## CHAPTER ONE

## Administrative Arrangements

1.1 The Preamble to the Convention makes explicit the twin premises upon which the Convention is based: first, that the interests of children are of paramount importance in matters relating to their custody and, second, that, in cases of international abduction, these interests are best served by the establishment of procedures ensuring their prompt return to the place where they were habitually resident prior to their removal. The acceptance of the second premise entails a willingness on the part of a State to exercise a degree of self-denial regarding its natural inclination to make its own assessment about the interests of children who are presently in its jurisdiction by investigating the facts of each individual case. To do this would generally give abductors important advantages over the other parent. It will usually be difficult for the latter effectively to present his or her side of the case from what may be a great distance and in foreign courts. By the time these questions are all investigated the child may have begun to settle in its new environment and it may be difficult to argue that its return will be in its best interests. The longer the abductor can delay the decision, the stronger the likelihood that his abduction will succeed. Hence the necessity, in dealing with this problem, for prompt action to return the child.

This accounts for the distinction, which runs through the Convention, between a decision on an application for the return of the child and a decision on the merits of the case. No decision on the merits can be made until it is decided that a child is not to be returned under the Convention (or unless there has been an unreasonable delay in seeking the return) (Article 16) and a decision to return a child is not to be taken as a decision on the merits (Article 19). This does not mean that the merits of the custody issue will go undetermined. It means simply that they will be determined in the place where it is most appropriate, both for the child and the parties, that they should be determined, namely, the place where the child normally lives. It is in this spirit that the Convention should be approached and implemented.

1.2 Insofar as the central issue of the Convention concerns the way judges (or other authorities) decide cases, its major objective can be achieved without implications for resources or the imposition of administrative burdens. Indeed, it is even possible that judges might come to decide cases in the way sought by the Convention by the development of case-law. However, as I explained in my paper to the Meeting of Law Officers in Barbados, there is much division of judicial opinion on the subject and it is essential, if the Convention is to be properly adhered to, that legislation is enacted which lays down appropriate guidance to the judiciary. How this might be done is discussed later. But it must also be appreciated

that such a measure would not, in itself, be sufficient adequately to tackle the problem of international child abduction. In order properly to safeguard the interests of a child who has recently been brought into one country from another and whose presence in the recipient country is challenged by a person living abroad, some administrative machinery needs to be available. This machinery has three major roles. One is to facilitate the passage of information concerning the child; another is to provide, or help to secure the provision of assistance to the party who lives abroad; the third is generally to concern itself with the welfare of the child in question.

1.3 Before discussing these questions of administration in detail, one important point should be made and it is hoped that it will be kept in the minds of Governments when they decide whether to participate in the Convention. This is that, although there is evidence that international child abduction has been increasing <u>in general</u> over recent years, the number of cases affecting <u>any particular country</u> each year will (apart from a few countries with large populations) be small or non-existent. It is unlikely, therefore, that any administrative procedures introduced will be used very often, so that their implications in terms of personnel and resources are minimal. It is, of course, to be hoped that knowledge of their very existence will deter abductors and this, of course, will reduce their use. This point is of relevance also when a Govern-

ment considers the extent of any administrative arrangements it makes, for the Convention is flexible and permits a degree of discretion among participating States as regards the scope of the administrative machinery it wishes to establish. A Government may think that the stronger and more effective the administrative arrangements are, the less likely are the chances, in the longer term, of cases arising in its jurisdiction because it will be known to be a country unfavourable to abductors. It should also be stated that, while it is undoubtedly possible to participate in the Convention without implying the commitment of anything more than minimal resources, some such commitment is inevitable because it is not possible to meet the aspirations of the Law Ministers that the interests of children should be better protected by legal systems without being prepared to incur some burdens.

1.4 The Convention adopts the method of other Hague Conventions of channelling administrative arrangements in Contracting States through Central Authorities to be designated by each State. It must be stressed that this does not involve the establishment of any new administrative authority. The designation can be pro forma only. The bodies so designated will become the points of contact between Contracting States in matters concerning the Convention. Provision is made for Federal States, and States with more than one system of law, to appoint more than one Central Authority, although one of them must be autho-

rised to receive applications from abroad for transmission to the appropriate Authority within the State (Article 6). The duties of Central Authorities are set out in Article 7. It is important to notice that the duties are qualified in two ways. First, the Authority need only take "appropriate" measures to achieve the specified objectives; each State may determine for itself which kinds of measures are appropriate given its own legal and administrative structure. Second, the Authority may achieve this through "any intermediary"; thus, it may pass the matter over to an appropriate agency, whether public or private. It is probable that most countries would wish to proceed in this way with respect to many of the functions listed in Article 7.

1.5 Governments will wish to assess, by their own examination of the functions of Central Authorities set out in Article 7, where they wish to locate the Central Authority. My suggestion is that the office of the Law Minister (or Attorney-General, if different) may be the appropriate one. How far the functions specified in that Article could be appropriately discharged by personnel of that office would be a matter for judgment in each case. It is likely that function (e) (provision of information of a general character about the law of the State) could be adequately discharged within the Department. On the other hand, function (a)(discovery of the child) would probably be passed on to the police. Function (b) (taking action to prevent further harm to the child) might in some cases

be passed over to (public or private) social welfare agencies. But with regard to the other functions, a difficult problem arises which requires direct confrontation and decision. These functions would normally require the services of someone acting on behalf of the absent parent. That person may become involved in negotiations to secure the voluntary return of the child or to bring about an amicable settlement of the dispute (function (c)) or the initiation of legal proceedings (function (f)). This suggests that he might appropriately be a lawyer. Indeed, one of the functions of the Central Authority is "where the circumstances so require", to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers, (function (g)) and Article 25 entitles nationals or persons habitually resident in the Contracting State from which the request for return of the child has come to legal aid and advice in the requested State as if a national and habitually resident in that State. Where the requested State has a legal aid system, the solution to the problem of representation lies in putting the case in the hands of a lawyer who operates under that system (at least, if the applicant would qualify for such aid under the system). But the Convention has been careful to state that such an entitlement exists only where it exists for citizens of the requested state. If it does not, the Central Authority can do no more than to "facilitate" the provision of legal aid and advice, which will

presumably mean seeing whether the applicant's case will be taken on by a local lawyer in private practice.

1.6 It is probable that, in many cases, such action will be sufficient to enable the major provisions of the Convention to be mobilised. But it may not. It may be asked whether the Central Authority (or the requested State) will be expected to underwrite the expenses of the action should the applicant be unable to meet them. In this context it must be pointed out that Article 22 of the Convention forbids the requested State to require any security, bond or deposit for guaranteeing the payment of legal costs falling within the Convention. However, the requested State may charge the applicant for costs and expenses towards the proceedings (over and above those which would be met by its legal aid system, if any) provided it enters a reservation to this effect when acceding to the Convention (Articles 26 and 42). If the State did not charge the applicant in this way, it might be seen as providing the applicant with an unfair advantage over the alleged abductor, who may, after all, be one of its citizens. On the other hand, such charges may deter applicants from using the Convention in proper cases.

1.7 An alternative approach to the problem may be for the Central Authority, or some appropriate Governmental agency, to handle the legal proceedings itself. The Convention envisages that the Central Authority may wish to do this when it allows the Authority to require that an

application be accompanied by a written authorisation empowering it to act on behalf of the applicant (Article 28). The difficulty about this procedure is that it might give the appearance that the State is "taking sides" between the parties. I am inclined to accept this objection. If the State is to intervene at all it should do so on behalf of the child and not one of the adult parties. In some Commonwealth jurisdictions this may be done by the technical expedient of instituting wardship proceedings. The court could then appoint someone to act for the child (in the United Kingdom, this would be the Official Solicitor's Department), and he would present to the court the application for the child's return.

1.8 This question must be one for resolution by each Government in the light of its own circumstances. My own preference, in general principle, is for the use of a private practice lawyer. Even if the State intervenes to the extent of instituting wardship proceedings and ensuring that the application is presented to the court, some person other than a representative of a State agency should be present to argue the applicant's case and, as stated earlier, it is probably inappropriate that this should be done by the State on his or her behalf. As far as costs are concerned, it should be remembered that applications under the Convention are not applications for determination of the merits of the custody issue. If the Convention works properly, the points at issue should be relatively

straightforward. Although, as we will see, some difficult points may occur in some cases, most should be capable of rapid disposition, and the procedures should be geared to achieve this. This should work towards keeping legal costs to a minimum. In States which do not possess any extensive system of legal aid, rapidity of action would be assisted if Governments could see their way to guaranteeing to meet the costs of proceedings while leaving it open for themselves to have recourse against the applicant. To do this, it would be necessary to enter the appropriate reservation under Article 42, and this is accordingly recommended. But Governments must balance the advantages of doing this against the fact that reservations are, in international law, normally reciprocal in effect so that, by entering such a reservation, they may deprive their own citizens of the benefits of legal aid in other Contracting States.