The Hague Convention on the Civil Aspects of International Child Abduction

Explanatory Documentation
prepared for
Commonwealth Jurisdictions

Commonwealth Secretariat

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Explanatory Documentation prepared for Commonwealth Jurisdictions by Mr J M Eekelaar in association with the Commonwealth Secretariat

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Preface

This is the third in the series of 'accession kits' for international Conventions in the field of private international law, designed to keep Commonwealth Governments, who are not already parties to the Conventions with which they deal, fully informed of relevant international developments and to facilitate accession should they wish to do so. The first two 'kits' deal with The Hague Conventions on the Service of Process, the Taking of Evidence and Legalisation; and a series of Conventions in the field of succession.

This present 'kit' on The Hague Convention on the Civil Aspects of International Child Abduction has been prepared for the Commonwealth Secretariat by Mr. John Eekelaar, a Fellow of Pembroke College, University of Oxford. Mr. Eekelaar is also a Research Fellow of the Centre for Socio-Legal Studies, Wolfson College, Oxford and Vice-President of the International Society of Family Law. He was the author of a major study which formed the basis of the discussions on the subject by Law Ministers at their Meeting in Barbados and which is published separately along with other memoranda produced for that meeting. He also particiated in the deliberations of the 14th Session of The Hague Conference which culminated in this Convention. Ministers on that occasion paid tribute to Mr. Eekelaar's scholarship and we, for our part, record our own very great indebtedness to him in all that he has accomplished.

Copies of all three 'kits' are available from the Commonwealth Secretariat on request.

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INTRODUCTION

The Communique issued at the conclusion of the Meeting of Commonwealth Law Ministers held in Barbados in April/May 1980 contained the following declaration:

> "Ministers expressed profound concern that their legal systems were, in a growing number of instances, failing to safeguard adequately the welfare of children. Increasingly, parties to disputes over custody had been abducting their children and taking them to foreign jurisdictions, frequently in defiance of court orders. Ministers reaffirmed their view that in attempting to deal with this matter the best interests of children must always be paramount. They saw the question of jurisdiction as lying at the heart of the matter, and in this context felt that the nationality of a child could not of itself be the deciding factor.
>
> Prompt and concerted collective action was regarded as essential, and it was of great importance that any arrangements should include non-Commonwealth, as well as Commonwealth jurisdictions. The Meeting welcomed the fact that the matter is to be considered by The Hague Conference on Private International Law in October this year. A number of Governments were convinced that the present Draft Hague Convention on the topic, with jurisdiction based on the 'habitual residence' of the child, was an appropriate response to the problem. The Meeting expressed the sincere hope that the deliberations at The Hague would be successful, and that a large number of countries would accede to any resulting Convention as a matter of priority."

On 25 October 1980 a Draft Convention on the Civil Aspects of International Child Abduction was agreed at The Hague by the delegates of 29 Governments (Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Jugoslavia, Luxembourg, the Netherlands,

Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela). It is open to non-member States of the Hague Conference on Private International Law to accede to Hague Conventions. The following Commonwealth Governments who are not members of the Conference have acceded to certain Conventions in the past: Barbados (Notification), Botswana (Form of Wills, Legalisation, Notification), Cyprus (Legalisation, Enforcement of Judgments, Protocol of Jurisdiction), Fiji (Form of Wills, Legalisation), Lesotho (Legalisation), Malawi (Legalisation, Notification), Malta (Legalisation), Seychelles (Legalisation), Singapore (Taking of Evidence), Swaziland (Form of Wills, Legalisation), Tonga (Legalisation). It will be evident that effective action against the problem of international child abduction is particularly dependent on the number of countries which participate in such action so that the number of "abduction havens" is reduced and, if possible, eliminated entirely. The purpose of this document is, therefore, to explain the essential features of The Hague Convention, to evaluate their implications for Commonwealth countries and to make suggestions about the legal and administrative steps necessary for accession and implementation.

Appendix A contains a Draft Model Act. Its purpose is to provide Governments some idea of the <u>kind</u> of legislation that may be necessary to give effect to the

Convention. Naturally, it ignores questions that may be specific to particular States and can therefore be no more than a rough guide to them. It must also be emphasized that the Draft Model Act does not purport to translate into legislative form all the provisions of the Convention in a comprehensive manner. This simply reflects an individual judgment that some provisionsof the Convention can be followed without being incorporated in statutory form. But these questions are obviously ones of judgment for each Government.

Appendix B sets out the Convention itself.

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.

CHAPTER TWO

Substantive principles

2.1 The central tenet of the Convention is that children should be returned to their State of habitual residence if they have been wrongfully removed therefrom. It is not a Convention for the reciprocal recognition and enforcement of foreign custody orders. It seeks to protect children by safeguarding the relationships which they actually have with those exercising care over them. It does this by protecting "rights of custody" attributed to a person, institution or other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before its removal or retention if such rights were "actually exercised", or would have been so exercised if the child had not been removed or retained. A removal or retention is considered wrongful if it is in breach of such rights (Article 3). It is important to consider, therefore, what the expression "rights of custody" means. In common law, the term "custody" does not simply mean the actual possession of the child (this is often referred to as "care and control" butrefers to a bundle of "rights" respecting the child. These will include the day to day care of the child, but can also comprehend the rights to determine the child's religion, education and place of residence. Sometimes these "rights" may be fragmented and shared between a

number of persons, or between a person and an institution. (See J.M. Eekelaar, "What are Parental Rights?" (1973) 89 L.Q.R. 210). Now, States may define the term "custody" in whatever way they choose, but what is essential for determining their obligations under the Convention is the definition used in the Convention. This definition is open-ended in that it specifies rights of custody as <u>including</u> rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence (Article 5). Such rights, by whatever name they might be called in a State's domestic legal system, are "rights of custody" for the purposes of the Convention and are protected by it. There is nothing to suggest that such rights cannot be separated. Hence, if the right to day to day care is vested in A and the right to determine the child's place of residence in A and B, both A and B have rights of custody under the Convention. This may be of crucial significance if, for example after a divorce, the court grants <u>joint custody</u> to <u>both</u> parents but <u>care and control</u> to one only. A joint custodian would normally be entitled to be consulted as to where the child should live, and if the custodian who has care and control removes the child without consulting him or her, that is a wrongful removal. The result would be the same if the court had specifically stated that a child should not be removed from the jurisdiction without the consent of one parent (or the court)

for, although the expression "custody" may not have been used, that parent would possess a right to determine the child's place of residence which falls within the protection of the Convention.

2.2 The custody rights referred to above may have arisen automatically under the law of the State of habitual residence or may have been defined under a decision or agreement operative under the law of that State. This makes it clear that the Convention does not protect only custody rights arising under a court order. If a parent abducts a child before any such order is made, the other parent may seek its return under the Convention without necessarily seeking an order in his or her home State. This facility should assist in the speed of actions securing the return of such children. The provision that the custody rights must have been actually exercised at the time of the removal or retention seeks to exclude claims by persons who, though they may technically retain such rights, have ceased to exercise them. This point is returned to in para. 2.4(i). Where the right in question is only the right to determine the child's place of residence, it may be more difficult to understand what is meant by this right being "actually exercised". However, it is probable that in practice this will not be difficult to establish: a person's conduct may easily show that he or she has retained the expectation to be consulted about the child's place of abode. It should be

noted, in this context, that the custody rights in question may be vested in "a person, an institution or any other body". Hence a state or voluntary body to which custodial rights have been transferred by virtue of agreement, court order (or any other manner) may apply under the Convention for the return of a child abducted in breach of those rights.

2.3 Judicial or administrative authorities in the requested State are obliged to return "forthwith" to its habitual residence any child removed to or retained in that State in breach of custody rights as defined in the Convention provided that proceedings for the child's return have been instituted within a period of a year from the removal or retention. The only grounds for refusing to return the child are those expressly permitted by the Convention. The grounds may be conveniently set out as follows:

(i) If 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 the removal or retention (Article 13(a));

(ii) if the person, institution or other body having the care of the person of the child had consented to or subsequently acquiesced in the removal or retention (ibid);

(iii) if there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place him or her in an intolerable situation;

(Article 13(b));

(iv) (if more than a year ahs elapsed between the removal or retention and the institution of proceedings) that the child is now settled in its new environment (Article 12).

In (i) to (iii) the burden of proving the ground is expressly placed on the person, institution or other body opposing the child's return. In the case of (iv), the Convention says only that this must be "demonstrated". It is suggested that the effect of this is similarly to place the burden of proof on the abductor.

In addition to the above grounds, return may be refused if the court finds:

(v) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take into account its views (Article 13);

(vi) that the return of the child would "not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms". (Article 20).

2.4 It is significant that none of these grounds for refusal is equivalent to a simple finding that "to return the child would be contrary to the child's best interests". To have permitted a ground of this nature to justify refusal to return the child would have opened the way to an examination of the merits of the dispute between the adult parties and thus undermined the foundations of the

Convention (see para. 1.1). The grounds set out all require an express finding of the presence of a specific element in the situation and it is on this that the objection to return must be based, not an omnibus survey of the child's general condition. It is in the light of this that the following brief comments on each of the six grounds for refusal mentioned in 2.3 above must be seen:

(i) this does little more than to re-iterate the requirement that, for the removal to be wrongful, the custody rights breached must have been actually exercised, either jointly or alone, at the time of the breach or would have been so exercised were it not for the breach. However, it does make it clear that the burden of proving this lies on the party opposing return, at least where the custody right alleged to have been breached is the right relating to the care of the person of the child. Where the right breached is the right to determine the child's place of residence, this ground of opposition does not seem to apply, although, as has been argued, it is possible to conceive of such a right being "actually exercised". It is also hardly conceivable that this ground of opposition could apply where the reason why the rights were not exercised is precisely because the child was abducted. It was to cover this situation that the words "or would have been exercised but for the removal or retention" were added to Article 3 (b). In order to avoid contradiction within the Convention, and also to give effect to

its manifest purpose, some words such as "unless those rights would have been exercised but for the removal or retention" must be implied after "retention" where it first occurs in Article 13 (a).

Thus the Convention covers the case where a parent, who has had the care of a child during the course of litigation, removes the child the moment the court orders its transfer to the other parent. That other parent "would have" exercised custody rights were it not for the removal or retention. What would be the situation if the removal took place before the order was made? The parent in whose favour the order is made cannot rely on the order itself because the Convention covers only rights of custody existing at the time of the removal or retention and, furthermore, it must be shown that these rights were, or would have been, exercised at that time. It is suggested that such a case would normally come within the Convention for the following reasons: (a) normally while custody is in dispute the parents will retain their equal rights to possession of the person of the child, although, if they have separated, one of them will in fact not be exercising this right. It could be argued that the parent who does not exercise this right during the dispute waives it on the understanding that the matter will be decided by the court and would not have done so if the child was likely to be removed. Hence such a parent "would have" exercised the right were it not for the removal. (b) Alternatively,

during the dispute each parent would normally retain the right to determine the place where the child should live. This right is "actually exercised" during the dispute in the sense described in para. 2.2 and it is this right which is breached by the removal before the court makes its order. One situation does, however, fall outside the Convention. This is where one of the parties to the proceedings (A) has no rights of custody, the other party (B) removes the child before the decision is made and the decision confers custody rights on A. The removal would not have been in breach of any custody right of A existing at the time of the removal. The situation could arise where a parent who has been given access rights only in an earlier order seeks, and obtains, custody; or where a welfare authority is seeking an order granting it parental rights. But to have covered this case would have required recognition of the decision as a basis for ordering the return of the child, which was not the approach of the Convention. It is not thought that the omission is serious as very few cases of this kind are likely to arise. If they do, the Convention does not prevent the return of such children if this is thought appropriate (Articles 18 and 36).

(ii) The purpose of this ground of opposition is clear enough. It is curious that it expressly applies only where the person, institution or other body "having the care of the person of the child" consents to or acquiesces

in the removal and not, at least expressly, where the person having the right to determine the place where the child shall live so consents or acquiesces. It is surely highly relevant to such circumstances. It would be gravely anomalous if the ground did not apply to that situation and it would seem reasonable, when implementing the Convention, that States should make it do so.

(iii) This emergency clause is clearly necessary lest the working of the Convention becomes oppressive to children. The addition of the expression "or otherwise place the child in an intolerable situation" valuably covers situations where the return, at any rate at that very moment, might subject the child to extreme disruption, if not to actual physical or psychological harm.

(iv) This ground of opposition comes closest to allowing the court to review the merits. The Convention sought to strike a balance between the overriding policy of deterring abductors by encouraging the rapid return of abducted children and the realisation that, in time, return of such children might indeed be against their best interests. After a year had passed since the abduction or retention it was felt that the circumstances generated by the child's new environment compelled genuine consideration. Therefore, once that period has passed, it is open to the abductor to demonstrate that the child has settled in his or her new invironment.

If he fails to establish this (perhaps because the child has been continually moved) the requirement to return the child, subject to the grounds of opposition already discussed, remains, although it must be assumed that the longer the child has in fact been away from its original place of habitual residence the more likely it is that a court might find the ground for opposition mentioned in sub-paragraph (iii) above to be satisfied. If he succeeds, the court will be free to decide the case on a full review of its merits.

(vi) This ground for opposition embraces a broad public policy element. The Convention does not require states to adopt it and Governments must decide, in the light of the following discussion, whether they wish to avail themselves of it. It is to be noted that it is strongly drawn and it seems that it is unlikely, without strain, to include situations where the principles of family law of the requested state differ from those in the requesting state: for example, if the latter state operated a system of preferred custody rights in one parent. This is important because family law in particular reflects different cultural patterns and, if the Convention is to operate successfully, there must be mutual respect among States for these differences. The child's future should normally be determined according to the cultural practices of the place of his habitual residence. However, it may be that the circumstances prevailing in the requesting State are such that to return

the child there would seriously endanger his future exercise of basic human rights and fundamental freedoms, or those of the parent who would accompany him. At this level, the view of the requested State must prevail. (An example might be a case of child refugees). How this view is to be ascertained could be controversial. Is the decision to be left to the judge, on a broad discretionary basis, or should a certificate of a Minister of the requested State be required? My preference would be to leave it to the judge, for to do this would at least require the matter to be openly argued and considered.

How closely should this judicial discretion be guided? It would seem desirable to try to direct the inquiry as far as possible so as to minimize the risk of open-ended surveys of a quasi-political nature. Certain matters could, for example, be specified as the primary or exclusive grounds for establishing this objection to a return. Clause 3 in the Draft Model Act appended to this Report gives an illustration of one method of approaching this problem.

2.5 These provisions apply to breaches of rights of custody, as defined in para. 2.1 above. It is to be noted that they do not apply to breaches of access rights only. Thus if a parent who has the day to day care of the child but who is under an obligation (whether imposed by court order or agreement or other-

wise) to allow the other parent to visit the children removes the children, thus rendering it impossible for the visits to take place, such removal is not wrongful under the Convention. The reason for this is that disputes about access are notoriously difficult to unravel (it might be alleged that the absent parent was visiting very infrequently, or that the children disliked the visits) and to order the return of the children when such matters may well be in dispute is to provide too drastic a remedy. But it must also be remembered that, if the parent with access rights has also the right to determine where the children shall live, the latter right is a "right of custody" within the Convention and, if breached, may be remedied by return of the children. It seems right to draw a distinction in this manner because a parent with the latter right who can be held to be "actually exercising" it is likely to be more involved with the children and it seems proper that if any dispute over its exercise arises, this should be resolved at the place where the children habitually reside. Problems may, of course, arise about how an order for the return of the children is to be implemented in such a case, for it is not clear that it will always be appropriate for the children to be returned to the care of a parent who has hitherto not been actually caring for them. If it would not be appropriate to do this, the court may want to be satisfied that the abducting parent returns with

the children so as to be able to continue their day to day care. If that parent refuses to do this, the court may have to be satisfied that other appropriate arrangements are available for the children when returned (and it may be assumed that the abductor would not readily wish to be separated from the children) but, if these cannot be made, it may be necessary to refuse the order, at least for the time being, on the ground that to return the children would place them in an intolerable situation.

2.6 While withholding the remedy of return in a case of breach of access rights only, the Convention seeks to re-inforce access arrangements which involve children moving between Contracting States. Thus Article 21 allows a party resident outside a Contracting State to present to that State's Central Authority an application for making arrangements for organising or securing the effective exercise of rights of access. Central Authorities are not placed under any mandatory duties with respect to such applications other than generally to promote co-operation on these questions and in practice this can be achieved by passing the matter on to a local lawyer who may then either negotiate agreement between the parties or institute whatever proceedings may be necessary in the local courts on behalf of the party living abroad (see paras. 1.5 - 6). The most effective way in which the Convention protects access arrangements is in the provisions requiring return of a child which

is wrongfully "retained" (for example, by a parent exercising access rights) in breach of the rights of custody of the other parent, for access rights are defined as including the right to take a child for a limited time to a place other than the child's habitual residence (Article 5(b)).

2.7 Two final points of substance must be made. The Convention applies only to children habitually resident in a Contracting State immediately before the breach of custody (or access) rights (Article 4). There is no reason, of course, why a State implementing the Convention should not go further if it so wishes and apply the protection of the scheme of the Convention to children wrongfully brought within its jurisdiction from non-Contracting States. However, States may prefer to proceed on the basis of reciprocity for in that way they can encourage a more widespread adoption of the Convention and, of course, safeguard the interests of children habitually resident in their own territory who may be abducted to those other States. It is therefore assumed that States will in fact proceed in this manner. The second point is that the Convention ceases to apply when a child reaches 16 (Article 4). The intention is that when a child reaches that age, even if this should happen after an application is lodged and proceedings have started, jurisdiction under the Convention should

terminate forthwith, for a child of that age is considered capable of deciding for himself or herself where to live. It is likely that a court would in any case give great weight to the views of a child approaching that age. Of course, it is open to States under whose laws a child reaches majority only at a later age to retain judicial jurisdiction with respect to the child in terms of its domestic law even if it is no longer obliged to operate the scheme of the Convention in his case.

CHAPTER THREE

Matters of Procedure

3.1 An applicant under the Convention is given the option of three methods of mobilising its provisions. He may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State (presumably the State where the child is thought or known to be) (Article 8). However, this facility is without prejudice to the right of the applicant, if he so wishes, to bypass the Central Authorities and make a direct application to the courts of a Contracting State (Article 29). If the removal or retention is wrongful within the meaning of the Convention, it should not matter in which way the proceedings originate. But if the application is made through Central Authorities, the Convention requires it to be accompanied by certain information. This is set out in Article 8. The information must include (a) the identity of the applicant, the child and the alleged abductor; (b) where available, the date of birth of the child; (c) the grounds on which the claim for return is based; (d) all available information relating the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The information may also include (a) an authen-

ticated copy of any relevant decision or agreement; (b) a certificate or affidavit 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 and (c) any other relevant documents. The Hague Conference has recommended a standard model form of application which is appended to the Convention. An Authority may also require (and this might be useful) that the application be accompanied by written authorisation empowering it or some other person to act on behalf of the applicant (Article 28). These communications should (where relevant) 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" into French or English (Article 24). However, a State may, by entering a reservation under Article 42, object to the use of French or English in this connection, but not to both.

3.2 On receipt of such an application, the Central Authority of the requested State may proceed no further with it if it is "manifest" that it falls outside the provisions of the Convention or is otherwise not well founded. If it does this, it is bound to inform the applicant, or the Central Authority through which the application was submitted, of its reasons for reaching

this conclusion (Article 27). If the application is accepted, there may be a number of choices open to the Central Authority of the requested State as to how to proceed. It probably should keep uppermost in mind, at this stage, the requirement of Article 10 that it should "take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child". So, if the whereabouts of the child is known, it may deem it best in the first instance to approach some social agency (for example, an officer of the International Social Services; or a local state or voluntary child welfare agency) to ascertain whether this can be achieved. If the whereabouts of the child is not known it might be necessary, in addition to or instead of taking the above steps, to contact the appropriate section of the police department. The Central Authority should also keep in view its duty, under the Convention, to prevent further harm being caused to the child "by taking or causing to be taken provisional measures". The appropriateness of taking such measures may best be judged by a child welfare agency. The Central Authority may also consider it right, even at this early stage, to obtain a lawyer to act on behalf of the applicant (see para. 1.5). That lawyer may be able to assist in negotiations between the parties and could institute relevant proceedings to safeguard the child's interests if available and appropriate.

3.3 But if these measures fail to secure the voluntary return of the child or an agreed resolution of the dispute, the Authority (or the lawyer acting on behalf of the applicant) should institute proceedings for the return of the child. It is assumed that the legal systems of Commonwealth countries would not permit the forcible removal of the child from the abductor for the purpose of returning the child home without a court order. The judicial procedure should be simple and rapid. The court should be able to act on the basis of the documents submitted with the application. Opportunities for delay by the abductor should be reduced to a minimum. Courts should attempt to determine the matter within days rather than weeks. In order to encourage rapidity, Article 11 states that if a decision has not been reached within six weeks from the institution of proceedings, the applicant or the Central Authority is entitled to ask for the reasons for the delay. If anorder for the return of the child is made, it is the duty of the Central Authority to ensure that appropriate arrangements exist for ensuring the safe return of the child. Any expenses so incurred may be recovered by the Central Authority, and the court ordering the child's return may direct that these be met by the abductor (Article 26).

CHAPTER FOUR

Questions of Evidence

4.1 In order to achieve the purposes of the Convention, it is necessary that courts can act on the basis of the evidence presented to them in the documentation accompanying the application. Thus Article 30 requires that the application and supporting documentation should be admissible in court proceedings. It is, therefore, obviously desirable that Central Authorities should try to ensure that this documentation is as complete as possible when the application is submitted. In the standard case, the evidence will be directed at two issues: the first, the question of fact that the applicant was "actually exercising" care of the person of the child at the time of the wrongful removal, and the second, the question of law that this exercise of the custody right was in accordance with the law of the State of the child's habitual residence. Evidence of the first issue should be reasonably easy to assemble in the form of affidavits by the applicant and other persons concerned with the family supplemented, perhaps, by school or other official records. On the question of law, the Convention seeks to promote speed by allowing the courts of the requested State to take notice "directly of the law of, and of judicial or administrative decisions, formally recognised 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" (Article 14). Thus if, for example, the adult parties had merely separated without the intervention of a court order, a general statement of the law of the State (provided, for example, by the Central Authority of that State) concerning the custody rights of parents of legitimate children (if the parties were married) or of illegitimate children (if they were not) should be accepted. If the rights were exercised under a court order or formal agreement, the court should accept an authenticated copy of the order or agreement.

4.2 Although the application should establish a prima facie case both of the custody right alleged to be breached and the actual exercise of it, it does not seem that the applicant retains the ultimate burden of proof on the question of the actual exercise of the right. Article 13 makes it clear that, if it is alleged that the right was not actually being exercised at the time of the removal or retention, the burden lies on the abductor to establish this. So, unless the court is satisfied, on the balance of probabilities, that the custody right was <u>not</u> actually being exercised, the ground for return will have been established. In the same way, the burden lies upon the abductor to esta-

blish any allegation that the other party had consented to or subsequently acquiesced in the removal or retention or that the return of the child would expose the child to physical or psychological harm or would otherwise place him or her in an intolerable situation. Hence, mere assertions to this effect will normally be insufficient to discharge this burden. The onus is placed on the abductor to adduce convincing evidence on these points. Courts should be slow to grant time to abductors to do this unless a convincing case is made out that such evidence is liekly to be forthcoming.

4.3 Although the burden of proof on the above matters is placed on the abductor, it seems to remain with the applicant with respect to the question whether the custody right in question was attributed to him or her under the law of the State of the child's habitual residence. Thus, if the abductor puts in issue questions of fact, the burden lies on him or her. But the burden regarding questions of law rests on the applicant. In view of the relatively straightforward way in which evidence of this kind can be submitted, it is thought that questions of law should seldom raise many problems. In this context, reference should be made to Article 15, which permits the courts of the requested State, prior to ordering the return of the child, to request that the applicant obtain from the authorities of the State

of the child's habitual residence "a decision or other determination" that the removal or retention was wrongful within the meaning of Article 3 "where such a decision or determination may be obtained in that State". It is greatly to be hoped that States will rarely, if ever, use this provision. The delay which it would undoubtedly cause would go far to frustrating the major purpose of the Convention. If the question in issue was whether the custody rights alleged to be breached were being "actually exercised" at the time of the alleged breach, such a reference would impose on the applicant the burden of proof which Article 13 clearly contemplates should rest on the abductor.

4.4 The Convention makes provision for the contingency that, prior or subsequent to the application being heard, a decision relating to the custody of the child might have been given in the requested State or be entitled to recognition in that State. It is stated that any such decision shall not of itself be a ground for refusing to return the child but that the reason for the decision may be taken into account in determining the application (Article 17). Let us consider, first, such a decision made in the State of habitual residence, and then a decision made in the requested State. In the first situation, it is necessary to stress that any such decision cannot in itself be a

ground either for or against ordering the return of the child under the Convention. This is because the Convention only covers abductions which were in breach of custody rights at the time of the removal or retention. If, for example (as sometimes happens) the decision vests sole custody in the applicant by way of penalty on the abductor, the decision is irrelevant except insofar as it may provide evidence as to how rights of custody were attributed at the time of the alleged breach (see above, para. 2.4(i)). If, on the other hand, the decision vested custody rights in the abductor, the removal will nevertheless remain unlawful. But in this case the court may well conclude that to return the child would place him or here in an intolerable situation because the court in the country of habitual residence would simply hand the child back to the abductor. In the situation where the decision is by a court of the requested State, the Convention makes it plain that any such decision should not inhibit the application of the provisions of the Convention. It seems highly probable that, if any such situation were to arise, the decision would not have been made in full appreciation of all the facts, for if it were known that the child had recently been removed or retained in breach of custody rights actually exercised in another State, it is difficult to see why the case was not decided under the terms of the Convention.

CHAPTER FIVE

Accession

5.1 Article 38 provides that the instrument of accession to the Convention shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, and that the Convention shall enter into force in the acceding State on the first day of the third calendar month after such deposit. But the accession affects relations only between the acceding State and such Contracting States as accept the accession. This acceptance is made by declaration in the same manner as the accession.

5.2 The Convention contains express provisions for Contracting States which comprise two or more territorial units in which different systems of law are applicable and States in which executive, judicial and legislative powers are distributed between central and other authorities of the State. In the former case, the Contracting State may, at the time of accession, declare that the Convention shall extend to one, some or all of the territorial units (Article 40); in the latter, Article 41 expressly states that accession "shall carry no implication as to the internal distribution of powers within that State" and Article 33 makes it clear that non-unitary States are not bound to apply to provisions of the Convention between

their internal territorial units. These clauses are intended to permit States of a federal character to accede to the Convention and implement it in the manner required by their particular constitutional circumstances.

APPENDIX A

DRAFT MODEL ACT ON INTERNATIONAL CHILD ABDUCTION

WHEREAS a Convention relating to the Civil Aspects of International Child Abduction was agreed at The Hague in October 1980 and WHEREAS, with a view to the accession by ---------- to that Convention, it is expedient to enact the following provisions.

PART ONE - APPLICATIONS FOR ORDERS FOR THE RETURN OF CHILDREN

1.(1) For the purposes of this Act a person has rights of custody with respect to a child when, under the law of the State in which the child has his habitual residence, that person has the right, either jointly or alone, either

(a) to possess the person of the child, or

(b) to determine the child's place of residence.

(2) In determining whether a person has such rights as defined in subsection (1) of this section, the court may take direct notice of the law of that State and shall have regard to any decision or agreement made under or recognised by the law of that State.

Comment

"habitual residence": this term will be left undefined, as it has been the policy of Hague Conventions to do this. It cannot be made more exact without becoming arbitrary. For discussion of the term, see Cruse v. Chittum, 1974 2 All E.R. 940 and Dicey and Morris on the Conflict of Laws, 10th ed., 144 - 5.

"to possess the person of the child": this expression is preferred to "rights relating to the care of the person of the child" which is used in the Convention, Article 5. It captures its essential intent while avoiding potential uncertainties as to whether, for example, temporary caregivers such as school or hospital authorities, can be said to have such rights. (See also section 14 (1) below.) It is based on the definition of "actual custody" used in the Children Act 1975 (UK).

The splitting of the concept of custody into two distinct limbs makes clear that the Convention covers cases where either of them is breached: see para. 2.1.

Subsection (2) expresses the intent of the final paragraph of Article 3, and of Article 14.

2.(1) An application may be made to a court under this section by or on behalf of any person with respect to a child on the following grounds,

(a) that the child is physically present in ------- at the time when the application is made;

(b) that the child was removed from the State in which he had his habitual residence in breach of rights of custody held by the applicant with respect to the child or retained outside that State in breach of such rights;

(c) that the applicant was actually exercising the rights of custody alleged to be breached at the time of the removal or retention or would have so exercised them were it not for the removal or retention; and

(d) that the State referred to in paragraph (b) is a specified State.

(2) Subject to the provisions of this Act, the court to which an application under subsection (1) of this section is made shall consider the terms of the application and any other evidence submitted to it and, if satisfied that the applicant has sufficiently proved each ground set out in that subsection, shall order that the child to which the application relates shall be returned to a State specified in the order.

(3) A court may be satisfied for the purposes of subsection (2) of this section without requiring oral testimony.

Comment

"on behalf of": see para. 1.7.

"physically present": this is the usual basis in common law countries for the assumption of jurisdiction in cases concerning children; see also Article 12(1), which refers to the requested State as being the State "where the child is."

"the applicant was actually exercising ... ": this incorporates the requirements of Article 3(b), but must be read subject to the draft section 14 (1), below.

Paragraph (d) assumes acceptance of the principle of reciprocity.

Subsection (2): This method of setting out the duty to order the child's return is chosen because it makes clear that the applicant is entitled to a favourable order if he establishes a prima facie case upon the submission of the application. (Article 30). The wording is based on Rule 48 of the Matrimonial Causes Rules 1977 (UK) which requires registrars to pronounce upon petitions for divorce under the "special procedure" This subsection is made subject to other provisions of the Act, the most important of which are sections 3 and 4.

Subsection (3): see para. 4.1.

3.(1) A court to which an application has been made under subsection (1) of section 2 of this Act shall not be bound to order the return of the child if it finds that

(a) the child objects to being returned and the court considers the child to be of such age and understanding that it is appropriate to take his views into account, or

(b) the return of the child would expose him or a parent or guardian of his to the risk of infringement of his human rights or fundamental freedoms.

(2) In determining whether paragraph (b) of subsection 1 of this section is established the court [shall consider only the following matters] [may consider the following matters]

(a) whether the return of the child would be inconsistent with rights possessed by the child or any other person under the law of ------- with respect to political refugees or political asylum

(b) whether the return of the child would expose the child or any other person to discrimination on the grounds of race, sex or religion.

Comment

It is not stated who may raise these questions before the court. The intention is that they are matters which may be taken by any person or by the court itself.

"age and understanding": preferred to "age and degree of maturity" of Article 13 on the ground of being in line with existing provisions; (for example, Magistrates' Courts (Children and Young Persons) Rules 1970, Rule 6).

"would expose him or a parent or guardian of his to the risk of infringement of his human rights or fundamental freedoms": this is intended to implement the intention of Article 20, which, however, permits refusal if the return would not be "permitted" by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. It is not entirely clear how the "return" may not be so permitted without taking into account what may happen when the child is returned. It is surely the risk of exposure to, say, political persecution, which this provision seeks to avoid and this seems better captured by the suggested wording: see further para. 2.4 (vi).

4. Without prejudice to the generality of section 3, a court to which an application has been made under subsection (1) of section 2 of this Act shall not be bound to order the return of the child if the application is opposed and the person opposing the application establishes to the satisfaction of the court one or more of the following

(a) that, subject to section 5 and subsection (1) of section 14 of this Act, the applicant was not at the time of the removal or retention actually exercising the rights of custody alleged to have been breached, or

(b) that the applicant has consented to or subsequently acquiesced in the removal or retention, or

(c) that there is a grave risk that the return of the child would expose him to physical or psychological harm or otherwise place him in an intolerable situation, or

(d) that a period of one year or more has elapsed between the removal or retention and the making of the application and that the child has settled in his new environment.

Comment

The burden of proving these grounds of opposition is placed squarely on the defendant according to the intention of the Convention: see para. 4.2.

"in his new environment": this is the wording of the Convention and it seems suitable for judicial application.

5. Paragraph (a) of section 4 shall not apply where the applicant satisfies the court that he would, at the time of the removal or retention, have exercised the rights of custody alleged to have been breached were it not for the removal or retention.

Comment

This qualification seems necessary in order to retain the effect of the second limb of section 2(1)(c).

6.(1) If a court to which an application is made under subsection (1) of section 2 of this Act is not satisfied with respect to any of the grounds on which the application is based or is satisfied with respect to any of the matters mentioned in sections 3 and 4, the court may either

(a) dismiss the application or

(b) adjourn the hearing.

Comment

The purpose of this provision, which may need to be expanded in Regulations or Rules of Court, is to enable a court to allow an applicant (or defendant) time to produce further information. It may, for example, not be appropriate to return the child at that very moment and it seems sensible to provide an opportunity for arrangements to be made which would remove any existing obstacles to the return and for these to be presented to the court at a later date. But care should be taken to minimise the risk of delaying tactics. The power to dismiss the application or stay the application would also be used if the child has been removed from the jurisdiction (Article 12).

It would be a matter for local rules of procedure whether a court which dismisses an application under the Act could proceed to consider the merits of the dispute.

(2) If, at the expiry of six weeks from the making of an application under subsection (1) of section 2 of this Act the court to which the application was made has neither

(a) made an order under subsection (2) of that section, nor

(b) dismissed the application

the applicant, or a person on his behalf, may apply

to the court for a statement of reasons explaining why no such decision has been made.

Comment

This attempts to implement Article 11. It must be admitted that such a provision looks a little strained in a common law context, for the reason for the delay is likely to be known to the applicant. But it is unlikely to be harmful and may serve to aid rapidity of action.

PART TWO - CENTRAL AUTHORITIES

7. The Minister shall designate a Central Authority to discharge the functions ascribed to that Authority by this Act.

Comment

This Central Authority may be the Minister himself, and if this is intended, this could be stated here. A more complex provision may be necessary in the case of non-unitary States: see paras. 1.4 and 5.2.

8.(1) The Central Authority shall receive an application which alleges the grounds specified in subsection (1) of section 2 of this Act with respect to a child who had his habitual residence in a specified State at the time of the alleged removal or retention if the application is duly submitted by any person or by the designated Central Authority of that State.

Comment

"duly submitted": in accordance with any requirements of form or content which may be stipulated by Regulation.

(2) Subject to subsection (2) of section 13 of this Act, on receipt of an application duly submitted under subsection (1) of this section, the Central Authority shall, either directly or through any other person, take all appropriate measures

(a) to discover the whereabouts of any child to which the application relates;

(b) to safeguard the safety of any such child and prevent prejudice to any interested party;

(c) to secure the voluntary return of any such child to the State of his habitual residence or the amicable resolution of the issues;

(d) to facilitate the making of an application to a court under section 2(1) of this Act by or on behalf of the applicant.

Comment

These duties of the Central Authority are discussed in paras. 1.4 - 5.

9.(1) The Central Authority shall receive an application duly submitted by a person under this section with respect to a child on the following grounds

(a) that the child has been removed from ------- in breach of custody rights held by the applicant with respect to the child or has been retained outside ---- in breach of such rights;

(b) that the child had his habitual residence in ----- at the time of the alleged removal or retention;

(c) that the applicant was actually exercising the rights of custody alleged to be breached at the time of the removal or retention or would have so exercised them were if not for the removal or retention;

(d) that the applicant has reasonable grounds for believing that the child is physically present in a specified State or States.

(2) Subject to subsection (2) of section 14 of this Act, on receipt of an application duly submitted under subsection (1) of this section, the Central Authority shall forthwith transmit the application together with any relevant documents to the designated Central Authority of the State or States specified in the application. The Central Authority shall also, if so requested by the designated Central Authority of any such State or States, transmit to that Central Authority information of a general

character on the law of ------ which is or may be relevant to the application.

Comment

This section enables Central Authorities to fulfil the function of transmitting applications under the Convention between Contracting States.

"duly submitted"; under any Regulations.

10.(1) The Central Authority shall receive any application duly submitted under this section with respect to a child who has his habitual residence in a specified State by a person or by the designated Central Authority of that State which alleges that

(a) an issue exists relating to rights of access with respect to the child; and

(b) the applicant has reasonable grounds for believing that the child is physically present in -----

(2) On receipt of an application duly submitted under subsection (1) of this section, the Central Authority shall, subject to subsection (2) of section 14 of this Act, take all appropriate steps, including the facilitation of legal proceedings, which may be necessary to resolve the issue to which the application relates.

11.(1) The Central Authority shall receive an application duly submitted by a person under this section with respect to a child who has his habitual residence in ----- which alleges that

(a) an issue exists relating to rights of access with respect to the child and

(b) the applicant has reasonable grounds for believing that the child is physically present in a specified State or States.

(2) On receipt of an application duly submitted under subsection (1) of this section, the Central Authority shall, subject to subsection (2) of section 14 of this Act, forthwith transmit the application together with any relevant documents to the designated Central Authority of the State or States specified in the application.

Comment

The purpose of sections 10 and 11 is to give effect to Article 21 of the Convention concerning questions of access. The Article is broadly drawn (see para. 2.5) and the suggested provisions aim to leave the Central Authorities with the utmost flexibility about how to proceed.

PART THREE - GENERAL

12. The Minister may by regulation

(a) make provision for the safe return of a child with respect to whom an order is made under subsection (2) of section 2 of this Act;

(b) specify the information required in and documents to be provided with any applications referred to in this Act and make provision for the translation of any relevant documents;

(c) make provision for the ordering of costs in connection with the application and expenses incurred in returning the child to be recovered from any person adjudged to have removed or retained a child in breach of custody rights;

(d) make provision for the recovery of expenses incurred in connection with the provision of legal assistance and the institution of legal proceedings from an applicant under this Act or any party to legal proceedings arising out of an application made under this Act;

(e) make provision entitling any person making an application under subsection (1) of section 2 of this Act to legal aid and advice under (local legislation) provided that the applicant is a national of or habitually resident in a specified State at the time of the application.

Comment

Paragraph (b): this could incorporate the Model Form of application appended to the Convention.
Paragraph (d): to do this, a Reservation would need to be entered under Article 42 of the Convention: see para. 1.8.
Paragraph (e): this gives effect to Article 25, but would only be relevant if the State enacting the Model Act operated a legal aid scheme: see generally para. 1.5.

13. No person who makes an application under subsection (1) of section 2 of this Act or who submits an application under subsection (1) of section 8, subsection (1) of section 9, subsection (1) of section 10 and subsection (1) of section 11 of this Act shall be required to effect any security, bond, deposit by way of guarantee for payment of or contribution towards the payment of costs and expenses related to any proceedings instituted as a result of any application made or submitted under this Act.

Comment

This refers to Article 22 of the Convention: see para. 1.6. Note that recovery may be resorted to after the application is heard: clause 12(d) above and the Comment thereto.

14. (1) For the purposes of this Act, an applicant shall be deemed to be actually exercising rights of custody notwithstanding, in the case of the rights referred to in paragraph (a) of subsection (1) of section 1, that the child was at the relevant time in the possession of a person other than the applicant for a limited period of time.

Comment

This provision seems necessary to avoid problems arising where a child is abducted when staying, for example, at boarding school or with relatives or friends.

(2) The Central Authority shall not be bound to act in accordance with sections 7(2), 8(2), 9(2) and 10(2) if it is of the opinion that any of the allegations required to be made with respect to applications under those sections are manifestly unfounded.

Comment

See Article 27 of the Convention.

(3) An application shall be deemed to be duly submitted under this Act only if it complies with any requirements regarding such applications made under any Regulations made under this Act.

(4) A single application may be made with respect to more than one child.

15. Nothing in this Act shall prevent a child being returned from ----- to any State otherwise than under the provisions of this Act.

Comment

See Articles 18 and 36 of the Convention and para. 2.4(i).

16. In this Act

"child" means any person who has not yet attained the age of sixteen years;

"the Convention" means the Convention referred to in the Preamble of the Act;

"decision" means any determination made by judicial or administrative authority;

"designated Central Authority" means the Central Authority designated by a specified State for the purposes of fulfilling its obligations under the Convention;

"habitual residence" means, in relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units, habitual residence in a territorial unit of that State;

"law" includes the conflict of laws and means, in relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units, the law of the territorial unit in that State where the child

habitually resides and, 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, the legal system specified by the law of that State.

"Minister" means

"person" includes persons, a body of persons or an institution;

"rights of access" means the right to visit a child, including the right to take a child for a limited period of time to a place other than the child's habitual residence;

"specified State" means any State for the time being designated by the Minister as a State in which in his opinion the Convention is in force.

Comment

"child": see Article 4
"habitual residence": see Article 31(a)
"law": see Articles 31(a) and 32
"specified State": this definition covers the provision about entry into force of the Convention in Article 35

17. This Act shall be known as the International Child Abduction Act and shall come into force on

Final Act of the Fourteenth Session

The undersigned, Delegates of the Governments of Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Jugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela, and the Representatives of the Governments of Brazil, the Holy See, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republics and Uruguay participating by invitation or as Observer, convened at The Hague on the 6th October 1980, at the invitation of the Government of the Netherlands, in the Fourteenth Session of the Hague Conference on Private International Law,

Following the deliberations laid down in the records of the meetings, have decided to submit to their Governments –

A The following draft Conventions –

I

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 a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV - RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.
The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V - GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.
However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.
Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they

may require the payment of the expenses incurred or to be incurred in implementing the return of the child.
However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.
Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

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 .... day of ..... 19... 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.

F The following Recommendation concerning the draft Convention on the Civil Aspects of International Child Abduction –

The Fourteenth Session,

Recommends to the States Parties to the *Convention on the Civil Aspects of International Child Abduction* that the following model form be used in making applications for the return of wrongfully removed or retained children –

Request for return

Hague Convention of ..... 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 .....
habitual residence before removal or retention .....
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*

.....

Date .....

Place .....

Signature and/or stamp of the requesting Central Authority or applicant

.....

* *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.

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