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Legal Aid Corporation

Metropolitan Region

ORDINARY OFFICIAL LETTER No. 1463-2000

Re: Questionnaire concerning the Practical
Operation of the Convention and Views
on

Possible Recommendations

Matter: Reply to questionnaire.

Santiago, December 7, 2000

TO: MR. WILLIAM DUNCAN, FIRST SECRETARY

Permanent Bureau of The Hague Conference on Private
International Law

6, Scheveningseweg, 2517 KT, The Hague, The Netherlands

Facsimile: 31 (70) 360 48 67

FROM: TITA ARANGUIZ ZUÑIGA, Deputy Director General

Legal Aid Corporation, Metropolitan Region

Chilean Central Authority for the Implementation of the
Convention on the Civil Aspects of International Child
Abduction.

Facsimile: 56 2 688 76 85

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56 2 672 87 00

Dear Sirs,

I hereby remit to you the reply to the questionnaire referred to above.

**QUESTIONNAIRE CONCERNING THE PRACTICAL OPERATION OF THE
CONVENTION AND VIEWS ON POSSIBLE RECOMMENDATIONS**

(1) The role and functioning of Central Authorities

General questions:

1. In reply to the first question: Yes, there are countries like Paraguay, Trinidad and Tobago, etc. that have not yet appointed a Central Authority to fulfil the obligations under the Convention. Therefore, the Convention is ineffective.
2. In reply to the second question: No.

Particular questions:

3. In reply to the third question: In practice, the Chilean Central Authority has firstly initiated proceedings and then secured a voluntary return of a child or bring about an amicable resolution. To firstly secure its return has proven ineffective, since in all the cases

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handled by this Central Authority, the abducting parent refuses to voluntarily return the child to the latter's country of habitual residence.

4. In reply to the fourth question: (a) The Chilean Central Authority directly provides legal counsel and advise services in Hague proceedings. The Legal Aid Corporation for the Metropolitan Region undertook to bear the charges connected with the participation of legal counsels and advisors, to the extent such costs are borne by the legal aid system prevailing in our country. Expenses related to implementing the return of a child are not paid. (2) No.
5. In reply to the fifth question: (1) The Chilean Central Authority represents applicant parents. (2) No.
6. In reply to the sixth question: As of this date, the Chilean Central Authority has not been required to take any protective measure to ensure that a child returned from abroad receives appropriate protection. There was only one case where violence might have existed and the courts of the requested country (Germany) refused the return of the children to our country and access rights

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to the father.

In particular, does your Central Authority:

- (a) No.
- (b) Yes.
- (c) Yes.
- (d) Yes.
- (e) Yes.
- (f) Yes.

7. In reply to the seventh question: An application for access rights is filed before the juvenile court of jurisdiction or else the enforcement of the access rights agreed upon by the parties in the requesting country is sought.

In particular, in the case of an applicant from abroad,

does your Central Authority:

- (a) Yes.
- (b) Yes.
- (c) Yes.

- (d) Yes.

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(e) Yes, provided a request has been made by the requesting Central Authority and a decision to modify access rights is in force.

8. In reply to the eighth question: The Permanent Bureau has requested the Chilean Central Authority to provide annual statistics in accordance with the Hague standard forms A1, A2, B1 and B2 only once, on July 4, 2000. The said statistics were sent to the Permanent Bureau on October 3, 2000.

Standard forms C1-6 and D1-6 were sent to Mr. Nigel Lowes, from the University of Wales, Cardiff Law School, as requested by the Permanent Bureau.

9. In reply to the ninth question: Yes, the Chilean Central Authority supports the conclusions reached by the first, second and third Special Commissions, as set out in footnotes 11 and 12. However, the Chilean State has not become aware of the fact that the Chilean Central Authority plays a critical role in the operation of the Convention and, therefore, has failed to provide it with the personnel and other resources necessary for efficiently discharging its duties.

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10. In reply to the tenth question: Yes, the Chilean Central Authority would support other recommendations in respect of the particular functions which Central Authorities do or might carry out, especially with regard to the matters raised in questions 6 and 7 above.

(2) Judicial proceedings, including appeals and enforcement issues, and questions of interpretation.

1. In reply to the first question: At first instance, only one level: the Juvenile court being nearest to the child's domicile. At the second instance, the Courts of Appeals.

2. and

3. In reply to the second and third question: A copy is attached of the Supreme Court ruling on the Procedure Applicable to The Hague Convention on the Civil Aspects of International Child Abduction, which clarifies the procedure to be followed by Chilean juvenile courts and Courts of Appeals with regard to Hague applications. The said decision was made in view of the persistence of the reasons reported by the Chilean Central Authority to the Chilean Ministry of Justice and the Supreme Court of

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Chile. In Chile, the implementation of the Convention gave rise to a handful of issues seriously affecting international relations established by our country and the comprehensive protection of children. Accordingly, the Supreme Court of Justice was requested to make a ruling governing the main procedural aspects thereof.

In particular,

- (a) No.
 - (b) There are no measures/rules.
 - (c) The Central Authority exercises control by keeping in close contact with the appropriate legal counsel and the Court.
 - (d) Appeals do exist. They must be lodged within five days and, according to the Supreme Court ruling, it shall be decided as soon as possible by the division appointed by the court of appeal.
4. In reply to the fourth question: (1) At the return proceeding, the judge is empowered to carry out a confidential hearing with the child. (2) According to the Supreme Court ruling, a judge shall not be bound to order the return of a child where it is found that the

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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.

According to Chilean juvenile laws, a judge shall conscientiously consider the evidence submitted.

5. In reply to the fifth question: Where the person opposing return raises any other defences under Article 13 or Article 20, what are the procedural consequences? Usually, judges admit evidence and do not follow the procedure established in the Supreme Court ruling, i.e. the evidence is not produced at the hearing. What burden of proof rests on the defendant? He must prove that he is telling the truth. Does the raising of defences under Article 13 or 20 in practice lead to delay? Yes. What measures, if any, exist to reduce such delay to a minimum? The counsel of the petitioner and the Central Authority submit writs or request a meeting with the judge to inform him that Hague applications must be processed expeditiously. If ineffective, a remedy of complaint can be filed against the judge before the Court of Appeals and the Visiting Judge of the

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controlling juvenile court.

6. In reply to the sixth question: Procedures in place in our jurisdiction to ensure that return orders are enforced promptly and effectively are as follows: (1) If a decision is final, the court sends an official letter giving Carabineros de Chile or Interpol full powers for having their officials visit the place of abode of the abducting parent and demand the delivery of the child and then to return it to the petitioner parent or his appointee.

Are there circumstances (apart from pending appeals) in which execution of a return order may not be effected?
Yes.

Do return orders require separate enforcement proceedings? Yes.

Is there appeal from such proceedings? Yes.

Are such enforcement procedures routinely invoked, and are they successful in achieving the enforcement of return orders? No, usually the abducting parent - upon the return order being made - returns to the requesting country with the child. In proceedings carried out in

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Chile, only once the Court was requested to send a return order via Interpol.

7. In reply to the seventh question: Would you support any of the following recommendations?

(a) Yes.

(b) Yes.

(c) Yes.

(d) Yes.

(e) Yes.

(f) Yes.

(g) The problem with the Chilean Central Authority is that our courts do not appoint nor respect the terms to ensure an expeditious processing of return applications. Even though the Supreme Court of Justice made a ruling on the procedure applicable to the Hague Convention, first instance (juvenile) courts and courts of appeals do not observe the terms appointed therein. As of this date, although the relevant complaints have been filed before the Supreme Court of Justice *en banc*, it has not considered them. Additionally, as the Chilean

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Judiciary is independent, the truth is that we have exhausted the measures to ensure an efficient, prompt processing of applications. Maybe the only way for the courts to take the Convention into account is that a recommendation or instruction to Chilean judges be made from abroad.

8. In reply to the eighth question: Important developments since 1996 in our jurisdiction may be summarized in an erroneous interpretation of the Convention by Chilean judges.

Accordingly, we find it appropriate to disclose several decisions made by our courts, which not only set a wrong precedent, but are also harmful in the light of the Convention.

Indeed, in the matter captioned "VOTTERO FURFERO, MARIA ANTONELLA", case roll No. 162-2000, the Eighth Juvenile Court of Santiago, by decision rendered on March 7, 2000, ordered the return of the child to her country of habitual residence - i.e. Argentina. The judge correctly interpreted the Convention and observed the Supreme Court ruling on the Procedure Applicable to the Hague Convention on the Civil

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Aspects of International Child Abduction. A copy of the decision is attached.

The defendant filed an appeal, but without the term prescribed. Accordingly, the Court of Appeals of Santiago withdrew it.

The defendant filed an habeas corpus, which was withdrawn by the Court of Appeals of Santiago, Second Division. A copy of the decision is attached.

The defendant filed an appeal before the Supreme Court of Justice related to the habeas corpus. Its Second Division affirmed the decision appealed on June 29, 2000. The decision was rendered with the dissenting vote of Judge Mr. Pérez "who found that the appealed decision was to be reversed since the custody of the child had been granted to her mother in the Argentine Republic and that, according to Chilean laws, the custody should also be held by the mother. Accordingly, the child in the instant case has the right to be with her mother - who is responsible for her personal care. An eventual transfer to the Argentine Republic would be to ignore the obligations and rights deriving from the said condition and shall evidently harm the child who would be prevented from

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following her studies and being with the person who is responsible for her personal care, which is contrary to the guarantees claimed."

In relation to the dissenting vote of the Supreme Court Justice Mr. Pérez, this Central Authority states that - as established by Article 16 of the Hague Convention on the Civil Aspects of International Child Abduction - "...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...", as judges within the country of habitual residence of the child before the wrongful removal or retention are responsible for deciding on the merits of a case. Accordingly, the decision made by the 8th Juvenile Court of Santiago conforms to law, since the purpose of the Convention is to restore the parties to the situation existing before the wrongful removal or retention (restore the status quo) through the immediate return of a child to its place of habitual residence, as ordered by the authorities of the State to which the child has been removed or in which it has been retained, thus preventing the person

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having wrongfully removed or retained a child to change the venue at its discretion and secure a favorable court decision.

Similarly, Article 17 of the Convention referred to above states that "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..."

The Convention official reporter, Elisa Pérez Vera, upon commenting the said article, states as follows: "Given that the decision on return of a child does not relate to the merits of the rights of custody, the grounds to be considered when making a decision restrict to the "implementation of the Convention". A controversy deriving from a decision made by the authorities of the place of habitual residence of a child before being wrongfully removed or retained which grants custody rights to the kidnapper or retainer would normally be settled according to Article 3 of the Convention, as the existence of a custody right must be construed in the light of the laws prevailing in such State."

In the case of the child María Antonella Vottero Furfero,

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an Argentine citizen, daughter of Argentine parents, her country of habitual residence was Argentina. Accordingly, Argentinean laws shall be applied in that:

(1) According to Argentinean laws, "parental rights and duties " is the set of rights and duties by parents over the person and property of their children, for their protection and comprehensive development..." (Section 264 of the Argentinean Civil Code).

(2) Article 5 of the Hague Convention states that "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."

(3) It is concluded that "parental rights and duties", as defined by the Argentinean laws, has a meaning being similar to that of the term "custody rights" under the Hague Convention.

Pursuant to Article 3 of the said Convention, "the removal or the retention of a child is to be considered wrongful where it is in breach of rights of custody attributed to a person ... under the law of the State in which the child was habitually resident immediately before

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the removal or retention."

Argentinean laws in force (section 264 of the Civil Code) states that parental rights and duties (custody rights) are shared by both parents; so, neither of them can unilaterally make a decision relating to a child. Section 264 of the Civil Code states that, in the situations described in paragraphs 1 and 2 (applicable to this case) and 5, the express consent by both parents is required for: 4.- Leaving the country.

A child requires the consent of both parents to leave the country, let alone to change his/her place of residence (which is highly meaningful for a child's life).

The fact that custody is exercised by the mother does not entitle her to change the place of residence of the child, since even though in cases like this - where parents are separated - custody rights are granted to the parent living with the child, parental rights and duties are shared by both parents, and "fundamental decisions" must be taken by both parents, since they are both responsible for the welfare of the child. In this regard, section 265 of the Argentinean Civil Code states that "Minor children are subject to the authority and care of their parents..." In the absence of an

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agreement between the parents on decisions relating to the best interests of a child, they shall submit the dispute to the judge of jurisdiction (in the instant case, the Argentinean judge), who shall decide what is best for the child (Section 264 ter and quater).

In view of the foregoing, it is concluded that the place of habitual residence of a child cannot be determined by a single parent - although it holds custody rights - in breach of the rights held by the other parent as, in spite of the latter failing to live with the child, it still holds paternal rights and duties (shared according to Argentinean laws) allowing it to take part in any fundamental decision affecting its child's life.

In the absence of an agreement between the parents, the judge of jurisdiction in the place of residence of a child shall make a decision. In the instant case, an Argentinean judge - who confirmed the custody agreement - is hearing the application to modify custody orders filed by the father on the grounds of the behaviour of the mother.

We note that each and every Argentinean piece of legislation applicable to the matter was enclosed to the

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court record.

In the matter of return to Australia of the child "SEBASTIAN CARRASCO", case roll No. 2774-98, tried by the 2nd Juvenile Court of Santiago, by decision dated February 4, 1999, it was ordered that the child be returned to his father. A copy of the decision is attached hereto.

On March 16, 1999, the Court of Appeals of Santiago reversed the decision made by the lower court because the 7-year old child had stated that he wanted to stay in Chile and had settled in his new environment.

The Court of Appeals ignored the information included in the court record, to wit:

- (1) That Australia was the place of habitual residence
of
the child;
- (2) Australian laws on custody rights. A copy of
Australian laws on the matter is attached hereto.
- (3) That the application for return of the child was
filed
within a term not exceeding 12 months. Accordingly,
judicial or administrative authorities of the

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Contracting State where the child was wrongfully retained should have ordered its return forthwith.

Article 12, paragraph one, of the Convention.

- (4) The father had granted his authority only for the child to stay in Chile from July 20, 1998 to September 5, 1999.

This information supports the implementation of the international convention.

In the matter of the child "WILLEM KLASS DIRKSEN ALARCON", case roll No. 2468-99, tried by the Supreme Court of Justice, the Chilean Central Authority requested the exequatur of the decision on access rights issued by the District Court in Utrech, The Netherlands, on June 10, 1999.

The Supreme Court of Chile denied the exequatur since on June 24, 1999, the mother had been granted a certificate by the 3rd Juvenile Court stating that she held custody rights over the child under a declaratory judgement; that the parents were de facto separated and that, according to the decision in relation to which the exequatur was requested, the father had filed for divorce before the

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court of jurisdiction in The Netherlands and Chilean laws on the matter were applicable since, in such a situation, any decision on access rights should be made by a Chilean court.

The Supreme Court of Justice ignored that the mother had obtained a declaratory custody judgment after having removed the child from The Netherlands.

Usually, the person wrongfully removing or retaining a child seeks a court or administrative decision in the State to which the child has been removed or in which it has been retained in order to legalize the situation it created.

Failure by the Chilean courts to observe both the letter and the spirit of the Hague Convention has given and will give rise to a series of international complaints. Even worse, Chile is at risk of becoming a privileged haven for those removing their child/children abroad.

The Convention is based on reciprocity between nations. This reciprocity entails extensive cooperation for implementing its provisions. It involves both the relation among those concerned and among countries.

We note that most of the courts in the Contracting

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States have implemented the Convention in the way its drafters had expected and that children were effectively returned to their home, either by consent or after a summary trial.

So, as of this date, in relation to each and every application for return filed by this Central Authority before the Convention's Contracting States, save for one case, the courts of the State to which a child has been removed or in which it has been retained have decided that it be returned to its country of habitual residence - Chile - and that the legal issues concerning access and custody rights should be settled in the child's "country of habitual residence."

(3) Issues surrounding the safe and prompt return of the child (and the custodial parent, where relevant).

1. In reply to the first question: Juvenile courts are entitled and prepared to employ undertakings as a means of overcoming obstacles to the prompt return of a child. Juvenile judges make their best efforts to bridge the gap between the parents and reach an agreement being satisfactory to the child. The first

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undertaking may be raised at the first hearing, upon filing of the application for return. The court shall decide "be the parties summoned to appear before the court for a settlement hearing 5 days after service of notice to the abducting parent." If they fail to reach an agreement at said hearing, the parties may raise an undertaking and reach an amicable settlement at any time during the proceeding.

2. In reply to the second question: (1) Yes. (2) There is no differentiation between undertakings by agreement between the parents and those made at the request of the court. A court shall always confirm undertakings between the parents, provided they are not contrary to the best interests of a child.
3. In reply to the third question: Chilean juvenile courts are not entitled to grant safe harbor or mirror orders. These orders may be issued by "Juzgados de Protección de Menores" (Child Protection Courts), which have broader powers on this matter. Perhaps, it would have been better that Child Protection Courts process applications for return.

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4. In reply to the fourth question: No. Unfortunately, Chile has not ratified the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.
5. In reply to the fifth question: No.
6. In reply to the sixth question: As of this date, the Chilean Central Authority has had no issue with regard to the right of a child/abducting parent to return to the country from which the child had been abducted or in which it had been unlawfully retained.
7. In reply to the seventh question: As of this date, in no case handled by the Chilean Central Authority in its capacity as requested or requesting State, a deciding judge has, before determining an application for return, communicated with a judge or other authority in the requesting State.
8. In reply to the eighth question: Never. Chile has appointed no judge or other person competent to act as a focus or channel of communication between judges at

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the international level in child abduction/access cases.

9. In reply to the ninth question: Where a child is returned to Chile, the accompanying parent may seek the legal advise of the Chilean Central Authority.
10. In reply to the tenth question: In Chile, where a custody order has been granted in favour of the left behind parent, it may be subject to review should a child be returned and the abducting parent request such a review.
11. In reply to the eleventh question: Yes, the Chilean Central Authority would support the recommendations in letters (a), (b), (c), (d), (e) and (f).

(4) Procedures for securing cross-frontier access/contact between parent and child

1. In reply to the first question: The Chilean Central Authority directly provides legal counsel and advise services in Hague proceedings. The Legal Aid Corporation for the Metropolitan Region undertook to bear the charges connected with the participation of legal counsels and advisors, to the extent such costs are borne by the legal

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aid system prevailing in our country. Expenses related to implementing the return of the child are not paid. Access orders may be sought provided the applicant parent submits an application pending return proceedings, following a refusal to return a child, an application not made in connection with other proceedings and an application to modify existing access orders.

2. In reply to the second question: Chilean Juvenile Courts exercise jurisdiction to grant or modify access/contact orders on the basis of Juvenile Act No. 16,618.
3. In reply to the third question: Usually, to enforce a decision in Chile issued by a foreign court, an exequatur should be submitted to the Supreme Court of Justice, i.e. the said Court should be required to authorize the enforcement of said decision in Chile.

As of this date, the Chilean Central Authority has handled two cases of foreign access orders, the results thereof being as follows:

(1) "WILLEM KLASS DIRKSEN ALARCON", Case roll No. 2468-99, tried by the Supreme Court of Justice. The Chilean Central Authority requested the exequatur of the decision

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on access rights issued by the District Court in Utrech, The Netherlands, on June 10, 1999.

The Chilean Supreme Court of Justice denied the exequatur since on June 24, 1999, the mother had been granted a certificate by the 3rd Juvenile Court stating that she held custody rights over the child under a declaratory judgement; that the parents were de facto separated and that, according to the decision in relation to which the exequatur was requested, the father had filed for divorce before the court of jurisdiction in The Netherlands and Chilean laws on the matter were applicable since, in such a situation, any decision on access rights should be made by a Chilean court.

(2) The other case where a decision had been issued was directly submitted to the Juvenile Court for enforcement of access rights granted. Both the lower court and the Court of Appeals refused to enforce it and ordered that an exequatur be sought.

Where there is no decision, a request for access rights is directly submitted to the juvenile court. In

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most cases, access should be exercised within the Chilean territory. Chilean judges are reluctant to grant access rights to the applicant parent in its country of habitual residence.

4. In reply to the fourth question: Supreme Court ruling on the Procedure Applicable to The Hague Convention on the Civil Aspects of International Child Abduction, made by the Supreme Court of Justice of Chile to clarify procedure to be followed by Chilean juvenile courts and Courts of Appeals with regard to Hague applications.
5. In reply to the fifth question: The proceeding and an agreement at the court.
6. In reply to the sixth question: Yes.
7. In reply to the seventh question: Chilean courts would normally grant no access rights without the country where the child is living with the custodial parent.
8. In reply to the eighth question: Overseas applicants seeking access orders may request information from the Chilean Central Authority.
9. In reply to the ninth question: Problems have arisen where the requested country's courts have refused access

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rights to an applicant parent residing in Chile and Chilean courts usually grant restricted access rights, i.e. access rights only in Chile.

10. In reply to the tenth question: Such measures may be financial guaranties, appointment of a surety for the return of the child to Chile, who will bear all the costs incurred by the applicant parent.
11. In reply to the eleventh question: As of this date, the Chilean Central Authority has not been bound to enforce these guaranties.
12. In reply to the twelfth question: Yes.

When processing applications for return of a child, this Central Authority has become aware that usually agreements or decisions for return of the child to its country of habitual residence establish access rights in favor of the abducting parent, which rights are never exercised once the child is within the country of habitual residence. Therefore, it is necessary that the agreement or decision establishing access rights be submitted by the requesting Central Authority to the court of jurisdiction in its country, for approval and

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enforcement of the agreement/decision.

(5) Securing State compliance with Convention obligations

1. In reply to the first question: The most serious problem faced by this Central Authority is that the Republic of Paraguay ratified and acceded to the Convention but has failed to comply with its obligation to appoint a Central Authority. Therefore, the Convention is ineffective.
2. In reply to the second question: In August 2000, our Ministry of Foreign Affairs was requested to check with the Chilean Central Authority before deciding whether or not to accept a new accession.

The Central Authority first asks the Hague Permanent Bureau whether the new country has appointed a Central Authority. If not, the new accession is refused. We do not want another Paraguay.

3. In reply to the third question: Yes. The questions to be included would deal with Juvenile or Family Law and the court proceedings in such country.
4. In reply to the fourth question: (1) Yes. (2) Yes.
5. In reply to the fifth question: (a) Yes. (b) Yes, and (c) Yes.

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(6) Miscellaneous and general

1. In reply to the first question: We have no suggestions.
As of this date, the Permanent Bureau has maintained an excellent cooperative relation with the Chilean Central Authority. As regards financing - this Central Authority's most serious problem - we reaffirm that the Governments of our respective countries should become aware of the relevance of International Law and of the fact that to ratify and adhere to an International Treaty involves not only subscribing it, but also complying with the obligations under such a Treaty. Accordingly, resources should be allocated to comply therewith.
2. In reply to the second question: Yes.
3. In reply to the third question: Yes.
4. In reply to the fourth question: Yes.
5. In reply to the fifth question: No.
6. In reply to the sixth question: We have no information on the matter.
7. In reply to the seventh question: Courts issue a relocation order only on reasonable grounds and if a

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child is really at a serious risk.

Sincerely yours,

Illegible signature

TITA ARANGUIZ ZUÑIGA

Deputy Director General

Legal Aid Corporation

The relevant seal is affixed

MINISTRY OF FOREIGN AFFAIRS

AUTHENTIC TRANSLATION

No. I-851/00

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IN WITNESS WHEREOF, I have hereunto set my hand and seal in
Santiago, Chile, on this 26th day of December, 2000.

THE OFFICIAL TRANSLATOR

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