal
Invalid Best Interests Defense
Stay of Trial Court's Order Returning the Children

Friedrich v. Friedrich,
983 F.2d 1396 (6th Cir. 1993)
Article 16 – No Consideration of Merits of Underlying Custody Dispute
Habitual Residence

In re Coffield,
644 N.E.2d 662 (Ohio Ct. App. 1994)
Article 12 Well-Settled Affirmative Defense

Jenkins v. Jenkins,
569 F.3d 549 (6th Cir. 2009)
Rights of Access

March v. Levine,
136 F. Supp. 2d 831 (M.D. Tenn. 2000)
aff'd, 249 F.3d 462 (6th Cir. 2001)
Evidentiary Issues in Hague Cases
Stay of Trial Court's Order Returning the Children
Article 16 – No Consideration of Merits of Underlying Custody Dispute

Robert v. Tesson,
507 F.3d 981 (6th Cir. 2007)
Exercising Custody Rights at Removal
Habitual Residence

Simcox v. Simcox,
511 F.3d 594 (6th Cir. 2007)
Article 13 Consent/Acquiescence Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Article 13 Mature Children Affimative Defense
Invalid Best Interests Defense

Stevens v. Stevens,
499 F. Supp. 2d 891 (E.D. Mich. 2007)
Article 12 Well-Settled Affirmative Defense

Wasniewski v. Grzelak-Johannsen,
No. 5:06-CV-2548, 2007 WL 2462643 (N.D. Ohio Aug. 27, 2007)
Return Does Not Moot Appeal

Wojcik v. Wojcik,
959 F. Supp. 413 (E.D. Mich. 1997)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
Petition Filed Within One Year
Tolling the One-Year Period

SEVENTH CIRCUIT

Doudle v. Gause,
282 F. Supp. 2d 922 (N.D. Ind. 2003)
Exercising Custody Rights at Removal

Fabri v. Pritikin-Fabri,
221 F. Supp. 2d 859 (N.D. Ill. 2001)
Exercising Custody Rights at Removal

Griffin v. Sebuliba,
No. 08c0952, 2009 WL 972862 (E.D. Wis. Apr. 9, 2009)
Article 16 Stay of Pending State Court Action

In re Polson,
578 F. Supp. 2d 1064 (S.D. Ill. 2008)
Exercising Custody Rights at Removal

Koch v. Koch,
450 F.3d 703 (7th Cir. 2006)
Habitual Residence

Koch v. Koch,
416 F.Supp. 2d 645 (E.D. Wis. 2006)
Habitual Residence

Mohamud v. Guuleed,
No. 09-C-146, 2009 WL 1229986 (E.D. Wis. May 4, 2009)
Children Under Sixteen

Tabacchi v. Harrison,
No. 99 C 4130, 2000 WL 190576 (N.D. Ill. Feb. 10, 2000)
Article 13 Consent/Acquiescence Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Exercising Custody Rights at Removal

Thomas v. City of Evanston,
636 F. Supp. 587 (N.D. Ill. 1986)
Stay of Trial Court's Order Returning the Children

Vale v. Avila,
No. 06-1246, 2008 WL 2246929 (C.D. Ill. May 29, 2008)
Stay of Trial Court's Order Returning the Children

Van De Sande v. Van De Sande,
431 F.3d 567 (7th Cir. 2005)
Article 13 Grave Risk Affirmative Defense

EIGHTH CIRCUIT

Antunez-Fernandes v. Connors-Fernandes,
259 F. Supp. 2d 800 (N.D. Iowa 2003)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
Petition Filed Within One Year
Tolling the One-Year Period

Barzilay v. Barzilay,
600 F.3d 912 (8th Cir. 2010)
Habitual Residence

Edudata Corp. v. Scientific Computers, Inc.,
599 F. Supp. 1084 (D. Minn. 1984)
Discovery in Hague Cases

In re Hague Application,
No. 4:07CV1125SNL, 2007 WL 4593502 (E.D. Mo. Dec. 28, 2007)
Exercising Custody Rights at Removal

Kofler v. Kofler,
No. 07-5040, 2007 WL 2081712 (W.D. Ark. July 18, 2007)
Article 13 Mature Children Affimative Defense
Exercising Custody Rights at Removal

Neng Nhia Yi Ly v. Heu,
294 F. Supp. 2d 1062 (D. Minn. 2003)
Article 12 Well-Settled Affirmative Defense

Rydder v. Rydder,
49 F. 3d 369 (8th Cir. 1995)
Affirmative Defenses of Articles 12, 13 and 20 Generally
Habitual Residence

Silverman v. Silverman,
338 F.3d 886 (8th Cir. 2003)
Article 12 Well-Settled Affirmative Defense
Article 16 Stay of Pending State Court Action
Habitual Residence

Slagenweit v. Slagenweit,
841 F. Supp. 264 (N.D. Iowa 1993)
When Removal/Retention Became Wrongful

Sorenson v. Sorenson,
559 F.3d 871 (8th Cir. 2009)
Habitual Residence

NINTH CIRCUIT

Asvesta v. Petroutsas,
580 F.3d 1000 (9th Cir. 2009)
Article 13 Consent/Acquiescence Affirmative Defense
Invalid Best Interests Defense

Duarte v. Bardales,
526 F.3d 563 (9th Cir. 2008)
Petition Filed Within One Year

Etienne v. Zuniga,
No. C10-5061BHS, 2010 WL 2262341 (W.D. Wash. June 2, 2010)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
When Removal/Retention Became Wrongful

Gaudin v. Remis,
415 F.3d 1028 (9th Cir. 2005)
Article 13 Grave Risk Affirmative Defense

Gonzalez v. Gutierrez,
311 F.3d 942 (9th Cir. 2002)
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

Gonzalez-Caballero v. Mena,
251 F.3d 789 (9th Cir. 2001)
Article 13 Consent/Acquiescence Affirmative Defense

Holder v. Holder,
No. C001927C, 2003 WL 24091906 (W.D. Wash. June 13, 2003)
Evidentiary Issues in Hague Cases

Holder v. Holder,
305 F.3d 854 (9th Cir. 2002)
Article 16 Stay of Pending State Court Action

In re B. Del C.S.B.,
559 F.3d 999 (9th Cir. 2009)
Article 12 Well-Settled Affirmative Defense

In re Tsarbopoulos,
243 F.3d 550 (Table), No. 00-35393, 2000 WL 1721800 (9th Cir. Nov. 17, 2000)
Article 13 Grave Risk Affirmative Defense

Jimenez v. Lozano,
No. C05-5736FDB, 2007 WL 527499 (W.D. Wash. Feb. 14, 2007)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal

Krishna v. Krishna,
No. C 97-0021 SC, 1997 WL 195439 (N.D. Cal. Apr. 11, 1997)
Article 13 Grave Risk Affirmative Defense

Man v. Cummings,
No. CV 08-15-PA, 2008 WL 803005 (D. Or. Mar. 21, 2008)
Article 13 Mature Children Affimative Defense

Mozes v. Mozes,
239 F.3d 1067 (9th Cir. 2001)
Habitual Residence

Nelson v. Petterle,
782 F. Supp. 2d 1081 (E.D. Cal. 2011)
Removal/Retention Breached Custody Rights

Paillier v. Pence,
50 Cal. Rptr. 3d 459 (Cal. Ct. App. 2006)
Rights of Access

Papakosmas v. Papakosmas,
483 F.3d 617 (9th Cir. 2007)
Habitual Residence

Riley v. Gooch,
No. 09-1019-PA, 2010 WL 373993 (D. Or. Jan. 29, 2010)
Article 12 Well-Settled Affirmative Defense
When Removal/Retention Became Wrongful

Roux v. Roux,
319 F. App'x 569 (9th Cir. 2009)
Exercising Custody Rights at Removal

Semitool, Inc. v. Tokyo Electron Am., Inc.,
208 F.R.D. 273 (N.D. Cal. 2002)
Discovery in Hague Cases

Steffen F. v. Severina P.,
966 F. Supp. 922 (D. Ariz. 1997)
Affirmative Defenses of Articles 12, 13 and 20 Generally

Stirzaker v. Beltran,
No. CV09-667-N-EJL, 2010 WL 1418388 (D. Idaho Apr. 6, 2010)
Article 13 Consent/Acquiescence Affirmative Defense
Exercising Custody Rights at Removal

Sullivan v. Sullivan,
No. CV-09-545-S-BLW, 2010 WL 227924 (D. Idaho Jan. 13, 2010)
Article 13 Grave Risk Affirmative Defense

Von Kennel Gaudin v. Remis,
282 F.3d 1178 (9th Cir. 2002)
Article 16 – No Consideration of Merits of Underlying Custody Dispute

TENTH CIRCUIT

DeSilva v. Pitts,
481 F.3d 1279 (10th Cir. 2007)
Article 13 Mature Children Affimative Defense

In re Marriage of Jeffers,
992 P.2d 686 (Colo. Ct. App. 1999)
Affirmative Defenses of Articles 12, 13 and 20 Generally

In re Robinson,
983 F. Supp. 1339 (D. Colo. 1997)
Article 12 Well-Settled Affirmative Defense
Article 13 Mature Children Affimative Defense

Kanth v. Kanth,
232 F.3d 901 (Table), 2000 WL 1644099 (10th Cir. Nov. 2, 2000)
Habitual Residence

Levesque v. Levesque,
816 F. Supp. 662 (D. Kan. 1993)
Exercising Custody Rights at Removal

Lieberman v. Tabachnik,
625 F. Supp. 2d 1109 (D. Colo. 2008)
Exercising Custody Rights at Removal

Navani v. Shahani,
496 F.3d 1121 (10th Cir. 2007)
Return Moots Appeal

Pod-Ners LLC v. N. Feed & Bean of Lucerne LLC,
204 F.R.D. 675 (D. Colo. 2002)
Discovery in Hague Cases

Robinson v. Robinson,
983 F. Supp. 1339 (D. Colo. 1997)
Article 13 Mature Children Affimative Defense

ELEVENTH CIRCUIT

Baran v. Beaty,
479 F. Supp. 2d 1257 (S.D. Ala. 2007),

aff'd, 526 F.3d 1340 (11th Cir. 2008)
Article 13 Consent/Acquiescence Affirmative Defense

Baran v. Beaty,
526 F.3d 1340 (11th Cir. 2008)
Article 13 Grave Risk Affirmative Defense

Bekier v. Bekier,
248 F.3d 1051 (11th Cir. 2001)
Evidentiary Issues in Hague Cases
Return Moots Appeal

Bocquet v. Ouzid,
225 F. Supp. 2d 1337 (S.D. Fla. 2002)
Article 12 Well-Settled Affirmative Defense
Article 13 Consent/Acquiescence Affirmative Defense
Exercising Custody Rights at Removal
Tolling the One-Year Period

Cabrera v. Lozano (*In re Cabrera*),
323 F. Supp. 2d 1303 (S.D. Fla. 2004)
Article 12 Well-Settled Affirmative Defense
Tolling the One-Year Period
When Removal/Retention Became Wrongful

Casimiro v. Chavez,
No. Civ. A. 1:06CV1889-ODE, 2006 WL 2938713 (N.D. Ga. Oct. 13, 2006)
Article 13 Mature Children Affirmative Defense
Guardian *Ad Litem* Issues

Chechel v. Brignol,
No. 5:10-CV-164-OC-10GRJ, 2010 WL 2510391 (M.D. Fla. June 21, 2010)
When Removal/Retention Became Wrongful

Ellis v. Gen. Motors Acceptance Corp.,
160 F.3d 703 (11th Cir. 1998)
Tolling the One-Year Period

Fimab-Finanziaria Maglificio Biellese Fratelli Fila S.p.A. v. Helio Import/Export, Inc.,
601 F. Supp. 1 (S.D. Fla. 1983)
Discovery in Hague Cases

Furnes v. Reeves,
362 F.3d 702 (11th Cir. 2004)
Exercising Custody Rights at Removal
Prima-Facie Case
Removal/Retention Breached Custody Rights
Tolling the One-Year Period

Ga. Gazette Publ'g Co. v. U.S. Dep't of Def.,
562 F. Supp. 1000 (S.D. Ga. 1983)
Discovery in Hague Cases

Garcia-Mir v. Meese,
781 F.2d 1450 (11th Cir. 1986)
Article 16 Stay of Pending State Court Action

Giampaolo v. Erneta,
390 F. Supp. 2d 1269 (N.D. Ga. 2004)
Article 12 Well-Settled Affirmative Defense
Article 13 Consent/Acquiescence Affirmative Defense
Article 13 Mature Children Affimative Defense
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights
Tolling the One-Year Period

Gil v. Rodriguez,
184 F. Supp. 2d 1221 (M.D. Fla. 2002)
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

Hanley v. Roy,
485 F.3d 641 (11th Cir. 2007)
Exercising Custody Rights at Removal

In re D.D.,
440 F. Supp. 2d 1283 (M.D. Fla. 2006)
Article 13 Grave Risk Affirmative Defense

Lalo v. Malca,
318 F. Supp. 2d 1152 (S.D. Fla. 2004)
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

Leslie v. Noble (*In re Leslie*),
377 F. Supp. 2d 1232 (S.D. Fla. 2005)
Exercising Custody Rights at Removal

Lops v. Lops,
140 F.3d 927 (11th Cir. 1998)
Article 12 Well-Settled Affirmative Defense
Article 16 – No Consideration of Merits of Underlying Custody Dispute
Tolling the One-Year Period

Mendez Lynch v. Mendez Lynch,
220 F. Supp. 2d 1347 (M.D. Fla. 2002)
Article 12 Well-Settled Affirmative Defense
Article 13 Consent/Acquiescence Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights
Tolling the One-Year Period

Mikovic v. Mikovic,
541 F. Supp. 2d 1264 (M.D. Fla. 2007)
Habitual Residence

Moreno v. Martin,
No. 08-22432-CIV, 2008 WL 4716958 (S.D. Fla. Oct. 23, 2008)
Article 12 Well-Settled Affirmative Defense
Article 13 Consent/Acquiescence Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Exercising Custody Rights at Removal

Olesen-Frayne v. Olesen,
No. 2:09-cv-49-FTM-29DNF, 2009 WL 1184686 (M.D. Fla. May 1, 2009)
Exercising Custody Rights at Removal
Return Moots Appeal

Robles Antonio v. Barrios Bello ("*Robles I*"),
No. Civ. A.1:04-CV-1555-T, 2004 WL 1895125 (N.D. Ga. June 2, 2004)
Obtaining Emergency Custody
Procedural Steps in Hague Cases Generally
Temporary Restraining Orders/Preliminary Injunction

Robles Antonio v. Barrios Bello ("*Robles II*"),
No. Civ. A.1:04-CV-1555-T, 2004 WL 1895124 (N.D. Ga. June 4, 2004)
Procedural Steps in Hague Cases Generally

Robles Antonio v. Barrios Bello ("*Robles III*"),
No. Civ. A.1:04-CV-1555-T, 2004 WL 1895126 (N.D. Ga. June 7, 2004)
Procedural Steps in Hague Cases Generally

Robles Antonio v. Barrios Bello ("*Robles IV*"),
No. Civ. A.1:04-CV-1555-T, 2004 WL 1895127 (N.D. Ga. June 7, 2004)
Procedural Steps in Hague Cases Generally

Robles Antonio v. Barrios Bello ("*Robles V*"),
No. 04-12794-GG, 2004 WL 1895123 (11th Cir. June 10, 2004)
Procedural Steps in Hague Cases Generally
Stay of Trial Court's Order Returning the Children
Stay Pending Appeal

Ruiz v. Tenorio,
392 F.3d 1247 (11th Cir. 2004)
Article 16 Stay of Pending State Court Action
Habitual Residence

Seaman v. Peterson,
762 F. Supp. 2d 1363 (M.D. Ga. 2011)
Article 13 Grave Risk Affirmative Defense

D.C. CIRCUIT

Ellsworth Assoc., Inc. v. United States,
917 F. Supp. 841 (D.D.C. 1996)
Discovery in Hague Cases

Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.,
559 F.2d 841, 843-44 (D.C. Cir. 1977)
Stay of Trial Court's Order Returning the Children

INTERNATIONAL CASES

In re Bates, No. CA 122-89, High Court of Justice, Fam. Div'n, Ct. Royal of Justice, United Kingdom (1989)
Signatory Countries

Re G (A Minor) (Enforcement of Access Abroad), [1993] All E.R. 657
Rights of Access

EXHIBIT B—HAGUE CONVENTION

HAGUE 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 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 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.

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 accompanied 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.

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 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 VI - 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 fulfillment 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.

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.

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 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;

(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.

EXHIBIT C—SIGNATORY COUNTRIES TO HAGUE CONVENTION*

(See: http://travel.state.gov/abduction/resources/congressreport/congressreport_1487.html)

Convention Partners* – The dates of entry into force with the United States:	
Argentina	06/01/91
Australia	07/01/88
Austria	10/01/88
Bahamas, The	01/01/94
Belgium	05/01/99
Belize	11/01/89
Bosnia and Herzegovina	12/01/91
Brazil	12/01/03
Bulgaria	01/01/05
Burkina Faso	11/01/92
Canada	07/01/88
Chile	07/01/94
China – *(Hong Kong and Macau only)*	
• **Hong Kong** • **Macau**	09/01/97 03/01/99
Colombia	06/01/96
Costa Rica	01/01/08
Croatia	12/01/91
Cyprus	03/01/95
Czech Republic	03/01/98
Denmark	07/01/91
Dominican Republic	06/01/07
Ecuador	04/01/92
El Salvador	06/01/07
Estonia	05/01/07
Finland	08/01/94
France	07/01/88
Germany	12/01/90
Greece	06/01/93
Guatemala	01/01/08
Honduras	06/01/94
Hungary	07/01/88

* List of countries as of June 2, 2011.

Convention Partners* – The dates of entry into force with the United States:	
Iceland	12/01/96
Ireland	10/01/91
Israel	12/01/91
Italy	05/01/95
Latvia	05/01/07
Lithuania	05/01/07
Luxembourg	07/01/88
Macedonia, Republic of	12/01/91
Malta	02/01/03
Mauritius	10/01/93
Mexico	10/01/91
Monaco	06/01/93
Montenegro	12/01/91
Netherlands	09/01/90
New Zealand	10/01/91
Norway	04/01/89
Panama	06/01/94
Paraguay	01/01/08
Peru	06/01/07
Poland	11/01/92
Portugal	07/01/98
Romania	06/01/93
Saint Kitts and Nevis	06/01/95
San Marino	01/01/08
Serbia	12/01/91
Slovakia	02/01/01
Slovenia	04/01/95
South Africa	11/01/97
Spain	07/01/88
Sri Lanka	01/01/08
Sweden	06/01/89
Switzerland	07/01/88
Turkey	08/01/00

* List of countries as of June 2, 2011.

Convention Partners* – The dates of entry into force with the United States:	
Ukraine	09/01/07
United Kingdom	07/01/88
• **Bermuda**	03/01/99
• **Cayman Islands**	08/01/88
• **Falkland Islands**	06/01/98
• **Isle of Man**	09/01/91
• **Montserrat**	03/01/99
Uruguay	09/01/04
Venezuela	01/01/97
Zimbabwe	08/01/95

* List of countries as of June 2, 2011.

EXHIBIT D—INTERNATIONAL CHILD ABDUCTION REMEDIES ACT

42 U.S.C. § 11601. 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 chapter 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.

42 U.S.C. § 11602. 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 this title;

(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 11606(a) of this title.

42 U.S.C. § 11603. 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.

42 U.S.C. § 11604. 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 11603(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 11603(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.

42 U.S.C. § 11605. Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 11603 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.

42 U.S.C. § 11606. 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.

42 U.S.C. § 11607. 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 11603 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 11603 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.

42 U.S.C. § 11608. 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.

42 U.S.C. § 11608a. 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.

42 U.S.C. § 11609. 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.

42 U.S.C. § 11610. 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.

42 U.S.C. § 11611. Report on compliance with the Hague Convention on International Child Abduction

(a) In general

Beginning 6 months after October 21, 1998 and every 12 months thereafter, the Secretary of State shall submit a report to the appropriate congressional committees on the compliance with the provisions of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, by the signatory countries of the Convention. Each such report shall include the following information:

(1) The number of applications for the return of children submitted by applicants in the United States to the Central Authority for the United States that remain unresolved more than 18 months after the date of filing.

(2) A list of the countries to which children in unresolved applications described in paragraph (1) are alleged to have been abducted, are being wrongfully retained in violation of United States court orders, or which have failed to comply with any of their obligations under such convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States.

(3) A list of the countries that have demonstrated a pattern of noncompliance with the obligations of the Convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States to the Central Authority for the United States.

(4) Detailed information on each unresolved case described in paragraph (1) and on actions taken by the Department of State to resolve each such case, including the specific actions taken by the United States chief of mission in the country to which the child is alleged to have been abducted.

(5) Information on efforts by the Department of State to encourage other countries to become signatories of the Convention.

(6) A list of the countries that are parties to the Convention in which, during the reporting period, parents who have been left-behind in the United States have not been able to secure prompt enforcement of a final return or access order under a Hague proceeding, of a United States custody, access, or visitation order, or of an access or

visitation order by authorities in the country concerned, due to the absence of a prompt and effective method for enforcement of civil court orders, the absence of a doctrine of comity, or other factors.

(7) A description of the efforts of the Secretary of State to encourage the parties to the Convention to facilitate the work of nongovernmental organizations within their countries that assist parents seeking the return of children under the Convention.

(b) Definition

In this section, the term "Central Authority for the United States" has the meaning given the term in Article 6 of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

EXHIBIT E—PUBLIC NOTICE 957

DEPARTMENT OF STATE
[Public Notice 957]
51 Fed. Reg. 10494, 1986 WL 133056
March 26, 1986

Hague International Child Abduction Convention; Text and Legal Analysis

***10494** 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 Services, 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

***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.)

Table of Contents

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:

I. Children Protected by the Convention

(Preamble, Article 1)

A. Age (Articles 4, 36, 18, 29, 34, 13)

B. Residence (Article 4)

C. Timing/cases covered (Article 35)

D. Effect of custody order concerning the child

1. Existing custody orders (Articles 17, 3)

2. Pre-decree removals or retentions (Article 3)

II. Conduct Actionable Under the Convention

A. International "child abduction" not criminal: Hague Convention distinguished from extradition treaties (Article 12)

B. "Wrongful removal or retention" (Articles 1, 3, 5(a))

1. Holders of rights protected by the Convention (i.e., with respect to whom the removal or retention is wrongful)

(a) "Person, institution or other body" (Article 3(a), (b))

(b) "Jointly or alone" (Article 3(a), (b))

2. Defined

(a) Breach of "custody rights" (Articles 3(a), 5(a))

(b) "Custody rights" determined by law of child's habitual residence (Articles 3(a), 31, 32, 33)

(c) Sources of "Custody rights" (Article 3, last paragraph)

i. Operation of law (Articles 3, 15)

ii. Judicial or administrative decision (Article 3)

iii. Agreement having legal effect (Article 3)

(d) "Actually exercised" (Articles 3(b), 5, 8(c), 13)

III Judicial Proceedings for Return of the Child

A. Right to seek return (Articles 29, 12, 34, 8)

B. Legal advice and costs (Articles 25, 26, 42)

C. Pleading requirements (Articles 8, 24)

D. Admissibility of evidence (Articles 30, 23)

E. Judicial promptitude/status report (Article 11)

F. Judicial notice (Article 14)

G. Court determination of "wrongfulness" (Articles 15, 3, 11, 12, 14)

H. Constraints upon courts in requested states in making substantive custody decisions (Article 16)

I. Duty to return not absolute

1. Temporal qualifications

(a) Article 4

(b) Article 35

(c) Article 12

2. Article 13 limitations on return obligation

(a) Legislative history (Articles 13, 20)

(b) Non-exercise of custody rights (Articles 13(a), 3(b))

(c) Grave risk of harm/intolerable situation (Article 13(b))

(d) Child's preference (Article 13)

(e) Role of social studies

3. Article 20

4. Custody order no defense to return (Article 17)

J. Return of the child (Article 12)

1. Return order not on custody merits (Article 19)

2. Costs, fees and expenses shifted to abductor (Article 26)

IV. Central Authority

(Articles 1, 10, 21)

A. Establishment of Central Authority (Article 6)

B. Duties (Article 7)

C. Other Tasks (Articles 8, 9, 10, 11, 15, 21, 26, 27, 28)

1. Processing applications (Articles 8, 9, 27, 28)

2. Assistance in connection with judicial proceedings

(a) Request for status report (Article 11)

(b) Social studies/background reports (Article 13)

(c) Determination of "wrongfulness" (Article 15)

(d) Costs (Article 26), reservation (Articles 42, 22)

V. Access Rights--Article 21

A. Remedies for breach (Articles 21, 12)

B. Defined (Article 5(b))

C. Procedure for obtaining relief (Articles 21, 8, 7)

D. Alternative remedies (Articles 18, 29, 34)

VI. Miscellaneous and Final Clauses

A. Article 36

B. Articles 37 and 38

C. Articles 42, 43 and 44

D. Articles 39 and 40

E. Article 41

F. Article 45

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, Post-box 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.

12. 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 Enforcement 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 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 occurring 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 of 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 returning 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 focussed 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 Sasketchewan.

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*

FN*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

Annex B.--Bibliography

Explanatory Report by E. Perez-Vera, Hague Conference on Private International Law, Actes et documents de la Quatorzieme session, vol. III, 1980, p. 426.

Anton, A.E.--The Hague Convention on International Child Abduction; 30 Int'l & Comp. L.Q. (1981), p. 537.

Bodenheimer, B.--The Hague Convention on International Child Abduction; XIV Fam. L.Q. (1980), p. 99.

Chatin, L.--Les conflicts relatifs a la garde des enfants et au droit de visite en droit international prive; Travaux du Comite francais de droit international prive, Seance du 12 mai 1982, Publication du Ministere de la Justice.

Crouch, R.E.--Effective Measures Against International Child Snatching; 131 New L.J. (1981), p. 592.

Deschenaux, D.--La Convention de La Haye sur les aspects civils de l'enlevement international d'enfants, du 25 octobre 1980; XXXVII Schweizerisches Jahrbuch fur internationales Recht (1981), p. 119.

Dyer, A.--International child abduction by parents; 168 Recueil des Cours de l'Academie de droit international de La Haye (1980), p. 231.

Eekelaar, J.M.--The Hague Convention on the Civil Aspects of International Child Abduction; Explanatory Documentation prepared for Commonwealth Jurisdictions, Commonwealth Secretariat, 1981.

Farquhar, K.B.--The Hague Convention on International Child Abduction Comes to Canada; 4 Can. J. Fam. L. (1983), p. 5.

Frank, R.J.--American and International Responses to International Child Abductions, 16 N.Y.U. J. Int'l L. & Pol. (Winter 1984), p. 415.

Hoff, P., Schulman, J. and Volenik, A.--Interstate Child Custody Disputes and Parental Kidnapping: Policy, Practice and Law. Legal Services Corporation-- American Bar Association, 1982.

Huesstege, R.--Internationale Kindesentfuehrungen und ***10516** Landesverfassungsrecht; IPRax (1982), p. 95--Der Uniform Child Custody Jurisdiction Act--Rechtsvergleichende Betrachtungen zu Internationalen Kindesentfuehrengen, Verlag fur Standesamtswesen, Frankfurt am Main, 1982.

Morgenstern, B.R.--The Hague Convention on the Civil Aspects of International Child Abduction: The Need for Ratification; 10 N.C.J. Int'l L. & Com. Reg. (1985), p. 463.

Reymond, P.H.--Convention de La Haye et Convention de Strasbourg. Aspects comparatifs des conventions concernant l'enlevement d'un enfant par l'un de ses parents; Revue de droit suisse 1981, p. 329.

Schulman, J.--cf. Hoff, P.

Vink, E.L.M.--Enkele civielrechtelijke aspecten van de internationale ontvoeringen van kinderen door een van de ouders; Leiden, mai 1981.

Volenik, A.--cf. Hoff, P.

Westbrook, G.R.--Law and Treaty Responses to International Child Abductions; 20 Va. J. Int'l L. (1980), p. 669.

[FR Doc. 86-6495 Filed 3-25-86; 8:45 am]

51 FR 10494-01, 1986 WL 133056 (F.R.)

EXHIBIT F—PEREZ-VERA REPORT

(See: http://www.hcch.net/upload/expl28.pdf)

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

---

[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.

of a Drafting Committee which drafted the text 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 *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 fulfill 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 fulfill 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.

---

[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 (Proces-verbal No 12).

[6] The 'Model Forms' Subcommittee, under the chairmanship of Professor Muller-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 Hetu (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.

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 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 *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

---

[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.

[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.

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.

12 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 whether or not a decision on custody exists in no way alters the sociological realities of the problem.

13 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 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 out with 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.

---

[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.

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 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 ignore 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'.

---

[12] Dyer Report, *supra*, pp. 22-23.

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]

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*

---

[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.

[14] Dyer Report, *supra*, p. 21.

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 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 l*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 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

---

[15] See P.-v. No 9 and associated Working Documents.

[16] The text was adopted with 14 votes in favor, 6 against and 4 abstentions, see P. -v. No 13.

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 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 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 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

[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.

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 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 coordinate 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,

---

[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.

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, 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

[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.*

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 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

[21] *Cf infra*, the commentary on article 12 of the Convention.

Convention's provisions will result in 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.

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', '*enlevement*' 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 1 - 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 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 I — 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 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 l*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 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

[23] *Cf.* Working Document No 2 (Proposal of the United Kingdom delegation) and P.-v. No 2.

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 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 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

---

[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.

[26] *Cf.* Working Document No 2 (Proposal of the United Kingdom delegation), and P.-v. No 2.

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 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

[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.

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 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.

---

[28] See Working Document No 58, '*Document de clarification presente par la delegation italienne,'* for the desirability of including such a case in the Convention.

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 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

[29] Working Documents Nos 1 (Proposal of the United States delegation) and 10 (Proposal of the Finnish delegation), and also P.-v. No 3.

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 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

---

[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.

[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 I)*; 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).

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.

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.

---

[32] *Cf.* Working Document No 4 (Proposition de la delegation beige) and P.-v. No 4.

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 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

---

[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*.

[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*.

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 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

---

[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.

[39] See *supra*, Nos 43 to 48.

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 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.

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

[40] See Working Document No 9 (Proposal of the United Kingdom delegation) and P.-v. No 5.

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.

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 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 2d.

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 authorities 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 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 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

---

[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.

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 Convention 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.

---

[43] See *supra*, Nos 28 to 35.

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 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

[44] See Working Documents Nos 12 (Proposal of the United States delegation) and 42 (*Proposition de la delegation hellenique*), and also P.-v. No 8.

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 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

[45] See Report of the Special Commission, Nos 102-103.

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 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 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.

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

---

[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.

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.

Of all the specific ways of securing the exercise 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

[48] See Working Document No 31 (Proposal of the Danish delegation) and P.-v. No 13.

[49] See Report of the Special Commission. No 110.

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 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

[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.

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.

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

---

[51] A somewhat different approach is found in article 7 of the *Convention on International Access to Justice*, referred to *supra*.

[52] See, in similar vein, articles I and 2 of the *Convention on International Access to Justice*, referred to *supra*.

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.

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

[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 delegation beige*) and Nos 57 and 67 (Proposals of the Canadian, Netherlands and United States delegations) and also P.-v. Nos 11 and 14.

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]

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.

---

[55] See article 26 of the preliminary draft Convention, Working Document No 49 (Proposal of the United States delegation) and P.-v. No 11.

[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*.

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 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.

---

[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.

[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.

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]

CHAPTER VI- FINAL CLAUSES

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).

---

[60] See, for example, the *Convention of 1 March 1954 on civil procedure.*

[61] See Working Documents Nos 70 (*Proposition des delegations beige, francaise et luxembourgeoise*) and 80 (Proposal of the United States delegation) as well as P.-v. Nos 16 and 18.

[62] See *supra*, No 42.

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 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 Perez-Vera

EXHIBIT G—Robles Antonio v. Barrios Bello Orders

2004 WL 1895125 (N.D.Ga.)

United States District Court,
N.D. Georgia, Atlanta Division.
Isaac ROBLES ANTONIO, Plaintiff/Petitioner,
v.
Josefina BARRIOS BELLO, Defendant/Respondent.
No. Civ.A.1:04-CV-1555-T.

June 2, 2004.

James F. Bogan III, for Plaintiff/Petitioner.

AMENDED ORDER GRANTING *EX PARTE* TRO AND EMERGENCY EQUITABLE RELIEF
THRASH, J.

***1** Plaintiff/Petitioner Isaac Robles Antonio ("Petitioner"), having filed his "*EX PARTE* MOTION UNDER THE HAGUE CONVENTION FOR ENTRY OF A TRO, APPLICATION FOR WARRANT SEEKING PHYSICAL CUSTODY OF CHILD, AND SCHEDULING OF AN EXPEDITED HEARING" ("Motion"), and the Court having conducted a hearing on the Motion on Tuesday, June 1, 2004, and after considering the arguments of Petitioner's counsel and the entire record, and pursuant to Federal Rule of Civil Procedure 65, the Court hereby GRANTS the Motion, ruling as follows:

(1) This Court finds that *ex parte* emergency relief is necessary to prevent irreparable injury. Specifically, the evidence of record shows that on November 29, 2003, Defendant/Respondent Josefina Barrios Bello ("Respondent"), who is currently married to Petitioner, wrongfully removed their seven-year-old daughter, Itzel Ameyalli Robles Barrios, without Petitioner's acquiescence or consent, from their familial home in Mexico and smuggled the child into the United States. Given that Respondent has already abducted the child and herself faces the risk of apprehension here, there exists a clear risk that Respondent will further secret the child and herself, in violation of the Hague Convention, and not appear before this Court to resolve the claim presented by Petitioner. Accordingly, and pursuant to Federal Rule of Civil Procedure 65(b), the Court finds it necessary to grant this Order without notice.

(2) Respondent is hereby prohibited from removing Petitioner's daughter, Itzel Ameyalli Robles Barrios, from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and no person acting in concert or participating with Respondent (including, without limitation, Respondent's brother, Santiago Barrios Bello, and her boyfriend, Cesar Guillermo Erasto Partida) shall take any action to remove the child from the jurisdiction of this Court pending a determination on the merits of this Petition.

(3) A preliminary injunction hearing on the merits of the Verified Complaint is hereby scheduled to be held on Friday, June 4, 2004, at 9 a.m. in Courtroom 2108 of this United States District Court, 75 Spring Street, Atlanta, Georgia 30303.

(4) Respondent is hereby directed to show cause at the hearing scheduled in paragraph (3) above why the child should not be returned to Mexico, accompanied by Petitioner, where an appropriate custody determination can be made under Mexican law, and why the other relief requested in the Verified Complaint should not be granted.

(5) The Court hereby orders that the trial of this action on the merits be advanced and consolidated with the preliminary injunction hearing scheduled in paragraph (3) above.

(6) The Court hereby orders the United States Marshals Service to take physical custody of the child, 7-year old Itzel Ameyalli Robles Barrios, and bring the child to a United States Magistrate Judge. The United States Marshals Service shall notify Petitioner's counsel of the date and time that Itzel Ameyalli Robles Barrios will be brought

before a Magistrate Judge, and Petitioner is hereby ordered to appear before the Magistrate Judge at that date and time. The Magistrate Judge shall thereupon arrange for the child to be placed in Petitioner's temporary physical custody and otherwise set conditions consistent with this. Order to guarantee that both Petitioner and the child will attend the preliminary injunction hearing scheduled in this case.

***2** (7) Pending the hearing, Petitioner's daughter will be placed and remain in his temporary custody. Petitioner is hereby ordered to bring the child and himself to the preliminary injunction hearing scheduled in this case.

(8) The United States Marshals Service is further directed to serve Respondent with this Order, as well as the pleadings filed by Petitioner in this case.

(9) To execute this Order, the United States Marshals Service may enlist the assistance of other law enforcement authorities, including the local police.

(10) The "Order Granting *Ex Parte* TRO and Emergency Equitable Relief" entered by this Court at 11 a.m. on June 1, 2004 is hereby superseded by this Amended Order.

SO ORDERED.

Not Reported in F.Supp.2d, 2004 WL 1895125 (N.D.Ga.)

END OF DOCUMENT

2004 WL 1895124 (N.D.Ga.)

United States District Court,
N.D. Georgia, Atlanta Division.
Issac ROBLES ANTONIO, Plaintiff/Petitioner,
v.
Josefina BARRIOS BELLO, Defendant/Respondent.
No. CIV.A.1:04-CV-1555-TWT.
June 4, 2004.

James Francis Bogan, III, Richard Allen Horder, Kilpatrick Stockton, Atlanta, GA, for Plaintiff.
Thomas Edward Vanderbloemen, King & Spalding, Atlanta, GA, for Defendant.

ORDER

SCOFIELD, Magistrate J.

***1** The above matter came before the undersigned pursuant to District Judge Thrash's order entered June 2, 2004, granting an ex parte temporary restraining order and emergency equitable relief. In Judge Thrash's order, the matter was referred to the undersigned to arrange for the minor child, Itzell Ameyalli Robles Barrios, to be placed in the temporary custody of the Petitioner herein. This Court was directed to impose any necessary conditions to ensure that both Petitioner and the child would attend the preliminary injunction hearing scheduled in this case for June 4, 2004, at 9:00 a.m. before Judge Thrash.

At the hearing before this Court, the Petitioner appeared with counsel, and the undersigned appointed attorney Vionette Reyes as guardian ad litem for the minor child Itzell. As conditions for the release of the child to Petitioner, the Court required the Petitioner to surrender his passport and ordered that the minor child be made available for private interview with attorney Reyes tomorrow, at the office of Petitioner's counsel or at such other location as may be mutually agreed upon. Petitioner was again ordered to appear with the minor child Itzell on Friday, June 4, 2004, before Judge Thrash, under pain of prosecution for contempt of this Court's order and the previous order of the district judge should he not appear as ordered. Upon the agreement of Petitioner to comply with these conditions, this Court ordered the minor Itzell released to the temporary custody of Petitioner pending the Friday hearing.

It is SO ORDERED.

Not Reported in F.Supp.2d, 2004 WL 1895124 (N.D.Ga.)

END OF DOCUMENT

2004 WL 1895126 (N.D.Ga.)

United States District Court,
N.D. Georgia, Atlanta Division.
Isaac ROBLES ANTONIO, Plaintiff/Petitioner,
v.
Josefina BARRIOS BELLO, Defendant/Respondent.
No. Civ.A.1:04-CV-1555-T.

June 7, 2004.

James Francis Bogan, III, Richard Allen Horder, Kilpatrick Stockton, Atlanta, GA, for Plaintiff.

Thomas Edward Vanderbloemen, King & Spalding, Atlanta, GA, for Defendant.

ORDER GRANTING RELIEF UNDER THE HAGUE CONVENTION AND THE INTERNATIONAL CHILD ABDUCTION REMEDIES ACT

THRASH, J.

***1** On May 28, 2004, Plaintiff/Petitioner Isaac Robles Antonio ("Petitioner") filed a "Verified Complaint/Petition under the Hague Convention for Return of Child to Plaintiff/Petitioner in Mexico, Including Provisional Orders, an Ex Parte Temporary Restraining Order, Application for Warrant Seeking Physical Custody and an Expedited Hearing" ("Complaint"), seeking the return of his seven-year-old daughter, Itzel Ameyalli Robles Barrios ("Itzel"), who Petitioner asserts was wrongfully removed from their familial home in Mexico by his wife, Defendant/Respondent Josefina Barrios Bello ("Respondent"). On June 4, 2004, a preliminary injunction hearing was held before the Court which was, pursuant to Federal Rule of Civil Procedure 65(a)(2), consolidated with a trial on the merits. After considering the evidence submitted at the hearing, the arguments of counsel, and the entire record, the Court hereby ORDERS as follows:

FINDINGS OF FACT

1. Itzel is the natural child of Petitioner and Respondent. Respondent is Petitioner's wife. From the time of Itzel's birth until November 29, 2003, she lived with Petitioner and Respondent at their home in Mexico.

2. On November 29, 2003, Respondent wrongfully removed Itzel from her home and habitual residence in Mexico and brought her to the United States.

3. Up until the time Respondent wrongfully removed the child from Mexico, Petitioner and Respondent had joint legal and physical custody of the child under Mexican law. This removal breached Petitioner's custody rights under Mexican law, which rights the Petitioner exercised at the time of the child's removal.

4. Respondent brought both herself and Itzel to this country illegally.

5. Petitioner has filed for divorce in Mexico, seeking custody of Itzel. The Court finds that the court in Mexico should determine whether Petitioner or Respondent should have custody of Itzel and does not by this order make a custody determination.

6. The Court appointed a guardian ad litem for Itzel, Vionnette Reyes, who made a report and recommendation to the Court at the hearing. The guardian ad litem interviewed the child, Petitioner and Respondent. According to the guardian ad litem, there is no evidence that the Petitioner ever abused Itzel. The guardian ad litem further recommended that the child should be returned to Mexico for an appropriate custody determination by the Mexican court, especially given that the child is in this country illegally. The guardian ad litem further stated that, in her opinion and based on her investigation, Itzel was in no physical or psychological danger while in the custody of her father (Petitioner).

7. While Respondent testified at the hearing that Petitioner had physically abused her during the marriage, she made no claim and submitted no evidence that Petitioner had ever harmed Itzel.

8. Respondent did not prove that any of the exceptions provided in the Hague Convention applies in this case.

CONCLUSIONS OF LAW

***2** 1. "A petitioner establishes a prima facie case of wrongful removal by demonstrating by a preponderance of the evidence that: 1) the habitual residence of the child immediately before the date of the alleged wrongful removal was in the foreign country; 2) the removal breached the petitioner's custody rights under the foreign country's law; and 3) the petitioner exercised custody of the child at the time of her alleged removal." *Gil v. Rodriguez*, 184 F.Supp.2d 1221, 1224 (M.D.Fla.2002) (citations omitted).

2. "A respondent may avoid returning the child to petitioner if respondent can demonstrate by clear and convincing evidence that: 1) return would 'expose the child to physical or psychological harm or otherwise place the child in an intolerable situation' or; 2) if the child objects to return and is of sufficient age and maturity to do so; or 3) if return would not be permitted by fundamental American principles concerning the protection of human rights and freedoms. Furthermore, to avoid return, a respondent may demonstrate by a preponderance of the evidence that: 1) more than one year has elapsed since the child's removal and the child is settled in her new environment or; 2) the petitioner does not really have custody rights; or 3) petitioner has consented or acquiesced to the removal." *Id.* (citations omitted).

3. Petitioner has met his burden by establishing that: 1) Itzel habitually resided in Mexico prior to her removal on November 29, 2003; 2) by removing Itzel, Respondent breached Petitioner's custodial rights under Mexican law; and 3) Petitioner possessed custodial rights at the time of Itzel's removal.

4. Respondent has not proved that any of the exceptions to the Hague Convention apply.

5. Accordingly, the Court hereby orders that Itzel must be returned to Mexico by her father pending a custody determination by the courts of Mexico.

This Order and the Court's verbal order of June 4, 2004, are stayed pursuant to the order of the United States Court of Appeals for the Eleventh Circuit until further order of that Court.

SO ORDERED.

Not Reported in F.Supp.2d, 2004 WL 1895126 (N.D.Ga.)

END OF DOCUMENT

2004 WL 1895127 (N.D.Ga.)

United States District Court,
N.D. Georgia, Atlanta Division.
Isaac ROBLES ANTONIO, Plaintiff,
v.
Josefina BARRIOS BELLO, Defendant.
No. Civ.A.1:04-CV-1555-T.

June 7, 2004.

James Francis Bogan, III, Kilpatrick Stockton, Richard Allen Horder, Kilpatrick Stockton, Atlanta, GA, for Plaintiff.

Thomas Edward Vanderbloemen, King & Spalding, Atlanta, GA, for Defendant.

ORDER

THRASH, J.

***1** This is an action under the Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610. The Petitioner seeks to have his seven-year-old daughter returned to Mexico. It is before the Court on the Respondent's Motion to Stay the Order granting the relief requested in the Petition.

The Petitioner and the Respondent are the natural parents of Itzel Ameyalli Robles Barrios. Until November 29, 2003, the child lived with her parents in their home in Mexico. On that date, while Petitioner was at work, the Respondent fled with the child. She left a note telling Petitioner not to look for them. Through relatives and others, the Petitioner learned that the Respondent had smuggled herself and the child into the United States and was living at an address on Buford Highway in Atlanta, Georgia. The Petitioner filed an action for divorce in Mexico.

This action was filed on May 28, 2004. On June 1, 2004, I held an ex parte hearing and entered an order directing the United States Marshals to take custody of the child and bring her before a Magistrate Judge. The Order also directed the United States Marshals to serve the Respondent with the Petition and notify her of a hearing on the Petition to be held on June 4, 2004, at 9:00 a.m. The Respondent was served on June 2, 2004. The child was brought before Magistrate Judge Scofield who appointed Vionnette Reyes, a Spanish-speaking attorney, as her guardian ad litem. The Magistrate Judge released the child into the custody of the Petitioner with conditions to assure their appearance at the hearing on June 4, 2004.

On June 2, 2004, I started the jury trial of *United States v. Joseph Ryan.* On the second day of trial, at 4:30 p.m., I interrupted the trial to have a conference call in this case. During the conference call, an attorney for the Respondent requested postponement of the June 4 hearing because he said he needed more time to prepare. I stated that because of my trial schedule, it would probably be a month before I could reschedule the hearing. Counsel for the Petitioner objected to postponement of the hearing under these circumstances. I then told counsel for the Respondent that the hearing would have to proceed as scheduled.

On June 4, 2004, at 9:00 a.m., I held a hearing on the merits of the Petition. The Petitioner was represented by lawyers from the law firm of Kilpatrick Stockton. The Respondent was present and represented by lawyers from the law firm of King & Spalding. The Petitioner and the Respondent testified at the hearing. She testified that he had hit her, locked her in a room and raped her. He denied that. There was no testimony that the Petitioner had ever abused or mistreated the child. I heard argument from counsel for both parties. The guardian ad litem recommended that the child be returned to Mexico with her father with the ultimate custody decision to be made by the courts in Mexico. I followed that recommendation and granted the relief requested in the Petition.

***2** The Respondent moved for an order staying the Order granting the Petition. I denied the Respondent's motion to stay for the following reasons. First, the likelihood of success on appeal is low. It is undisputed that the Respondent

smuggled herself and the child from Mexico into this country and that they were living here illegally. It is undisputed that she did that in violation of the Petitioner's custody rights under Mexican law. The Respondent was subject to arrest, detention and deportation at any time. There was no evidence in the hearing or in the report of the guardian ad litem that returning the child to the Petitioner and returning her to Mexico would result in any harm to the child. The testimony of spousal abuse was legally insufficient to establish an exception to the mandate of the Hague Convention. Under these circumstances, not granting the relief requested would have been an abuse of discretion. This is not a close case.

The Respondent may raise procedural issues on appeal. Certainly, under other circumstances, I would have given the Respondent more notice of the hearing and counsel more time to prepare, Unfortunately, this matter came up in the middle of a lengthy criminal jury trial of a detained defendant. Because of that trial and other matters, it may have been weeks before I could have rescheduled the hearing for a time when all of the parties and the guardian ad litem were available. If the hearing had to be delayed, I could not give the child back to the Respondent because of the substantial risk that she would again take the child and flee, or be arrested on immigration charges. If the Petitioner (a factory worker) was forced by economic necessity to return to Mexico, the child would have to be placed in the custody of the Georgia Department of Family and Children Services which I hope to avoid. Under these difficult circumstances, I think that I had the discretion to deny the request for a continuance in the best interest of the child.

I refused the request for a stay for the same reasons. If I had granted a stay, there is a high probability that the child would have ended up in the custody of the Georgia Department of Family and Children Services. In addition, denying the request for a stay only means that the Respondent has to go back to Mexico to adjudicate her custody rights to the child in the courts of that country. Balancing the hardships to the parties and considering the best interest of the child, it seemed to me that the request for a stay should be denied.

SO ORDERED.

Not Reported in F.Supp.2d, 2004 WL 1895127 (N.D.Ga.)

END OF DOCUMENT

2004 WL 1895123 (11th Cir.(Ga.))

United States Court of Appeals, Eleventh Circuit.
Isaac ROBLES ANTONIO, Plaintiff-Appellee,
v.
Josefina BARRIOS BELLO, Defendant-Appellant.
No. 04-12794-GG.

June 10, 2004.

On Appeal from the United States District Court for the Northern District of Georgia.

William A. Clineburg, Jr., Thomas Edward Vanderbloemen, King & Spalding, Atlanta, GA, for Appellant.

James F. Bogan, III, Kilpatrick Stockton, Atlanta, GA, for Appellee.

Before HULL, MARCUS and PRYOR, Circuit Judges.

BY THE COURT:

PER CURIAM.

***1** The Appellant, Josefina Barrios Bello, has filed with this Court an Emergency Motion for Stay Pending Appeal from a Judgment of the United States District Court for the Northern District of Georgia--entered on June 4, 2004 after an evidentiary hearing on that same day--granting the Verified Complaint/Petition Under the Hague Convention for Return of a Child (Itzel Ameyalli Robles Barrios) to Mexico, filed by Appellee, Isaac Robles Antonio. Also in her Emergency Motion, Appellant states that on June 4, 2004, the district court denied her Motion to Stay the Order granting the relief requested in the Verified Complaint/Petition. Appellant has also filed a Consolidated Motion for leave to file a supplemental brief to her Emergency Motion for Stay and leave to file a reply brief to Appellee's Response to the Emergency Motion for Stay.

On June 4, 2004, this Court entered an Order that temporarily granted Appellant's Motion for Stay and temporarily enjoined the removal of the child from the jurisdiction of the United States District Court of the Northern District of Georgia. Also in that Order, we directed the Court Reporter to transcribe, and Appellant's counsel to furnish this Court with a transcript of the June 4, 2004 hearing in the district court. We further ordered Appellant's counsel to furnish copies of any exhibits which were filed and received in evidence by the District Court at the aforementioned hearing and the Clerk of the United States District Court to file with this Court any materials filed under seal or received *in camera* by the District Court.

After thorough review of the foregoing materials, as well as careful consideration of the parties' written submissions, we now VACATE our June 4, 2004 Order and DENY Appellant's Motion for Stay Pending Appeal. We GRANT IN PART Appellant's Consolidated Motion. We grant Appellant leave to file the supplemental brief she filed with the Consolidated Motion and deny Appellant leave to file a reply to Appellee's Response.

The grant of an emergency motion to stay a district court's order is an exceptional remedy, which will be granted only upon a showing that: (1) the movant is likely to prevail on the merits on appeal; (2) absent a stay, the movant will suffer irreparable damage; (3) the non-movant will suffer no substantial harm from the issuance of the stay; and (4) the public interest will be served by issuing the stay. *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir.1986). Ordinarily, the first factor is the most important and, in order to find a likelihood of success on the merits, we must find that the district court's decision was clearly erroneous. *See id.* Absent being able to establish the first factor, a movant for emergency stay relief must establish that the three remaining factors for stay relief, the "equities," tend strongly in her favor. *See id.* at 1454; *see also Gonzalez v. Reno*, 2000 WL 381901, *1 (11th Cir. Apr.19, 2000).

***2** In his petition brought under the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 *et seq.*, [FN1] Appellee, a citizen of Mexico, alleged that Appellant, also a citizen of Mexico, had wrongfully removed their seven-year-old daughter, without his acquiescence or consent, from their family home in Mexico. Pursuant to ICARA, Appellee requested that the child be returned to Mexico for a determination of her custody there, where the parties are currently undergoing divorce proceedings.

> FN1. In 1980, Congress enacted ICARA to implement the Hague Convention on the Civil Aspects of International Child Abduction, 19 I.L.M. 1501 (1980), a treaty to which the United States and Mexico are signatories. *See* 42 U.S.C. § 11601(b)(1).

The district court conducted an evidentiary hearing on the petition at which both parties testified. The court also appointed a *guardian ad litem* who interviewed the child, Appellant, and Appellee, and made a report and recommendation to the court. Based on the parties' testimony, the recommendation of the *guardian ad litem*, [FN2] and documentary evidence, the district court found the following: (1) since her birth, the child, Itzel, has lived with both parents at their familial home in Mexico; (2) on November 29, 2003, Appellant wrongfully removed Itzel from her home and habitual residence in Mexico and brought both the child and herself to the United States illegally; (3) prior to Itzel's removal, Appellant and Appellee had joint legal and physical custody of Itzel under Mexican law; and (4) Itzel's removal breached Appellee's custody rights under Mexican law, which rights Appellee had exercised at the time of the child's removal.

> FN2. The *guardian ad litem* specifically recommended that the child be returned to Mexico for the determination of custody, especially since the child is in this country illegally. In the *guardian ad litem'* s opinion, based on her interviews with both parties and Itzel, there was no physical or psychological danger to Itzel if she was returned to Mexico in the custody of her father.

Based on these factual findings, the district court concluded a court in Mexico was the appropriate venue to determine whether Appellant or Appellee should have custody of Itzel. [FN3] Thus, the district court granted Appellee's Petition and ordered that Itzel be returned to Mexico by her father pending a custody determination by the courts of Mexico.

> FN3. The court noted that Appellant had testified at the hearing that she had been physically abused by Appellee during their marriage, but had made no claim and presented no evidence that Appellee had ever harmed Itzel. From our *de novo* review of the record, we also have found no such evidence or claim.

In reviewing a district court's order on an ICARA petition, we review a district court's findings of fact for clear error and its conclusions of law *de novo. See Lops v. Lops,* 362 F.3d 702, 710 (11th Cir.2004).[534]

The district court also denied Appellant's motion for a stay of the Order granting ICARA relief. In its order denying a stay, the court observed that "[t]here was no testimony that the Petitioner had ever abused or mistreated the child.... It is undisputed that the respondent smuggled herself and the child from Mexico into this country and they are living here illegally. It is undisputed that she did that in violation of petitioner's custody rights under Mexican law." The district court further explained that it had denied Appellant's prior request to continue the hearing and her motion for stay of the Order granting Appellee's ICARA petition based on the following considerations, *inter alia:* (1) if the hearing was postponed and Appellant given temporary custody, the court was concerned that Appellant might again flee with Itzel and leave the court's jurisdiction; (2) if Appellee had to return to Mexico prior to the re-scheduled hearing, since Appellant was subject to deportation based on her illegal status, there was the real prospect that Itzel would have to be placed in the care of Georgia Department of Family and Children Services; and (3) denial of the stay meant only that Appellant must return to Mexico to adjudicate her parental rights there. We can find no abuse of discretion in the district court's denial of a continuance based on the reasons enumerated by the district court in its Order denying appellant's Motion for a Stay. *See United States v. Bowe,* 221 F.3d 1183, 1189 (11th Cir.2000) (reviewing district court's decision on motion to continue trial for abuse of discretion; observing that district court enjoys "broad discretion" in deciding such motions).

---

[534]Note that the Court's reference to *Lops v. Lops*was apparently incorrect and should have been to *Furnes v. Reeves*, which appears at 362 F.3d 702.

***3** In denying Appellant's motion for a stay pending appeal, the district court concluded that Appellant's "likelihood of success on appeal was low." We agree. As we recently outlined in *Furnes v. Reeves*, 362 F.3d 702, 712 (11th Cir.2004), to state an ICARA violation based on the wrongful removal or retention of a child, a petitioner must show by a preponderance of the evidence that: (1) the child has been removed or retained in violation of the petitioner's rights of custody, and (2) "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." *Id.* (citation omitted). In the district court, it was undisputed that these two factors were met. Moreover, Appellant could not show that one of the recognized affirmative defenses to an ICARA violation applied. This conclusion was also based, in large part, on undisputed facts. *See id.* (outlining these defenses). On this record, we can find no error in the district court's conclusion that Appellant's likelihood of success on the merits of her appeal from the grant of Appellee's ICARA petition is "low."

Moreover, the Appellant has also failed to establish that the other three factors for stay relief (the "equities") tend strongly in her favor. *See Garcia-Mir*, 781 F.2d at 1454. Again, these factors consider whether denial of the stay will result in irreparable damage to the movant, whether grant of the stay will cause substantial harm to the non-movant, and whether the public interest will be served by issuing the stay. *See id.* at 1453. As for irreparable harm to the Appellant, the district court found that denial of the stay meant only that the Appellant, who is here illegally and is subject to deportation in any event, has to go back to Mexico to adjudicate her custody rights to the child in the courts of that country. [FN4] Moreover, on the harm to Appellee, the district court found that if a stay was entered, Appellee (a factory worker in Mexico) may be forced by economic necessity to return to work and Itzel could then be placed in state protective custody. Finally, the district court noted the public interest would not be served by placing Itzel in state protective custody. The return order also furthers the public interest in complying with this country's treaty obligations, as implemented by ICARA, and in doing so expeditiously. [FN5]

> FN4. The irreparable harm from not granting a stay is *not*, as Appellant suggests, that she will lose her child. The return order does not effect any change in custody since Appellant is free to accompany Itzel back to Mexico and assert her custody rights there. *See Furnes*, 362 F.3d at 717.
>
> FN5. One of the stated purposes of the Hague Convention is " 'to establish procedures to ensure [that children wrongfully removed are] prompt[ly] return[ed] to the State of their habitual residence." ' *Furnes*, 362 F.3d at 716 (citation omitted).

We cannot say that the district court clearly erred in its factual findings. Moreover, based on our *de novo* review of the entire record, we also conclude that Appellant is not entitled to the exceptional remedy of an emergency stay.

Should the child be removed from the jurisdiction of this Court while the appeal is pending, Appellee's counsel shall advise this Court and file any appropriate motions. *See Bekier v. Bekier*, 248 F.3d 1051 (11th Cir.2001).

Not Reported in F.3d, 2004 WL 1895123 (11th Cir.(Ga.))

END OF DOCUMENT

Exhibit H: Samples of Common Hague Case Pleadings and Filings*

* The sample pleadings and filings are offered as samples only. Please verify the current status of any cases cited, as there may have been changes in the law since they were filed.

Verified Petition

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE THE APPLICATION OF)
)
)
Plaintiff/Petitioner,)
)
v.)
) Civil Action File No. 1:11-
)
)
Defendant/Respondent.)
)

VERIFIED COMPLAINT AND PETITION
FOR RETURN OF THE CHILDREN

Plaintiff and Petitioner [redacted] respectfully shows this Court as follows:

I. INTRODUCTION

1. This action is brought by [redacted] ("Mr. J[redacted]" or "Petitioner"), a citizen of Spain, to secure the return of his six-year-old daughter, A[redacted] J[redacted] H[redacted], and his five-year-old son, F[redacted] J[redacted] H[redacted] (together, "Children"; individually, "Child"), who were, without Petitioner's consent or acquiescence, wrongfully removed from Spain and brought to the Northern District of Georgia by

the Children's mother, Defendant/Respondent [redacted] ("Ms. H[redacted]" or "Respondent").

2. This Petition is filed pursuant to the Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention")[1] and the International Child Abduction Remedies Act ("ICARA").[2] A copy of the Hague Convention is attached hereto as Exhibit A. The Hague Convention came into effect in the United States of America on July 1, 1988, and has been ratified between, among other Contracting States, the United States of America and Spain.

3. The objects of the Hague Convention are:

> Article 1(a): To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> Article 1(b): To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

(*Id.*)

4. The Hague Convention authorizes a federal district court to determine the merits of a claim for the wrongful removal or retention of a child; it does not,

---

[1] Oct. 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986).
[2] 42 U.S.C. §§ 11601-11610 (2011).

however, permit the district court to consider the merits of any underlying custody dispute.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over this case pursuant to 42 U.S.C. § 11603(a) (jurisdiction under the Hague Convention) and 28 U.S.C. § 1331 (federal question jurisdiction). Venue is proper pursuant to 42 U.S.C. § 11603 and 28 U.S.C. § 1391(b) because, upon information and belief, the Children and Respondent are residing at the home of the Respondent's boyfriend, [redacted] Perez also known as [redacted], in the Atlanta Division of the Northern District of Georgia at [redacted], Roswell, Georgia 30076. A copy of a letter from the United States Postal Service concerning the residence at [redacted], Roswell, Georgia is attached hereto as Exhibit B.

III. STATEMENT OF FACTS

6. As noted above, Petitioner and Respondent are the parents of the Children. Petitioner and Respondent have never been married but lived together in Benacazon, Seville, Spain prior to Respondent's wrongful removal of the Children on November 30, 2010. A certified copy of the census of residents of the town council of Benacazon and translation thereof are attached hereto as Exhibit C.

7. On [redacted] 2004, Ms. H[redacted] gave birth to A[redacted] J[redacted] H[redacted] in Seville, Spain. A copy of A[redacted] J[redacted] H[redacted]'s birth certificate and a translation thereof are attached hereto as Exhibit D.

8. On [redacted] 2006, Ms. H[redacted] gave birth to F[redacted] J[redacted] H[redacted] in Seville, Spain. A copy of F[redacted] J[redacted] H[redacted]'s birth certificate and a translation thereof are attached hereto as Exhibit E.

9. Until the date of the separation between Mr. J[redacted] and Ms. H[redacted], as detailed below, Mr. J[redacted], Ms. H[redacted] and the Children lived together at their familial residence at Rio Guadiamar Street, No. 9, Benacazon, Seville, Spain. See Exhibit C. In total, Mr. J[redacted] and Ms. H[redacted] lived together in Spain for seven years.

10. The Children attended school at C.E.I.P. Talhara School of Benacazon (Seville) in Spain until their wrongful removal. A copy of a certified letter from the school and a translation thereof are attached hereto as Exhibit F.

11. In April 2010, Mr. J[redacted] and Ms. H[redacted] separated. After the separation, Mr. J[redacted] continued to exercise his parental rights and maintained his relationship with the Children.

12. On September 15, 2010, Mr. J[redacted] sought provisional measures from a Spanish court in San Lucar La Mayor due to the separation. A copy of an affidavit from Luis Zarraluqui Navarro and translation thereof are attached hereto as Exhibit G.

13. The Court of First Instance No. 4 of San Lucar La Mayor issued an opinion on November 24, 2010 that provides that Mr. J[redacted]'s request for a "provisional measures" is "admissible." A copy of the November 24, 2010 opinion and a translation thereof are attached hereto as Exhibit H.

14. The opinion further demands that both Mr. J[redacted] and Ms. H[redacted] appear before the court on December 15, 2010. See Exhibit H, p. 2.

15. On December 3, 2010, twelve days before the date of the hearing ordered by the Spanish court, Ms. H[redacted] called Mr. J[redacted] on his mobile phone and informed him that she moved to the United States with the Children.

16. That same day, Mr. J[redacted] received a fax from Ms. H[redacted] informing him that she and the Children were in the United States. In the fax, Ms. H[redacted] acknowledges the parental relationship between Mr. J[redacted] and the Children. A copy of the fax from Respondent to Mr. J[redacted] and a translation thereof are attached hereto as Exhibit I.

17. Ms. H[redacted] abducted A[redacted] J[redacted] H[redacted] and F[redacted] J[redacted] H[redacted] from Spain without Mr. J[redacted]'s permission.

18. On December 9, 2010, the Court of the First Instance and Preliminary Investigation No. 4 of San Lucar La Mayor issued an opinion prohibiting the Children from leaving Spain. A copy of the December 9, 2010 opinion of the court and its translation thereof is attached hereto as Exhibit J.

19. On the same day, an Indictment against Ms. H[redacted] was filed before the Court of the First Instance and Preliminary Investigation No. 4 of San Lucar La Mayor. The Indictment and translation thereof are attached hereto as Exhibit K.

20. On December 28, 2010, the Spanish Court issued an opinion which provides how there is the "possible existence of a penal infringement" and that Mr. J[redacted] should attend a hearing on February 4, 2011 to declare his damages. The December 28, 2010 opinion and translation thereof are attached hereto as Exhibit L.

21. Upon information and belief, the Children are currently being kept in the company of Respondent, their mother and her boyfriend, at [redacted], Roswell, Georgia 30076. See Exhibit B.

22. In February of 2011, Mr. J[redacted] received from the Fulton County Probate Court for the State of Georgia a notice of a petition for the appointment of a temporary guardian, the mother's boyfriend, [redacted] Perez, for the Children. A copy of the notice is attached hereto as Exhibit M.

23. Mr. J[redacted] submitted a sworn statement objecting to the appointment of Mr. Perez as the Children's guardian. A copy of the sworn statement and a translation thereof is attached hereto as Exhibit N.

24. On March 3, 2011, the Probate Court for Fulton County, based on Mr. J[redacted]'s objection, dismissed the Petition for Appointment of a Temporary Guardian for the Children. A copy of the Orders are attached hereto as Exhibit O.

25. On May 12, 2011, Petitioner's Request for Return for the Children was submitted to the United States Department of State through the Spanish Central Authority. A copy of the Petitioner's Request for Return and a translation thereof are attached hereto as Exhibit P.

IV. WRONGFUL REMOVAL AND RETENTION OF CHILDREN BY RESPONDENT: CLAIM FOR RELIEF UNDER THE HAGUE CONVENTION

26. As set forth above, on or about November 30, 2010, Respondent wrongfully removed the Children within the meaning of Article 3 of the Convention and continues to wrongfully retain the Children in the state of Georgia, United States, in violation of Article 3 and despite Petitioner's efforts to have the Children returned to Spain.

27. Petitioner has never acquiesced or consented to the removal of the Children from Spain to the United States or to their living outside of Spain.

28. Respondent's removal and retention of the Children is wrongful within the meaning of Article 3 of the Convention because:

(a) It is in violation of Petitioner's rights of custody as established by the Spanish law. A copy of Articles 108, 154, 156, 158, 159 and 160 of the Spanish Civil Code and Article 225 of the Spanish Penal Code are attached hereto respectfully as Exhibits Q & R. Specifically, Respondent's removal and retention of the Children is in violation of Petitioner's right as a physical custodian to determine the Children's place of residence. See Hague Convention, Art. 5(a) (defining "rights of custody" under Article 3 to include "in particular, the right to determine the child's place of residence");

(b) At the time of the Children's removal from Spain, Petitioner was actually exercising his rights of custody within the meaning of Articles 3 and 5 of the Convention and, but for Respondent's removal and retention of the Children, Petitioner would have continued to exercise those rights; and

(c) The Children were habitually resident with Petitioner in Spain within the meaning of Article 3 of the Convention immediately before their removal and retention by Respondent.

29. Respondent is presently wrongfully retaining the Children in the State of Georgia, County of Fulton.

30. Upon information and belief, Respondent is keeping the Children at Respondent's boyfriend's residence, [redacted], Roswell, Georgia 30076.

31. The Children are now six and five years old. The Hague Convention applies to children under sixteen (16) years of age and thus applies to both Children.

32. This Petition is filed less than one year from Respondent's wrongful removal of the Children. Petitioner has never consented or acquiesced to Respondent's wrongful removal or retention of the Children.

V. PROVISIONAL REMEDIES
(42 U.S.C. § 11604 & HAGUE CONVENTION, ARTICLE 16)

33. Petitioner requests that this Court issue an immediate order restraining Respondent from removing the Children from the jurisdiction of this Court, and a warrant seeking immediate physical custody of the Children, directing any United States Marshal or other law enforcement officer to bring the Children before this Court. Petitioner also asks that this Court schedule an expedited hearing on the merits of this Petition.

VI. ATTORNEY FEES AND COSTS (42 U.S.C. § 11607)

34. To date, Petitioner has incurred attorneys' fees and costs as a result of the wrongful retention of the Children by Respondent.

35. Petitioner respectfully requests that this Court award him all costs and fees, including transportation costs, incurred to date as required by 42 U.S.C. § 11607.

VII. NOTICE OF HEARING (42 U.S.C. § 11603(C))

36. Pursuant to 42 U.S.C. § 11603(c), Respondent shall be given notice of these proceedings in accordance with the laws governing notice in interstate child custody proceedings.

VIII. RELIEF REQUESTED

WHEREFORE, Petitioner [redacted] prays for the following relief:

(a) An immediate temporary restraining order prohibiting the removal of the Children from the jurisdiction of this Court pending a hearing on the merits of this Verified Complaint, and further providing that no person acting in concert or participating with Respondent shall take any action to remove the Children from the jurisdiction of this Court pending a determination on the merits of the Verified Complaint;

(b) The scheduling of an expedited preliminary injunction hearing on the merits of the Verified Complaint; an order that Respondent show cause at this hearing why the Children should not be returned to Spain, and why such other relief requested in the Verified Complaint should not be granted; and, pursuant to Federal Rule of Civil Procedure 65, an order that the trial of the action on the merits be advanced and consolidated with the hearing on the Verified Complaint;

(c) A final judgment in Petitioner's favor establishing that the Children shall be returned to Spain, where an appropriate custody determination can made by a Spanish court under Spanish law;

(d) An Order requiring that Respondent pay Petitioner's expenses and costs, including transportation costs, under 42 U.S.C. § 11607, such expenses and costs to be resolved via post-judgment motion, consistent with the procedure outlined under Local Rule 54.2(A) of this Court; and

(e) For any such further relief as may be just and appropriate under the circumstances of this case.

Respectfully submitted, this 29th day of July, 2011.

KILPATRICK TOWNSEND &
STOCKTON LLP
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
Telephone (404) 815-6500
Facsimile (404) 815-6555
@ktslaw.com
@ktslaw.com
@ktslaw.com

Georgia Bar No. 098775
Georgia Bar No. 141306
Georgia Bar No. 143128

Attorneys for Plaintiff/Petitioner

VERIFICATION

I am one of the attorneys for Plaintiff/Petitioner, [redacted]. I make this verification on behalf of Petitioner because Petitioner is absent from this country. The above document is true based on the above-identified attorneys' investigation to date and communications between Kilpatrick Townsend & Stockton LLP and Mr. J[redacted], except as to the matters that are stated in it on information and belief and as to those matters I believe it to be true. I declare under penalty of perjury under the laws of the State of Georgia that the foregoing is true and correct.

This 29th day of July, 2011.

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Times New Roman font in 14 point type in compliance with Local Rule 5.1(B).

TRO Motion and Brief in Support

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE THE APPLICATION OF)
F[redacted])
)
Plaintiff/Petitioner,)
)
v.)
) Civil Action File No. 1:11-CV-2489
Y[redacted],)
)
Defendant/Respondent.)

WSD

PLAINTIFF'S MOTION UNDER THE HAGUE CONVENTION FOR ENTRY OF A TEMPORARY RESTRAINING ORDER AND SCHEDULING OF AN EXPEDITED HEARING

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Petitioner, F[redacted] ("Mr. J[redacted]" or "Petitioner"), hereby moves the Court for an order temporarily restraining and prohibiting Respondent, Y[redacted] ("Ms. H[redacted]" or "Respondent") from removing their minor children, A[redacted] J[redacted] H[redacted] and F[redacted] J[redacted] H[redacted] (the "Children") from the jurisdiction of this Court, and also moves for other relief to protect Petitioner's rights under the Convention on Civil Aspects of International Child Abduction (the "Hague Convention") and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610. Injunctive relief on a basis is necessary to prevent irreparable harm to Petitioner and to preserve the status quo. Under 42

U.S.C. §11604(a), a district court is empowered to take appropriate 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." For the reasons set forth in Plaintiff's Brief in Support of this Motion, such relief is needed in this case.

Petitioner respectfully requests that the Court shorten or otherwise waive the time requirements that apply to motions, grant an immediate hearing on this motion, enter a temporary injunction, and further grant another hearing requiring Respondent to show cause why the relief set forth in the Verified Complaint should not be granted by this Court. Specifically, Petitioner seeks the following relief:

(a) An immediate temporary restraining order prohibiting the removal of the Children from the jurisdiction of this Court pending a hearing on the merits of this Verified Complaint, and further providing that no person acting in concert or participating with Respondent shall take any action to remove the Children from the jurisdiction of this Court pending a determination on the merits of the Verified Complaint;

(b) The scheduling of an expedited preliminary injunction hearing on the merits of the Verified Complaint; an order that Respondent show cause at this hearing why the Children should not be returned to Spain by Petitioner, and why such other relied requested in the Verified Complaint should not be granted; and,

pursuant to Federal Rule of Civil Procedure 65, an order that the trial of the action on the merits be advanced and consolidated with the hearing on the Verified Complaint; and

(c) Any such further relief as may be just and appropriate under the circumstances of this case.

Respectfully submitted, this 29th day of July, 2011.

[redacted]

KILPATRICK TOWNSEND & STOCKTON LLP
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
Telephone (404) 815-6500
Facsimile (404) 815-6555
[redacted]@ktslaw.com
[redacted]@ktslaw.com
[redacted]@ktslaw.com

Georgia Bar No. 098775
[redacted]
Georgia Bar No. 141306
[redacted]
Georgia Bar No. 143128

Attorneys for Plaintiff/Petitioner
[redacted]

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Times New Roman font in 14 point type in compliance with Local Rule 5.1(B).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE THE APPLICATION OF
F[redacted]

Plaintiff/Petitioner,

v.

Y[redacted],

Defendant/Respondent.

Civil Action File No. 1 11 CV-2489

WSD

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION UNDER THE HAGUE CONVENTION FOR A TEMPORARY RESTRAINING ORDER AND SCHEDULING AN EXPEDITED HEARING

Plaintiff/Petitioner F[redacted] ("Mr. J[redacted]" or "Petitioner") urgently needs emergency equitable relief to prevent Defendant/Respondent Y[redacted] ("Ms. H[redacted]" or "Respondent") from further interference with Petitioner's rights of custody over their minor children, A[redacted] J[redacted] H[redacted] and F[redacted] J[redacted] H[redacted] (the "Children"), who were, without Petitioner's acquiescence or consent, wrongfully removed from Spain by Respondent. As set forth in Petitioner's Verified Complaint and Petition for Return of Children (the "Verified Complaint"), Respondent has wrongfully removed the Children from their place of habitual residence in Seville, Spain, in violation of the Convention on the Civil Aspects of International Child Abduction

(the "Hague Convention"). Oct. 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98 (a copy of the Hague Convention is attached as Exhibit A to the Verified Complaint). Petitioner is entitled to relief in the form of an order for the Children's return to Spain under Articles 8 (providing a right of action to a person exercising rights of custody) and 12 (providing for the return of the child as a remedy) of the Hague Convention, as well as under the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§11601-11610. Emergency relief is authorized under 42 U.S.C. §11604(a), which provides that a court may take appropriate 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*." (Emphasis added.) As discussed below, emergency relief is appropriate here.

I. FACTUAL BACKGROUND

Petitioner and Respondent are the parents of the Children. Petitioner and Respondent have never been married but lived together for seven years until they separated in 2010. Verified Complaint, ¶¶ 6, 9 & 11. After the separation, Petitioner continued to exercise his parental rights of custody. Id. at ¶ 11.

On [redacted] 2004, Ms. H[redacted] gave birth to A[redacted] J[redacted] H[redacted] in Seville, Spain. Id. at ¶ 7. A[redacted] J[redacted] H[redacted] is currently six years old. On [redacted] 2006, Ms. H[redacted] gave birth to F[redacted] J[redacted] H[redacted]

in Seville, Spain. Id. at ¶ 8. F[redacted] J[redacted] H[redacted] is currently five years old. The Hague Convention applies to children under sixteen years of age, and thus, applies to the Children.

On December 3, 2010, twelve days before the date of a hearing ordered by the Spanish court, Ms. H[redacted] called Mr. J[redacted] on his mobile phone and informed him that she moved to the United States with the Children. Id. at ¶¶ 14 & 15. That same day, Mr. J[redacted] received a fax from Ms. H[redacted] informing him that she and the Children were in the United States. Id. at ¶ 16. Ms. H[redacted] abducted A[redacted] J[redacted] H[redacted] and F[redacted] J[redacted] H[redacted] from Spain without Mr. J[redacted]'s permission. Id. at ¶ 17.

Upon information and belief, the Children are currently being kept in the company of Respondent and her boyfriend at [redacted] Georgia. Id. at ¶ 5.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Petitioner is Entitled to Emergency Relief.

Federal courts are empowered to grant temporary restraining orders and preliminary injunctions. See FED. R. CIV. P. 65. Like Federal Rule 65, the Local Rules of this Court authorize the grant of emergency relief. See L.R. 7.2B, NDGA ("Upon written motion and for good cause shown, the court may waive the time

requirements of this rule and grant an immediate hearing on any matter requiring such expedited procedure").

Consistent with Federal Rule 65 and the exigent circumstances that typically exist in Hague Convention cases, Article 2 of the Hague Convention provides: "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." October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98. The "objects" of the Hague Convention are expressed in Article 1: the prompt return of an abducted child and the protection of the rights of custody. Exhibit A to Verified Complaint, Article 1. Federal Rule 65 allows this Court to expeditiously promote the Hague Convention's objectives by emergency equitable relief.

Applicable state law provisions also support Petitioner's request for expeditious procedures for the return of his Children.[1] For instance, under O.C.G.A. § 19-9-91(b), a court may issue a warrant to take physical custody of a child if there is an imminent likelihood that a child will be removed from the jurisdiction of the court. Likewise, under the Georgia Juvenile Code, O.C.G.A. § 15-11-1, et seq., a child may be taken into immediate custody if the possibility

[1] Under 42 U.S.C. § 11604(b), "No court exercising jurisdiction . . . may . . . order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied."

exists that the child will "be removed from the jurisdiction of the court or will not be brought before the court, notwithstanding the service of the summons, ..." O.C.G.A. § 15-11-49.1.

The decision to grant or deny an injunction is "within the sound discretion of the district court." Int'l Cosmetics Exch., Inc. v. Gapardis Health & Beauty, Inc., 303 F.3d 1242, 1246 (11th Cir. 2002). "A preliminary injunction may be issued to protect the moving party from irreparable injury and to preserve the power of the trial court to render a meaningful decision on the merits." Compact Van Equip. Co., Inc. v. Leggett & Platt, Inc., 566 F.2d 952, 954 (5th Cir. 1978). The Court's task on an application for a preliminary injunction is to find: "(1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if it is issued, would not be adverse to the public interest." Id. As explained below, all of the elements for the emergency equitable relief requested herein, including injunctive relief, are satisfied in this case.

B. There is a Substantial Likelihood that Petitioner Will Ultimately Prevail on the Merits.

According to the Hague Convention, the removal or retention of a child is wrongful where the removal is in breach of established custody rights defined by

the law of the country in which the child was habitually resident immediately before the removal or retention, and where, at the time of removal, these custodial rights were exercised (either jointly or alone) or would have been so exercised but for the removal. Art. 3, October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98. By virtue of Spanish law, the country of the Children's habitual residence, Petitioner has custodial rights to the Children. Verified Petition, ¶ 28. Additionally, Petitioner exercised his custodial rights until the wrongful removal. Id. Consequently, Petitioner is likely to prevail on the merits of his petition for the return of the Children.

1. The Children were habitual residents of Seville, Spain before their abduction.

The legal definition of "habitual residence" is well-established. In Pesin v. Rodriguez, for example, the district court held: "Courts in both the United States and foreign jurisdictions have defined habitual residence as the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective." 77 F. Supp. 2d 1277, 1284 (S.D. Fla. 1999) (citing Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir.1995), and Friedrich v. Friedrich, 983 F.2d 1396, 1401-03 (6th Cir.1993)), aff'd, 244 F.3d 1250 (11th Cir. 2001). The Children were both born in Seville, Spain and, until their wrongful removal, spent the entirety of

their lives there with Petitioner and Respondent. Consequently, Spain is the Children's habitual residence.

2. Petitioner was exercising his rights of custody at the time of the Children's wrongful removal.

By virtue of Spanish law, the law of the Children's habitual residence, Petitioner exercised his custodial rights over the Children at the time of the wrongful removal. Verified Complaint, ¶ 9. As the Verified Complaint establishes, the Children have lived with and/or been supported by Petitioner since their births. Prior to their wrongful removal, Petitioner sought the provisional measures from a Spanish court to ensure he could continue to exercise his custodial rights. Id. at ¶ 12. Clearly, Petitioner was exercising his rights of custody at the time of the Children's wrongful removal.

Petitioner has not waived his rights of custody. Before and after the November 2010 abduction of the Children, Petitioner diligently sought to exercise his custodial rights as well as to locate his children. Id. at ¶ 25.

3. Granting Petitioner's Hague Petition Will Not Terminate Any Right of Custody of Respondent.

As shown above, Petitioner is very likely to succeed on the merits of his Hague Convention claim. It should be noted, moreover, that all Petitioner seeks is the Children's return to Spain, their habitual residence, and not any change

detrimental to Respondent's own rights of custody, should she still retain any such rights.

The Hague Convention authorizes a federal district court to determine the merits of a claim for wrongful removal or retention of a child. The Hague Convention does not, however, allow the district court to consider the merits of any underlying custody dispute. In re: Morris, 55 F. Supp. 2d 1156, 1160 (D. Colo. 1999) (recognizing that "[p]ursuant to Article 19 of the Convention, [this Court has] no power to pass on the merits of custody"). See also Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991); Loos v. Manuel, 651 A.2d 1077 (N.J. Super. Ct. Ch. Div. 1994). Stated another way, a district court only has jurisdiction to decide the merits of the wrongful removal claim, as the Hague Convention is intended to restore the pre-abduction status quo and deter parents from crossing borders in search of more sympathetic courts. Lops v. Lops, 140 F.3d 927, 936 (11th Cir. 1998) (citations omitted); Barrios Gil v. Del Valle Matheus Rodriguez, 184 F. Supp. 2d 1221, 1224 (M.D. Fla. 2002) (Emphasis added).

C. Petitioner will suffer irreparable injury unless equitable relief is granted.

Given that Respondent has already wrongfully removed the Children to the United States and impeded Petitioner's attempt to locate them, there is obviously a risk that Respondent will further hide the Children and herself when she learns that Petitioner is seeking the return of his Children to Spain through the United States

court system. If Respondent flees with Petitioner's Children again, it may be difficult, if not impossible, to locate them again. Petitioner could suffer irreparable injury if the requested relief is not granted, and, under these circumstances, emergency equitable relief is authorized under the Hague Convention.

ICARA directly speaks to such a remedy. 42 U.S.C. §11604(a) provides that a court may take appropriate 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.*" (Emphasis added).

Should this Court decide to prevent the possibility of the Children's removal from its jurisdiction, Petitioner is willing to travel to Atlanta to care for the Children pending the resolution of this matter.

D. The threatened injury to Petitioner outweighs any damage an injunction may cause Respondent.

The potential of Petitioner once again losing the Children outweighs any perceived injury to Respondent. Petitioner merely seeks the restoration of the status quo: the return of the Children to their habitual residence.

In Furnes, the Eleventh Circuit emphasized the importance of re-establishing the status quo before the alleged wrongful removal: "A return order effectively maintains the status quo with regard to custody of the child. . . A return order will not effect a change in custody. . . because she [Respondent] is free to accompany her child back . . . and retain custody. . . The specific purpose of the Hague

Convention was to deter and amend the exact type of abduction in this case, not to bless it." Furnes v. Reeves, 362 F.3d 702,717 (11th Cir. 2004) (holding the father had custody rights of the child, and therefore remanded the petition to the trial court in order for it to be granted).

Here, Petitioner is not seeking a custody order from this Court. Rather, he seeks the status quo prior to the wrongful abduction: the ability to exercise his rights of custody in Spain; the Children's habitual residence. Any custody issues will be determined by a court in Seville, Spain.

E. An injunction, if issued, would not be adverse to the public interest.

The relief Petitioner seeks is authorized under the Hague Convention, an international treaty ratified as between Spain, the United States, and other contracting states. The relief is further consistent with federal and state law implementing the Convention. Indeed, this lawsuit was referred to Petitioner's counsel by the United States Department of State. The Department of State facilitates the provision of legal aid and advice for Hague Convention applicants. There can be no public interest objection raised to the relief sought by Petitioner. The only relevant considerations are whether Petitioner satisfies the requirements of the Hague Convention and the requirements under the Federal Rules of Civil Procedure for the issuance of emergency equitable relief. Those requirements are satisfied here.

III. CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Petitioner asks this Court to grant the following relief:

(a) An immediate temporary restraining order prohibiting the removal of the Children from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and further providing that no person acting in concert or participating with Respondent shall take any action to remove the Children from the jurisdiction of this Court pending a determination on the merits of this Petition; and

(b) Scheduling an expedited preliminary injunction hearing on the merits of the Verified Complaint and ordering that Respondent show cause at this hearing why the child should not be returned to Spain, and why such other relief requested in the Verified Complaint should not be granted; and, pursuant to Federal Rule of Civil Procedure 65, ordering that the trial of the action on the merits be advanced and consolidated with the preliminary injunction hearing;

Respectfully submitted, this 29th day of July, 2011.

[redacted]

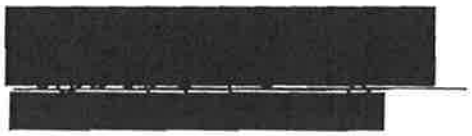
KILPATRICK TOWNSEND &
STOCKTON LLP
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
Telephone (404) 815-6500
Facsimile (404) 815-6555
[redacted]@ktslaw.com
[redacted]@ktslaw.com
[redacted]@ktslaw.com

[redacted]
Georgia Bar No. 098775
[redacted]
Georgia Bar No. 141306
[redacted]
Georgia Bar No. 143128

Attorneys for Plaintiff/Petitioner
F[redacted]

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Times New Roman font in 14 point type in compliance with Local Rule 5.1(B).



Ex Parte TRO Motion and Brief in Support

ORIGINAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE THE APPLICATION OF)
K[redacted])
)
Plaintiff/Petitioner)
)
v.)
)
O[redacted])
)
Defendant/Respondent.)

1 07-CV-2974
Civil Action File No.: _____

CAD

PLAINTIFF'S MOTION UNDER THE HAGUE CONVENTION FOR ENTRY OF A TEMPORARY RESTRAINING ORDER AND SCHEDULING OF AN EXPEDITED HEARING AND FEDERAL RULE 65(b) CERTIFICATE OF COUNSEL

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Petitioner, K[redacted] ("Ms. A[redacted]" or "Petitioner"), hereby moves the Court for an order temporarily restraining and prohibiting Respondent, O[redacted] ("Mr. C[redacted]" or "Respondent"), from violating the Convention on Civil Aspects of International Child Abduction (the "Hague Convention")[1] and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610. Injunctive relief on this basis is necessary to prevent irreparable harm to Petitioner and to preserve the status quo. Under 42 U.S.C. §11604(a), a district

[1] A copy of the Hague Convention is attached to Petitioner's Verified Complaint as Exhibit P.

court is empowered to take appropriate 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." Such relief is needed in this case.[2]

On December 1, 2006, Respondent, who is Petitioner's former husband, wrongfully removed and retained their son, B[redacted] or the "Child") from his place of habitual residence in Canada to Gwinnett County, Georgia without Petitioner's acquiescence or consent. Given that Respondent removed and retained the Child, there is a substantial risk that Respondent will further hide the Child and himself in violation of Canadian law and the Hague Convention.

Petitioner respectfully requests that the Court shorten or otherwise waive the time requirements that apply to motions, grant an immediate hearing on this motion, enter a temporary injunction, and further grant another hearing requiring Respondent to show cause why the relief set forth in the Verified Complaint should not be granted by this Court. Specifically, Petitioner seeks the following relief:

(a) An immediate temporary restraining order prohibiting the removal of the Child from the jurisdiction of this Court pending a hearing on the merits of this Verified Complaint, and further providing that no person acting in concert or participating with Respondent shall take any action to remove the Child from the

[2] This motion is supported by Petitioner's Verified Complaint and supporting brief, filed contemporaneously.

jurisdiction of this Court pending a determination on the merits of the Verified Complaint.

(b) The scheduling of an expedited, ex parte preliminary injunction hearing on the merits of the Verified Complaint; an order that Respondent show cause at this hearing why the Child should not be returned to Canada by Petitioner, and why such other relied requested in the Verified Complaint should not be granted; and, pursuant to Federal Rule of Civil Procedure 65, an order that the trial of the action on the merits be advanced soon after the preliminary injunction hearing; and

(c) Any such further relief as may be just and appropriate under the circumstances of this case.

This 30th day of November 2007.

[redacted]
[redacted] Esq.
Georgia Bar No. 446655
[redacted] Esq.
Georgia Bar No. 141306

Attorneys for Petitioner

KILPATRICK STOCKTON LLP
1100 Peachtree Street
Suite 2800
Atlanta, Georgia 30309
(404) 815-6500

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Times New Roman font in 14 point type in compliance with Local Rule 5.1(B).

[redacted]

ORIGINAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE THE APPLICATION OF
K[redacted],

Plaintiff/Petitioner

v.

O[redacted],

Defendant/Respondent.

1 07-CV-2974
Civil Action File No.: _____

PLAINTIFF'S BRIEF IN SUPPORT OF A MOTION UNDER THE HAGUE CONVENTION FOR A TEMPORARY RESTRAINING ORDER AND SCHEDULING OF AN EXPEDITED HEARING

Plaintiff/Petitioner, K[redacted] ("Ms. A[redacted]" or "Petitioner"), urgently needs emergency equitable relief to prevent Defendant/Respondent, [redacted] ("Mr. C[redacted]" or "Respondent"), from further interference with Petitioner's rights of custody over their minor child, B[redacted] or the "Child"), who was, without Petitioner's acquiescence or consent, wrongfully removed from Canada by Respondent and thereafter wrongfully retained in Gwinnett County, Georgia. As set forth in Petitioner's Verified Complaint for Return of Child to Petitioner (the "Verified Complaint"), Respondent has wrongfully removed and retained the Child from his place of habitual residence in Canada, in violation of the Convention on the Civil

Aspects of International Child Abduction (the "Hague Convention"). Oct. 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98 (a copy of the Hague Convention is attached as Exhibit P to the Verified Complaint). Plaintiff is entitled to relief in the form of an order for the Child's return to Canada under Articles 8 (providing a right of action to a person exercising rights of custody) and 12 (providing for the return of the child as a remedy) of the Hague Convention, as well as under the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§11601-11610. Emergency relief is authorized under 42 U.S.C. §11604(a), which provides that a court may take appropriate 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.*" (Emphasis added.)

I. FACTUAL BACKGROUND

As noted above, Petitioner and Respondent are the parents of the Child. (Verified Complaint, ¶ 5.) On December 22, 2001, Petitioner and Respondent were married in California. On September 19, 2002, Ms. A[redacted] gave birth to the Child. (Id. at ¶ 6.)

In the Spring of 2005, Petitioner and Respondent separated. Petitioner then returned to Ottawa, Ontario, Canada with the Child. From Spring of 2005 to November of 2006, the Child spent time in both Canada and Georgia, where the Respondent lives. (Id. at ¶ 7.) On or about June 27, 2005, Petitioner and

Respondent executed an agreement whereby Respondent consented and acquiesced for the Child to permanently reside in Ottawa, Ontario, Canada with Petitioner beginning in September of 2005. (Id. at ¶ 8.)

On October 12, 2006, Respondent filed a Complaint for Divorce and Motion and Brief for Emergency Ex Parte Relief in the Superior Court of Gwinnett County. More than a month later, on or about November 23, 2006, after the Child had lived in Canada for a year with the Petitioner, the Respondent filed an *ex parte* petition under the Hague Convention in the Court of the Queen's Bench of Alberta Judicial District of Calgary in Canada. After an *ex parte* hearing, which the Petitioner had no knowledge of, the Queen's Bench of Alberta, Judicial District of Calgary of Canada, ordered the return of the Child to Georgia. Pursuant to the order, the Royal Canadian Mounted Police took the Child from the Petitioner on December 1, 2006 and turned him over to Respondent who took him to Georgia. (Id. at ¶¶ 9-10.)

However, on April 12, 2007, the Court of Appeal of Alberta reversed the Canadian trial court's November 23, 2006 decision and ordered the return of the Child to Canada. (Id. at ¶ 14.) Mr. C[redacted] knew of the appeal because on February 27, 2007, Mr. C[redacted] requested an adjournment of the appellate case until April 10, 2007 in order for Mr. C[redacted] to retain counsel. (Id. at ¶ 13.) The appellate court held that Respondent consented to the Child residing with his

mother in Canada; that Canada was the place of the child's habitual residence; and therefore, the Child should be returned to Canada. (Id. at ¶¶ 16-17.) On April 16, 2007, the appellate court filed its Certificate of Judgment. On that same day, Petitioner's Canadian counsel faxed to the Respondent the appellate court's April 12, 2007 decision and April 16, 2007 Certificate of Judgment. (Id. at ¶ 18.)

On June 4, 2007, Petitioner submitted an application under the Hague Convention for the return of the Child to the Central Authority for the Province of Alberta, Canada. (Id. at ¶ 19.) Two days later, on June 6, 2007, the Central Authority for the Province of Alberta, Canada forwarded Petitioner's application to the National Center for Missing and Exploited Children. (Id. at ¶ 20.)

However, almost three months after the Canadian appellate court's order, on July 13, 2007, Respondent filed a Motion for Reconsideration and Brief in Support in the Gwinnett County action. In his Motion, Respondent requested the Gwinnett County Court to reconsider the Final Judgment and Decree because it failed to address the custody of the Child. The Motion failed to reference or cite the Canadian appellate court's April 16, 2007 order requiring return of the Child to Canada. (Id. at ¶ 21.) On July 16, 2007, the Superior Court of Gwinnett County filed the Amended Final Judgment and ordered Respondent sole, physical and legal custodian of the Child. (Id. at ¶ 22.)

II. ARGUMENT AND CITATION OF AUTHORITY

A. Petitioner is Entitled to *Ex Parte* Emergency Relief.

Federal courts are empowered to grant temporary restraining orders and preliminary injunctions. See FED. R. CIV. P. 65. Consistent with Federal Rule 65, the Local Rules of this Court authorize the grant of emergency relief. See LR 7.2B, NDGA ("Upon written motion and for good cause shown, the court may waive the time requirements of this rule and grant an immediate hearing on any matter requiring such expedited procedure").

Rule 65(b) further provides that "[a] temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required." FED. R. CIV. P. 65.

Consistent with Federal Rule 65 and the exigent circumstances that typically exist in Hague Convention cases, Article 2 of the Hague Convention provides: "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." October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98. The "objects" of the Hague Convention are expressed in Article 1: the prompt return of an abducted child and the protection of the rights of custody. Federal Rule 65 allows this Court to expeditiously promote the Hague Convention's objectives by emergency equitable relief.

Applicable state law provisions also support Petitioner's request for expeditious procedures for the return of her son.[1] O.C.G.A. §§ 19-9-81 – 19-9-104 are the Georgia Code provisions providing for the enforcement of orders entered under the Hague Convention. Under O.C.G.A. § 19-9-91(b), a court may issue a warrant to take physical custody of a child if there is an imminent likelihood that a child will be removed from the jurisdiction of the court. Likewise, under the Georgia Juvenile Code, O.C.G.A. § 15-11-1, et seq., a child may be taken into immediate custody if the possibility exists that the child will "be removed from the jurisdiction of the court or will not be brought before the court, notwithstanding the service of the summons, ..." O.C.G.A. § 15-11-49.1.

The decision to grant or deny an injunction is "within the sound discretion of the district court." Int'l Cosmetics Exch., Inc. v. Gapardis Health & Beauty, Inc.,

[1] Under 42 U.S.C. § 11604(b), "No court exercising jurisdiction . . . may . . . order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied."

303 F.3d 1242, 1246 (11th Cir. 2002). "A preliminary injunction may be issued to protect the moving party from irreparable injury and to preserve the power of the trial court to render a meaningful decision on the merits." Compact Van Equip. Co., Inc. v. Leggett & Platt, Inc., 566 F.2d 952, 954 (5th Cir. 1978). The Court's task on an application for a preliminary injunction is to find: "(1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if it is issued, would not be adverse to the public interest." Id. As explained below, all of the elements for emergency equitable relief, including *ex parte* injunctive relief, are satisfied in this case.

B. There is a Substantial Likelihood that Petitioner Will Ultimately Prevail on the Merits.

According to the Hague Convention, the removal or retention of a child is wrongful where the removal is in breach of established custody rights defined by the law of the country in which the child was habitually resident immediately before the removal or retention, and where, at the time of removal, these custodial rights were exercised (either jointly or alone) or would have been so exercised but for the removal. Art. 3, October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514

U.N.T.S. at 98. By virtue of the Canadian appellate court's decision, it is clear the Petitioner has a substantial likelihood of success in prevailing on the merits.

1. The Child was a habitual resident of Canada before the wrongful removal and retaining of the Child.

The legal definition of "habitual residence" is well-established. In Pesin v. Rodriguez, for example, the district court held, "Courts in both the United States and foreign jurisdictions have defined habitual residence as the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective." 77 F. Supp. 2d 1277, 1284 (S.D. Fla. 1999) (citing Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir.1995), and Friedrich v. Friedrich, 983 F.2d 1396, 1401-03 (6th Cir.1993)), aff'd, 244 F.3d 1250 (11th Cir. 2001).

The Canadian appellate court concluded that the Child was a "habitual resident" of Canada as required under the Hague Convention:

> It is highly questionable based on the record before the Chambers Judge, and certainly as supplemented before, that the father met the test for an Order to return child . . . *Thompson* holds that the Convention applies to a situation where the court of the country where the child was habitually resident (in this case Canada) was removed before the Court could determine the child's custody. *Thompson* holds that the child must be returned forthwith to the place of habitual residence absent some narrow exceptions. In other words, had the Chambers Judge been aware that the child appeared to have been habitually resident here, as that term is defined under the [Hague] Convention, he would likely had declined to make this Order.

(Verified Complaint, ¶ 16.) The Child lived with the Petitioner for over a year in Canada before he was wrongfully removed and retained by the Respondent. Pursuant to the Canadian appellate court's decision, the Child is a habitual resident of Canada.

2. Petitioner was exercising her rights of custody at the time of the Child's wrongful removal.

Petitioner was exercising her custodial rights at the time of the Child's wrongful removal. Art. 3, October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98. See Talsky v. Talsky, [1975] 62 D.L.R. (3d) 267 (Can.). As the Complaint establishes, Petitioner has never waived her parental rights. To the contrary, Petitioner has continually sought to enforce her parental rights by contacting the Central Authority for the Province of Alberta as well as the National Center for Missing and Exploited Children ("NCMEC"). Consequently, Petitioner is very likely to succeed on the merits of her Hague Convention claim because she was exercising her custodial rights at the time of the wrongful removal.

It must be noted, moreover, that all Petitioner seeks is the Child's return to Canada, the Child's habitual residence, and not any change detrimental to Respondent's own rights of custody, should he choose to exercise them. The Hague Convention authorizes a federal district court to determine the merits of a claim for wrongful removal or retention of a child. The Hague Convention does not, however, allow the district court to consider the merits of any underlying

custody dispute. In re: Morris, 55 F. Supp. 2d 1156, 1160 (D. Colo. 1999) (recognizing that "[p]ursuant to Article 19 of the Convention, [this Court has] no power to pass on the merits of custody"). See also Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991); Loos v. Manuel, 651 A.2d 1077 (N.J. Super. Ct. Ch. Div. 1994). Stated another way, a district court only has jurisdiction to decide the merits of the wrongful removal claim, as the Hague Convention is intended to restore the pre-abduction status quo and deter parents from crossing borders in search of more sympathetic courts. Lops v. Lops, 140 F.3d 927, 936 (11th Cir. 1998) (citations omitted); Barrios Gil v. Del Valle Matheus Rodriguez, 184 F. Supp. 2d 1221, 1224 (M.D. Fla. 2002) (Emphasis added).

C. Petitioner will suffer irreparable injury unless equitable relief is granted.

Respondent has already disregarded the Canadian appellate court's authority. Respondent failed to appear before the appellate court. Given that Respondent has already wrongfully removed the child to the United States and has impeded Petitioner's attempts at contacting her own son, there obviously exists a risk that Respondent will further hide the child and himself. This easily satisfies the "irreparable injury" prong for injunctive relief under Federal Rule of Civil Procedure 65.

ICARA directly speaks to such a remedy. 42 U.S.C. §11604(a) provides that a court may take appropriate 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.*" (Emphasis added). The requirements of state law, however, must be satisfied as well. 42 U.S.C. § 11604(b) ("No court exercising jurisdiction of an action brought under section 11603(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."). The applicable state law requirements are satisfied here.

The applicable state law includes O.C.G.A. §§ 19-9-81 – 19-9-104, the Georgia provisions providing for the enforcement of orders entered under the Hague Convention. Under O.C.G.A. § 19-9-91(b), a court may issue a warrant to take physical custody of a child if there is an imminent likelihood that a child will be removed from the jurisdiction of the court.

Also applicable are the provisions under O.C.G.A. § 15-11-1, et seq. ("Juvenile Code"). Under the Juvenile Code, if the possibility exists that a child will be removed from the jurisdiction of the Court or will not be brought before the Court (notwithstanding service of process), a court may endorse on the summons an order that a law enforcement officer shall serve the summons and take the child into immediate custody and immediately bring the child before the Court. O.C.G.A. § 15-11-49.1 (2001). A child may also be taken into custody if the child is "deprived." A "deprived child" is a child who is without proper parental care

and control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental or emotional health. O.C.G.A. §15-11-2(8)(A).

A deprived child may be returned to remain with a guardian, subject to appropriate conditions and limitations prescribed by the Court, including supervision as directed by the Court for the protection of the child. O.C.G.A. § 15-11-55(a)(1). Should this Court decide to prevent the possibility of B[redacted]'s removal from its jurisdiction, Petitioner will be in Atlanta to care for her son pending the resolution of the instant matter.

The threat of irreparable injury clearly exists. While it is possible that Respondent will comply with the summons and voluntarily attend a hearing, the Court should take into account that Respondent has already wrongfully removed and retained the Child in contravention of the Hague Convention and the Canadian appellate court's decision. The Court should also note the significant possibility that Respondent will ignore the summons and go into hiding, further concealing the Child. Under these facts, emergency equitable relief is authorized under the Hague Convention. 42 U.S.C. §11604(a) (where appropriate, a district court should take measures "to prevent the child's further removal or concealment before the final disposition of the petition").

D. The threatened injury to Petitioner outweighs any damage an injunction may cause Respondent.

The potential of Petitioner losing any rights to the child outweighs any perceived injury to Respondent. Petitioner merely seeks the return of the status quo.

In Furnes, the Eleventh Circuit emphasized the importance of re-establishing the status quo before the alleged wrongful removal: "A return order effectively maintains the status quo with regard to custody of the child . . . A return order will not effect a change in custody . . . because she [Respondent] is free to accompany her child back . . . and retain custody . . . The specific purpose of the Hague Convention was to deter and amend the exact type of abduction in this case, not to bless it." Furnes v. Reeves, 362 F.3d 702, 717 (11th Cir. 2004) (holding the father had custody rights of the child, and therefore remanded the petition to the trial court in order for it to be granted).

Here, Petitioner is not seeking a custody order from this Court. Rather, she seeks the status quo prior to the wrongful removal and retainment: the ability to exercise her rights of custody in Canada, the state of the Child's habitual residence. Any custody issues will be determined by a Canadian court.

E. An injunction, if issued, would not be adverse to the public interest.

The relief Petitioner seeks is authorized under the Hague Convention, an international treaty ratified as among Canada, the United States, and other contracting states. The relief is, further, consistent with federal and state law implementing the Convention. Indeed, this lawsuit was referred to Petitioner's counsel under the auspices of NCMEC. NCMEC, by agreement with the United States Department of State, facilitates the provision of legal aid and advice for Hague Convention applicants. There can be no public interest objection raised to the relief sought by Petitioner. The only relevant considerations are whether Petitioner satisfies the requirements of the Hague Convention and the requirements under the Federal Rules of Civil Procedure for the issuance of emergency equitable relief. Those requirements are satisfied here.

III. CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Petitioner asks this Court to grant the following relief:

(a) An immediate temporary restraining order prohibiting the removal of the Child from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and, further, providing that no person acting in concert or participating with Respondent shall take any action to remove the child from the jurisdiction of this Court pending a determination on the merits of this Petition;

(b) Scheduling an expedited, *ex parte* preliminary injunction hearing on the merits of the Verified Complaint and ordering that Respondent show cause at this hearing why the Child should not be returned to Canada, and why such other relief requested in the Verified Complaint should not be granted; and, pursuant to Federal Rule of Civil Procedure 65, ordering that the trial of the action on the merits be advanced soon after the preliminary injunction hearing.

This 30th day of November 2007.

[redacted] Esq.
Georgia Bar No. 446655
[redacted] Esq.
Georgia Bar No. 141306

Attorneys for Petitioner

KILPATRICK STOCKTON LLP
1100 Peachtree Street
Suite 2800
Atlanta, Georgia 30309
(404) 815-6500

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Times New Roman font in 14 point type in compliance with Local Rule 5.1(B).

[redacted]

Ex Parte TRO Motion and Application for Custody Warrant, and Brief in Support

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

I[redacted],

Plaintiff/Petitioner,

v.

J[redacted],

Defendant/Respondent.

CIVIL ACTION FILE
NO. 1:04-CV-1555 TWT

PLAINTIFF/PETITIONER'S *EX PARTE* MOTION UNDER THE HAGUE CONVENTION FOR ENTRY OF A TRO, APPLICATION FOR WARRANT SEEKING PHYSICAL CUSTODY OF CHILD, AND SCHEDULING OF AN EXPEDITED HEARING; AND FEDERAL RULE 65(b) CERTIFICATE OF COUNSEL

Pursuant to Fed. R. Civ. P. 65, Petitioner I[redacted] hereby moves the Court for an *ex parte* order temporarily restraining and prohibiting Respondent J[redacted] ("Ms. B[redacted]" or "Respondent") from violating the Hague Convention and the International Child Abduction Remedies Act (ICARA). This injunctive relief is vitally necessary on an *ex parte* basis to prevent irreparable harm to Petitioner and preserve the status quo. Specifically, under 42 U.S.C. §11604(a) of ICARA, a district court is empowered take appropriate

J

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." This is such a case.

This motion is supported by Petitioner's Verified Complaint (filed on May 28, 2004) and supporting brief, filed contemporaneously herewith. As explained in those papers, on November 29, 2003, Ms. B[redacted], who is currently married to Petitioner, wrongfully removed their daughter, without Petitioner's acquiescence or consent, from their familial home in Mexico and smuggled the child into the United States. Given that Respondent has already abducted the child and herself faces the risk of apprehension here (given that she is living here illegally), there obviously exists a risk that she will further secret the child and herself, in violation of the Hague Convention. Indeed, there is a substantial possibility that Respondent will refuse to appear before the Court to prevent her own return to Mexico.

By his signature below, Petitioner's counsel hereby certifies to the Court that, based on the specific facts shown by the Verified Complaint, it clearly appears that immediate and irreparable injury, loss, or damage will result to Petitioner before Respondent or her attorney can be heard in opposition to this motion; that counsel has made no effort to give notice of this motion to Respondent, because, if notice such notice was provided,

there exists the possibility that Respondent would further secret both herself and Petitioner's daughter from both Petitioner and this Court.

Petitioner respectfully requests that the Court shorten or otherwise waive the time requirements that apply to motions, grant an immediate hearing on this motion, enter an *ex parte* temporary injunction, and further grant another hearing requiring Respondent to show cause why the relief set forth in the Verified Complaint should not be granted by this Court. Specifically, Petitioner seeks the following relief on an *ex parte* basis:

(a) Enter an immediate *ex parte* temporary restraining order prohibiting the removal of the child from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and further providing that no person acting in concert or participating with Respondent (including Respondent's brother, S[redacted], and her boyfriend, C[redacted]) shall take any action to remove the child from the jurisdiction of this Court pending a determination on the merits of this case;

(b) Schedule an expedited preliminary injunction hearing on the merits of the Verified Complaint; order that Respondent show cause at this hearing why the child should not be returned to Mexico, and why such other relief requested in this Petition should not be granted; and, pursuant to

Federal Rule of Civil Procedure 65, order that the trial of the action on the merits be advanced and consolidated with the preliminary injunction hearing; and

(c) Issue a warrant seeking physical custody of the child, directing that the child, together with Respondent, be brought into this Court by any United States Marshal, federal officer or police officer to guarantee their attendance at the hearing, and further authorizing such officer to serve Respondent with notice of the hearing and the pleadings filed by Petitioner in this case.

For the Court's review and consideration, Petitioner respectfully submits a proposed order in the form attached hereto as Exhibit A.

Dated: June 1, 2004.

Respectfully submitted,

[redacted]
Georgia Bar. No. 065220
[redacted]
Georgia Bar No. 366750

KILPATRICK STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309
(404)815-6500 (Telephone)
(404)815-6555 (Facsimile)

Counsel for Plaintiff/Petitioner Isaac [redacted]

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Time New Roman font in 14 point type in compliance with Local Rule 5.1(B).

Dated: June 1, 2004.

[redacted]
Attorney for Plaintiff/Petitioner

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[redacted],

Plaintiff/Petitioner,

v.

J[redacted]

Defendant/Respondent.

CIVIL ACTION FILE
NO. 1:04-CV-1555 TWT

PLAINTIFF/PETITIONER'S BRIEF IN SUPPORT OF *EX PARTE* MOTION UNDER THE HAGUE CONVENTION FOR ENTRY OF A TRO, APPLICATION FOR WARRANT SEEKING PHYSICAL CUSTODY OF CHILD, AND SCHEDULING OF AN EXPEDITED HEARING

Plaintiff/Petitioner I[redacted] ("Mr. R[redacted]" or "Petitioner") urgently needs emergency equitable relief to prevent Defendant/Respondent J[redacted] ("Ms. B[redacted]" or "Respondent"), from further interference with Petitioner's custodial rights over their minor child, [redacted] A[redacted] R[redacted] B[redacted] ("I[redacted] A[redacted]"), who was, without Petitioner's acquiescence or consent, wrongfully removed from Mexico by Respondent. As set forth in Petitioner's "VERIFIED COMPLAINT/PETITION UNDER THE HAGUE CONVENTION FOR

RETURN OF CHILD TO PLAINTIFF/PETITIONER IN MEXICO, INCLUDING PROVISIONAL ORDERS, AN EX PARTE TEMPORARY RESTRAINING ORDER, APPLICATION FOR WARRANT SEEKING PHYSICAL CUSTODY AND AN EXPEDITED HEARING" ("Complaint"), Respondent has wrongfully removed [redacted] from her family home in Mexico, in violation of the Convention on the Civil Aspects of International Child Abduction (the "Hague Convention") and the International Child Abduction Remedies Act ("ICARA"). Oct. 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986) (a copy of the Hague Convention is attached as Exhibit A to the Complaint); 42 U.S.C. §§11601-11610 (2000). Furthermore, emergency relief is authorized under 42 U.S.C. §11604(a), which provides that a court may take appropriate 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.*" (Emphasis added.)

I. FACTUAL BACKGROUND

Mr. [redacted] (Petitioner) and Ms. [redacted] (Respondent) are the parents of [redacted]. Complaint ¶ 4. On December 31, 1995, Petitioner and Respondent were married in Quechultenango, State of Guerrero, Mexico. Id. Copies of their marriage certificate and a translation

thereof are attached to the Complaint as Exhibits B and C. On August 9, 1996, Ms. B[redacted] gave birth to I[redacted] A[redacted] at Villa de las Flores, Coacalco de Berriozabal, Mexico. Id. Copies of I[redacted] A[redacted]s birth certificate and a translation thereof are attached to the Complaint as Exhibits D and E. Until her wrongful removal to the United States (as detailed below), Mr. F[redacted], his wife, and his daughter lived together in their familial residence in Mexico. Id. Between 1999 and the date of I[redacted] A[redacted]s wrongful removal, the family lived at [redacted] State of Mexico. Id.

The Hague Convention and its remedies apply to children under sixteen years of age. Art. 4, Oct. 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986). I[redacted] A[redacted] is now seven years old, and the Hague Convention thus applies in this case. Complaint ¶ 5. While Petitioner and Respondent are still married, Petitioner has filed for divorce in Mexico seeking legal custody of I[redacted] A[redacted]. Complaint ¶ 5 & Exs. J and K thereto.

Mr. R[redacted] works as a maintenance technician at a DuPont plant in Mexico. Complaint ¶ 6. On November 28 and 29, 2003, he worked the night shift at the plant (from 10:45 p.m. to 6:45 a.m.). Id. When he returned home on the morning of November 29 at 7:15 a.m., he discovered

that his wife had taken [redacted] A[redacted] and had left him. Id. Ms. B[redacted] [redacted] left a note for Petitioner stating that she had taken her belongings and their seven-year-old daughter. Complaint ¶ 7. She instructed Petitioner "don't look for us." Id. Copies of the note and a translation thereof are attached to the Complaint as Exhibits F and G.

Petitioner investigated the circumstances, receiving more specific information regarding Respondent's departure and his daughter's removal from friends, neighbors, and Ms. B[redacted]'s parents. Complaint ¶ 8. Petitioner learned that Ms. B[redacted] had a boyfriend, a man by the name of C[redacted], and that they had formed a plan to leave Mexico together with I[redacted] A[redacted] and move to the United States. Id. Petitioner further learned that, on December 2, 2003, Respondent phoned her parents to explain that she was at the U.S.-Mexico border and that she and her boyfriend had arranged for "coyotes" (smugglers of illegal aliens) to transport Respondent, her boyfriend, and I[redacted] A[redacted] into the United States from Mexico illegally. Id. Petitioner now understands that Respondent and I[redacted] A[redacted] live in Atlanta, Georgia. Id.

Respondent herself phoned Petitioner on December 3, 2003, stating that she was at the U.S.-Mexico border and intended to move to the United States. Complaint Exs. J and K. Petitioner briefly spoke with his daughter,

and implored Respondent to return home. Id. Respondent did not return home but took her daughter across the U.S.-Mexico border. Id.

On December 5, 2003, Petitioner contacted the Mexican authorities to report [redacted] A[redacted]'s wrongful removal from her family residence. Complaint ¶ 10. Copies of the report and the translation thereof are attached to the Complaint as Exhibits H and I.

Pursuant to the Hague Convention, Petitioner has formally requested the return of [redacted] A[redacted] to Mexico, and has submitted an application under the Hague Convention to the Mexican Central Authority, the office designated by Mexico to administer that country's responsibilities under the Hague Convention. Complaint ¶ 13. Copies of Petitioner's Request for Return and a translation thereof are attached to the Complaint as Exhibits L and M. The Mexican Central Authority in turn contacted the United States Central Authority under the Hague Convention by contacting the National Center for Missing and Exploited Children ("NCMEC"). Complaint ¶ 13. The NCMEC, by agreement with the United States Department of State (the Central Authority of the United States under the Hague Convention), facilitates the provision of legal aid and advice for Hague Convention applicants. Id.

Petitioner understands that Respondent and [redacted] now live at [redacted], Atlanta, GA 30329, with Respondent's brother, [redacted]. Complaint ¶ 9.

On April 24, 2004, Petitioner sued Respondent for divorce in Mexico, seeking custody of [redacted]. Complaint ¶ 11. Copies of the divorce petition and translation thereof are attached to the Complaint as Exhibits J and K.

By contacting the Mexican authorities, including petitioning the Mexican State Department for [redacted]'s return under the Hague Convention, and by filing for divorce in Mexico, seeking an appropriate custody determination under the Mexican Civil Code, Petitioner has done everything in this power to secure the return of his daughter. This Court is the necessary culmination of that process, and is Petitioner's last resort to seek any relief with respect to his daughter.

II. ARGUMENT AND CITATIONS OF AUTHORITY

A. Petitioner is entitled to *ex parte* emergency relief.

Federal courts are empowered to grant temporary restraining orders and preliminary injunctions. Fed. R. Civ. P. 65. Consistent with Federal Rule 65, the Local Rules of this Court authorize the grant of emergency relief. See N.D. Ga. Local Rule 7.2(B) ("Upon written motion and for good

cause shown, the court may waive the time requirements of this rule and grant an immediate hearing on any matter requiring such expedited procedure.").

Federal Rule 65(b) further provides that "[a] temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required."

Consistent with Federal Rule 65 and the exigent circumstances that typically exist in Hague Convention cases, Article 2 of the Hague Convention provides, "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." October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986).

Applicable state law provisions are in accord.[1] O.C.G.A. §§ 19-9-81 – 19-9-104 are the Georgia Code provisions providing for the enforcement of orders entered under the Hague Convention. Under O.C.G.A. § 19-9-91(b), a court may issue a warrant to take physical custody of a child if there is an imminent likelihood that a child will be removed from the jurisdiction of the court. Likewise, under the Georgia Juvenile Code, O.C.G.A. § 15-11-1, et seq., a child may be taken into immediate custody if the possibility exists that the child will "be removed from the jurisdiction of the court or will not be brought before the court, notwithstanding the service of the summons, ..." O.C.G.A. § 15-11-49.1 (2001).

The decision to grant or deny an injunction is "within the sound discretion of the trial court." International Cosmetics Exchange, Inc. v. Gapardis Health & Beauty, Inc., 303 F.3d 1242, 1246 (11th Cir. 2002). "A preliminary injunction may be issued to protect the moving party from irreparable injury and to preserve the power of the trial court to render a meaningful decision on the merits." Compact Van Equip. Co., Inc. v. Leggett & Platt, Inc., 566 F.2d 952, 954 (5th Cir. 1978). The Court's task on an application for a preliminary injunction is to find: "(1) substantial

[1] Under 42 U.S.C. § 11604(b) (2000), "No court exercising jurisdiction . . . may . . . order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied."

likelihood that the movant will ultimately prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and (4) showing that the injunction, if issued, would not be adverse to the public interest." Id. As explained below, all of the elements for emergency equitable relief, including *ex parte* injunctive relief, are satisfied in this case.

1. There is a substantial likelihood that Petitioner will ultimately prevail on the merits.

According to the Hague Convention, the removal or retention of a child is wrongful where the removal is in breach of established custody rights defined by the law of the country in which the child was habitually resident immediately before the removal or retention, and where, at the time of removal, these custodial rights were exercised (either jointly or alone) or would have been so exercised but for the removal. Art. 3, October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986).

The legal definition of "habitual residence" is well-established. In Pesin v. Rodriguez, for example, the district court held, "Courts in both the United States and foreign jurisdictions have defined habitual residence as the

place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective." 77 F. Supp. 2d 1277, 1284 (S.D. Fla. 1999) (citations and internal quotations omitted), aff'd, 244 F.3d 1250 (11th Cir. 2001).

The facts of this case easily establish that [redacted] was wrongfully removed from her habitual residence (Petitioner's home) in Mexico. [redacted] was born in Mexico and, until her wrongful removal, spent the entirety of her life living with both of her parents. She has only recently been taken, without her father's permission, to the United States. As for whether the removal was "wrongful" within the meaning of the Hague Convention, Respondent's letter to Petitioner stating that she was leaving, taking Petitioner's daughter with her, and telling Petitioner "don't look for us" is direct evidence of that fact. Complaint ¶ 7 & Exs. F and G thereto. See also 42 U.S.C. § 11603(f)(2) (providing that "wrongful removal or retention" "include[s] a removal or retention of a child before the entry of a custody order regarding that child; . . .") (no custody order has been entered in Mexico; Petitioner has filed for divorce there, seeking custody).

Another issue is whether the custody rights of the Petitioner have been violated. This in turn depends on the law of the country or state of the

child's habitual residence. Art. 3, October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986). As [redacted] A[redacted]s habitual residence was in Mexico, specifically, in the State of Mexico, the civil code of the State of Mexico defines the scope of Petitioner's custodial rights.

The Mexican Civil Code broadly defines the scope of parental authority and custody rights. Specifically, under Article 396 of the Civil Code for the State of Mexico, "patria potestas" (custody) is exercised by both the father and the mother.[2] Respondent's wrongful removal of [redacted] A[redacted] clearly violated Petitioner's "patria potestas" rights under applicable Mexican law. This is further demonstrated by a very similar case construing "patria potestas" principles under the Mexican State of Baja California Sur, where the United States Court of Appeals for the First Circuit held that the petitioner had custody rights under Mexican law that had been violated in a Hague Convention case similar to this one, because both parents exercise patria potestas rights over a child under Mexican law, and both parents must consent to the removal of such child to another

[2] Attached hereto as Exhibit A is a translation of the "patria potestas" code provision from the Civil Code of the State of Mexico. This was provided to Petitioner's counsel by the National Center for Missing and Exploited Children ("NCMEC"). The NCMEC, by agreement with the United States Department of State (the Central Authority of the United States under the Hague Convention), facilitates the provision of legal aid and advice for Hague Convention applicants.

country. Whallon v. Lynn, 230 F.3d 450 (1st Cir. 200). See also Furnes v. Reeves, 362 F.3d 702, 714-722 (11th Cir. 2004) (adopting a broad view of custody rights under international law and holding: "it is crucial to note that the violation of a *single* custody right suffices to make removal of a child wrongful.") (emphasis in original).

Another inquiry, easily satisfied here, is whether Petitioner was exercising his custodial rights at the time of the wrongful removal. Art. 3, October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986). The Complaint easily establishes this fact, given that [redacted] lived with Petitioner at their familial residence in Mexico up until the time of her wrongful removal. See Feder v. Evans-Feder 63 F.3d 217, 225 (3d Cir. 1995); Wanninger v. Wanninger, 850 F. Supp. 78, 80-81 (D. Mass. 1994).

This is an open and shut case. Petitioner is very likely to succeed on the merits of his Hague Convention claim. It must be noted, moreover, is that all Petitioner seeks is the child's return to Mexico, so that a custody determination may properly be made in Mexico. He is not asking this Court

to award him custody of the child, and Respondent retains all of her rights to travel back to her homeland and contest custody there.[3]

2. Petitioner will suffer irreparable injury unless equitable relief issues.

Respondent is in the country illegally and herself faces the risk of apprehension. Given that Respondent has already wrongfully removed the child to the United States, there obviously exists a risk that Respondent will further secret the child and herself, in violation of the Hague Convention. Indeed, there is a substantial possibility that Respondent will refuse to appear before the Court to prevent Respondent's own return to Mexico. This easily satisfies the "irreparable injury" prong for injunctive relief under Federal Rule of Civil Procedure 65.

ICARA directly speaks to such a remedy. 42 U.S.C. §11604(a) provides that a court may take appropriate measures "to protect the well-being of the child involved *or to prevent the child's further removal or*

[3] As is well-established under the Hague Convention, the Hague Convention authorizes a federal district court to determine the merits of a claim under the Hague Convention for wrongful removal or retention of a child; it does not, however, allow the district court to consider the merits of any underlying custody dispute. Morris v. Morris, 55 F. Supp. 2d 1156, 1160 (D. Colo. 1999) (recognizing that "[p]ursuant to Article 19 of the Convention, [this Court has] no power to pass on the merits of custody"). See also Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991). Accordingly, a district court's role is not to make traditional custody decisions but to determine the jurisdiction in which a proper custody determination should be made. Loos v. Manuel, 651 A.2d 1077 (N.J. Super. Ct. Ch. Div. 1994). Stated another way, a district court only has jurisdiction to decide the merits of the wrongful removal claim, as the Hague Convention is intended to restore the pre-abduction status quo and deter parents from crossing borders in search of more sympathetic courts. Lops v. Lops, 140 F.3d 927, 936 (11th Cir. 1998) (citations omitted); Barrios Gil v. Del Valle Matheas Rodriguez, 184 F. Supp. 2d 1221, 1224 (M.D. Fla. 2002).

concealment before the final disposition of the petition." (Emphasis added.) The requirements of state law, however, must be satisfied as well. 42 U.S.C. § 11604(b) ("No court exercising jurisdiction of an action brought under section 4(b) 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.") The applicable state law requirements are satisfied here.

The applicable state law includes O.C.G.A. §§ 19-9-81 – 19-9-104, which are the Georgia Code provisions providing for the enforcement of orders entered under the Hague Convention. Under O.C.G.A. § 19-9-91(b), a court may issue a warrant to take physical custody of a child if there is an imminent likelihood that a child will be removed from the jurisdiction of the court.

Also applicable are the provisions under O.C.G.A. § 15-11-1, et seq. ("Juvenile Code"). Under the Juvenile Code, if the possibility exists that a child will be removed from the jurisdiction of the Court or will not be brought before the Court (notwithstanding service of process), a court may endorse on the summons an order that a law enforcement officer shall serve the summons and take the child into immediate custody and immediately bring the child before the Court. O.C.G.A. § 15-11-49.1 (2001). A child

may also be taken into custody if the child is "deprived." A "deprived child" is a child who is without proper parental care and control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental or emotional health. O.C.G.A. §15-11-2(8)(A) (Supp. 2003).

While Petitioner understandably does not know the details of his daughter's present health and living conditions, it certainly appears that his daughter, [redacted] is without proper parental care in that her mother, Ms. [redacted], brought her into the United States both illegally and by the use of "coyotes." Furthermore, she is without proper parental care for her emotional and mental health because she has wrongfully been removed from her habitual residence in Mexico and has been wrongfully retained in the United States by her mother in violation of Petitioner's custodial rights under Mexican law, and she has spoken with Petitioner, her legal and custodial parent, only sporadically since her abduction last November, thus suffering alienation from her father and the adverse effects to her emotional and mental health caused by such alienation. Finally, the child is at risk of having her physical and mental health and welfare adversely impacted by continuing to remain with Ms. [redacted] and at risk of having Ms. [redacted] remove her from the jurisdiction of the Court, given that Ms.

B[redacted] herself is in this country illegally. A deprived child may be returned to remain with her parent (in this case, her father), subject to appropriate conditions and limitations prescribed by the Court, including supervision as directed by the Court for the protection of the child. O.C.G.A. § 15-11-55(a)(1) (Supp. 2003).

Construing the Hague Convention and similar provisons under Iowa state law, the district court issued *ex parte* relief in Morgan v. Morgan, because it feared that "if a temporary restraining order is not issued *ex parte*, Mrs. M[redacted] [Respondent] and Mr. F[redacted] [Respondent's boyfriend] will likely flee this jurisdiction with the child upon receiving notice of Mr. M[redacted] [Petitioner's] intent to seek a temporary restraining order preventing them from doing so." 289 F. Supp.2d 1067, 1070 (N.D. Iowa 2003).

Furthermore, it is a common-sense proposition that the separation of a parent from the parent's child is an irreparable injury that can only be rectified by reunion with the child.

The threat of irreparable injury clearly exists. While it is possible that Respondent, an illegal alien, will comply with the summons and voluntarily attend a hearing before this federal district court, this Court must be mindful of the fact that, given that Respondent has abducted the child and is herself

here illegally, the greater possibility is that Respondent will ignore the summons and go into hiding, further concealing the child. She might even misinterpret this action as a deportation proceeding, which it clearly is not. Under these facts, emergency equitable relief is authorized under the Hague Convention. 42 U.S.C. §11604(a) (where appropriate, a district court should take measures "to prevent the child's further removal or concealment before the final disposition of the petition.")

3. The threatened injury to Petitioner outweighs whatever damage an injunction may cause Respondent.

In Furnes, the Eleventh Circuit articulated a legal principle that is relevant to this element of injunctive relief when it stated that the remedies under the Convention "effectively maintain the status quo with regard to custody. . . . A return order will not effect a change in custody. . . because she [Respondent] is free to accompany her child back to Norway and retain custody. . . . The specific purpose of the Hague Convention was to deter and amend the exact type of abduction in this case, not to bless it." 362 F.3d at 717.

This analysis of course applies here. Petitioner is not seeking a custody order from this Court. He is only seeking the ability to determine

custody where it should have been properly determined in the first instance – in Mexico, the state of the child's habitual residence.

And Respondent is no position to complain. Having abducted the child and, through her unilateral, unauthorized conduct, smuggled her into the United States, she left Petitioner with no choice but to pursue these remedies.

4. An *ex parte* injunction, if issued, would not be adverse to the public interest.

This requirement is easily met. The relief Petitioner seeks is authorized under the Hague Convention, an international treaty ratified as between Mexico, the United States, and other contracting states. The relief is further consistent with federal and state law implementing the Convention. Indeed, this lawsuit was referred to Petitioner's counsel under the auspices of the United States Department of State, the Central Authority of the United States under the Hague Convention. There can be no public interest objection raised to the relief sought by Petitioner. The only relevant considerations are whether Petitioner satisfies the requirements of the Hague Convention, as well as the requirements under the Federal Rules of Civil Procedure for the issuance of emergency equitable relief. Those requirements are satisfied here.

III. CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Petitioner asks this Court to grant the following relief, *ex parte*:

(a) Enter an immediate *ex parte* temporary restraining order prohibiting the removal of the child from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and further providing that no person acting in concert or participating with Respondent (including Respondent's brother, S[redacted], and her boyfriend, C[redacted]) shall take any action to remove the child from the jurisdiction of this Court pending a determination on the merits of this Petition;

(b) Schedule an expedited preliminary injunction hearing on the merits of the Verified Complaint; order that Respondent show cause at this hearing why the child should not be returned to Mexico, and why such other relief requested in the Verified Complaint should not be granted; and, pursuant to Federal Rule of Civil Procedure 65, order that the trial of the action on the merits be advanced and consolidated with the preliminary injunction hearing;

(c) Issue a warrant seeking physical custody of the child, directing that the child, together with Respondent, be brought into this Court by any

United States Marshal, federal officer or police officer to guarantee their attendance at the hearing, and further authorizing such officer to serve Respondent with notice of the hearing and the pleadings filed by Petitioner in this case.

Dated: June 1, 2004

Respectfully submitted,

[redacted]
Georgia Bar. No. 065220
[redacted]
Georgia Bar No. 366750
Counsel for Plaintiff/Petitioner

KILPATRICK STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309
(404)815-6500 (Telephone)
(404)815-6555 (Facsimile

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Time New Roman font in 14 point type in compliance with Local Rule 5.1(B).

Dated: June 1, 2004.

Attorney for Plaintiff/Petitioner

EXHIBIT / ATTACHMENT

A

(To be scanned in place of tab)

UNOFFICIAL TRANSLATION

CIVIL CODE
FOR THE STATE OF MEXICO

TITLE EIGHT
ABOUT THE PATRIA POTESTAS

CHAPTER I
ABOUT THE EFFECTS OF THE PATRIA POTESTAS OVER THE CHILDREN

ARTICLE 397.- The patria potestas (custody) is excercising under the person and property of the minors.

ARTICLE 396.- The Patria Potestas (Custody) over the children during the marriage, is exercised by:

I The father and the mother,
II. The parental grandparents,
III. The maternal grandparents

ARTICLE 397.- When both parents have recognized their minor who has borned out of marriage (concubinage) and both parents live together, they have the custody of their minor.

ARTICLE 399.- In case that the concubines are living dismissed, they will decide who will has the custody of the minor in the event that they do not do it, the local family judge will solve whom maybe the most convenient for the interest of the minor.

Proposed Order Granting TRO and Scheduling Hearing on the Merits

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE THE APPLICATION OF K[redacted],	)	
Plaintiff/Petitioner	)	
v.	)	Civil Action File No.: 1:07-cv-2974
C[redacted],	)	
Defendant/Respondent.	)	

ORDER GRANTING TEMPORARY RESTRAINING ORDER UNDER THE HAGUE CONVENTION

Plaintiff/Petitioner, K[redacted] having filed Plaintiff's Motion Under The Hague Convention For A Temporary Restraining Order And Scheduling Of An Expedited Hearing ("the Motion"), Plaintiff's Brief In Support Of A Motion Under The Hague Convention For A Temporary Restraining Order And Scheduling Of An Expedited Hearing, and Verified Complaint For Return of Child To Petitioner, the Court having considered these pleadings in this case, and pursuant to Federal Rule of Civil Procedure 65, the Motion is hereby GRANTED as follows:

(1) Respondent is hereby prohibited from removing the Child from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and no person acting in concert or participating with Respondent shall take any action to remove the child from the jurisdiction of this Court pending a determination on the merits of the Verified Complaint.

(2) A hearing on the merits of the Verified Complaint is hereby scheduled to be held on _____, 2007 at _____ o'clock in Courtroom __ of this Court; and

(3) Respondent is hereby directed to show cause at the hearing scheduled in paragraph (2) above why the child should not be returned forthwith to Canada, accompanied by Petitioner, and why the other relief requested in the Verified Complaint should not be granted.

SO ORDERED, this ___ day of _____, 2007, at _____ o'clock _.m.

CHARLES A. PANNELL, JR., JUDGE
United States District Court for the
Northern District of Georgia
Atlanta Division

Proposed Order Granting TRO, Issuing Warrant and Scheduling Hearing on the Merits

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

I[redacted], Plaintiff/Petitioner,	
v.	CIVIL ACTION FILE NO. 1:04-CV-1555
J[redacted], Defendant/Respondent.	

ORDER GRANTING *EX PARTE* TRO AND EMERGENCY EQUITABLE RELIEF

Plaintiff/Petitioner I[redacted], having filed his "*EX PARTE* MOTION UNDER THE HAGUE CONVENTION FOR ENTRY OF A TRO, APPLICATION FOR WARRANT SEEKING PHYSICAL CUSTODY OF CHILD, AND SCHEDULING OF AN EXPEDITED HEARING" ("Motion"), and the Court having conducted a hearing on the Motion, and after considering the arguments of Petitioner's counsel and the entire record, and pursuant to Federal Rule of Civil Procedure 65, hereby GRANTS the Motion, ruling as follows:

(1) This Court finds that *ex parte* emergency relief is necessary to prevent irreparable injury. Specifically, the evidence of record shows that on November 29, 2003, Respondent, who is currently married to Petitioner, wrongfully removed their seven-year-old daughter, without Petitioner's acquiescence or consent, from their familial home in Mexico and smuggled the child into the United States. Given that Respondent has already abducted the child and herself faces the risk of apprehension here, there exists a clear risk that Respondent will further secret the child and herself, in violation of the Hague Convention, and not appear before this Court to resolve the claim presented by Petitioner. Accordingly, and pursuant to Federal Rule of Civil Procedure 65(b), the Court finds it necessary to grant this Order without notice.

(2) Respondent is hereby prohibited from removing Petitioner's daughter from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and no person acting in concert or participating with Respondent (including Respondent's brother, [redacted], and her boyfriend, C[redacted]) shall take any action to remove the child from the jurisdiction of this Court pending a determination on the merits of this Petition.

(3) A preliminary injunction hearing on the merits of this Petition is hereby scheduled to be held on _____ at _____ o'clock in Courtroom __ of this Court.

(4) Respondent is hereby directed to show cause at the hearing scheduled in paragraph (3) above why the child should not be returned to Mexico, accompanied by Petitioner, where an appropriate custody determination can be made under Mexican law, and why the other relief requested in the Verified Complaint should not be granted.

(5) The Court hereby orders that the trial of this action on the merits will advanced and consolidated with the preliminary injunction hearing scheduled in paragraph (3) above.

(6) The Court hereby issues a warrant seeking physical custody of the child, and directing that the child, together with Respondent, be brought into this Court by any United States Marshal, federal officer or police officer to guarantee their attendance at the hearing.

(7) Such officer is directed to serve Respondent with this Order, as well as the pleadings filed by Petitioner in this case.

(8) Pending the hearing, Petitioner's daughter will be placed in his temporary custody.

SO ORDERED this ___ day of _____, 2004, at _____ o'clock _.m.

_____
Judge, United States District Court

National Center for Missing & Exploited Children
Charles B. Wang International Children's Building
699 Prince Street
Alexandria, Virginia 22314-3175
1-800-THE-LOST® (1-800-843-5678)

Learn more at www.missingkids.com