Question 1

The role and functioning of Central Authorities

1. Have any difficulties arisen in practice in achieving effective communication or co-operation with other Central Authorities in accordance with Article 7 of the Convention? If so, please specify.

The United States has experienced significant problems with regard to Article 7 requirements. For example, numerous Central Authorities do not respond to requests for information or assistance from the U.S. Central Authority (USCA). Often the responding Central Authorities have told U.S. that they have too few resources to provide effective assistance. These problems may be due to inadequate human resources or equipment and may also stem from the fact that implementing legislation for the Central Authority in question confers the Central Authority with inadequate powers or has not been enacted.

2. Have any of the duties of Central Authorities, as set out in Article 7, raised any problems in practice?

Of the duties set out in Article 7, three create significant issues in practice. Those are: enforcement of return, exercise of rights of access, and discovery of whereabouts. In a number of countries, the judicial process permits the prolongation of a case to the point that the courts find justification in refusing return of children because of the supposed harm that would ensue by their being taken out of a now-familiar environment. Similarly, court-ordered access is often meaningless because the abducting parent can ignore the order with impunity and refuse to allow access notwithstanding the order. There is a seeming reluctance on the part of many judiciaries to order effective practical arrangements for access. There are also no effective sanctions on abducting parents sufficient to compel them to follow court orders for access.

There is often difficulty at the application stage in locating children. This may be caused by the fact that those agencies most likely to be able to find children, such as the police, are part of a different organizational hierarchy which is not necessarily linked to the Central Authority. It may also be caused by a lack of a sense of urgency on the part of police, especially in those countries where parental kidnapping is not considered a crime. Locating children can also be a problem when a court orders return and the parent and children disappear. Some police forces have been less than diligent in seeking such children.

3. What measures are taken by your Central Authority or others to secure the voluntary return of a child or to bring about an amicable resolution of the issues (Article 7 c)? Do these measures lead to delay?

Unless there is a fear of further flight, a letter is sent to the respondent parent explaining The Hague Convention process and asking the parent to return the child on a voluntary basis. The parent is given approximately 10 days to respond to the letter. If no response is received, the case proceeds. Seeking a voluntary return, therefore, does not delay processing of a case for more than two weeks. If a parent will voluntarily return the child, some time will elapse while arrangements are being made, either between the parents and facilitated by the Central Authorities, or by attorneys representing the parents. The U.S. Central Authority rarely has a case in which negotiations to return a child

voluntarily are begun and then abandoned. No voluntary return letter is sent if the applicant parent or Central Authority advises that the abducting parent is a flight risk.

4. What measures does your Central Authority take to provide or facilitate the provision of legal aid and advice in Hague proceedings, including the participation of legal counsel and advisors (Article 7 g))? Do these measures result in delays in your own jurisdiction or, where cases originate in your country, in any of the requested jurisdictions?

The United States does not provide legal aid directly. However, the U.S. Central Authority works to see that, wherever possible, every applicant parent who meets certain guidelines is provided with legal counsel and advice by private attorneys willing to provide pro bono or reduced fee services. The National Center for Missing and Exploited Children (NCMEC), as the U.S. Central Authority representative, maintains a list of attorneys who practice in the various jurisdictions in the United States and have agreed to represent at least one incoming Hague case without charge. This list is known as the International Child Abduction Attorney Network (ICAAN) list. When a new case is received, the applicant is asked to provide information about his or her financial status in order to determine whether he or she qualifies for full-fee, reduced-fee or pro bono representation.

Once the applicant's appropriate payment level is determined, the U.S. Central Authority through NCMEC contacts ICAAN attorneys, explains the basics of the case and asks if the attorney would be interested in representing the applicant parent. If the attorney agrees, the U.S. Central Authority forwards the name to the requesting Central Authority and asks that the applicant parent contact the attorney directly to ensure that they agree on the terms of the representation and payment (if any). New attorneys are regularly added and are provided with practical legal information and access to more experienced attorneys who will act as mentors and provide support as the case progresses.

5. Does your Central Authority represent applicant parents in Hague proceedings? If so, has this role given rise to any difficulties or conflicts, for example with respect to other functions carried out by your Central Authority?

The U.S. Central Authority does not represent applicant parents in any Hague proceeding. Those parents are generally represented by private counsel.

However, the State of California has a unique role in Hague cases due to legislation passed in that state. If a child who is the subject of a Hague application is located in the state of California, the case will be assigned to the county District Attorney's office. An investigator for the office will assist in locating the child and the attorney assigned to the case will file the case in court. The District Attorney's office does not represent the applicant parent; rather the District Attorney acts as "friend of the court". In uncomplicated cases, the applicant parent is not separately represented. If significant defenses or other complicating factors exist, the applicant parent may have a separate lawyer who represents his or her interests. In either case, the District Attorney presents information to the court regarding the objectives and the obligations of the Convention.

6. What obligations does your Central Authority have, and what measures does it take, to ensure that a child returned to your country from abroad receives appropriate protection, especially where issues of (alleged) abuse or violence have arisen?

The U.S. Central Authority has no specific obligations as such, but serves where possible as a facilitator for parents seeking information or services in cases involving alleged abuse or violence. In the United States, such services are available through child protective services (CPS), social and mental health services, and law enforcement agencies; are administered in accordance with state law;

and generally are operated by state and local agencies. All states have a system for receiving reports of suspected child abuse and neglect and state laws require that reports of child abuse be responded to in a timely manner. Suspected child maltreatment may be reported to child protective services or law enforcement.

Allegations of child abuse perpetrated by the left-behind parent have been reported in some cases prior to the parent fleeing the country with the child and in other cases at the time of the return of the child. In both types of situations CPS is responsible for ensuring the safety of the child following the child's return. It is not unusual for CPS to take temporary custody of a child and to place a child in foster care for the period of time needed to investigate the allegations of abuse. In such cases, the determinations of CPS would be available to the court reviewing the custody case.

Information about legal aid, financial assistance, protection in cases of alleged abuse or domestic violence, and other resources is made available by the U.S. Central Authority to returning parents upon request. Legal aid, financial assistance such as income support, and mental health and other social services are operated at the local level in most communities in the United States. The specific level of assistance and service available varies due to variations in state law and state and local resources.

In cases where the returning parent indicates a need for shelter and protection from abuse, a referral can be made by the Central Authority to community-based services for victims of domestic violence. These programs assist victims of violence with a variety of services including shelter for the abuse victim and her children, legal assistance or referral in obtaining orders of protection, counseling, assistance in obtaining longer-term housing, advocacy and accompaniment in court proceedings related to the abuse.

If there is a need for resources such as child protection or shelter, a referral from the U.S. Central Authority that includes contact information and available services can be provided upon request. The referral may include information about a local shelter program, state or local child protective services or Children's Advocacy Center, or state or local legal aid or other social services.

7. What arrangements does your Central Authority make for organizing or securing the effective exercise of rights of access (Article 7 f)?

Currently, the U.S. Central Authority treats applications for access in the same manner as applications for return. Attorneys are identified to handle the case on a full-fee, reduced-fee or pro bono basis. It can be more difficult to find attorneys for representation in access cases because they are typically more time-consuming than return cases. This is especially true if the case requires modification of a written order or creation of an access order as opposed to the more simple enforcement of an order as written. Because of these complications, delay in finding attorneys able to handle these cases is typically greater than in cases for return. The U.S. Central Authority will also contact parents and attempt to arrange voluntary access.

In particular, in the case of an applicant from abroad,[1] does your Central Authority:

a ***provide information or advice;***

Yes.

b ***facilitate the provision of legal aid or advice;***

Yes.

c ***initiate or assist in the institution of proceedings, where appropriate, on behalf of the applicant;***

Yes, facilitates identification of a private attorney to file the proceeding in court and provides technical assistance/support to the attorney.

d ***assist in ensuring that the terms or conditions on which access has been ordered or agreed are respected;***

Yes, through the services of a private attorney.

e ***assist in cases where modification of existing access provisions is being sought.***

Yes, through the services of a private attorney**.**

8. Please comment on any developments in relation to the maintenance of statistics concerning the operation of your Central Authority. Has your Central Authority been able to return to the Permanent Bureau annual statistics in accordance with the Hague standard forms? If not, please explain why.

The U.S. Central Authority has provided the Permanent Bureau with annual statistics and is installing a new computer case management tracking system, which will improve its ability to maintain data and generate more accurate statistics.

9. Can you affirm or reaffirm, as the case may be, support for the conclusions reached by the first, second and third Special Commissions, as set out in footnotes 11 and 12?

Yes.

10. Would you support any 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?

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[1] In answering these questions please distinguish where appropriate between:

a applications pending return proceedings;

b applications following a refusal to return a child;

c applications not made in connection with other proceedings; and

d applications to modify existing access orders.

Please note also that the term "access" should be read as including all forms of contact.

We would welcome a recommendation that each Hague Country Central Authority prepare for general distribution a country flyer that outlines child custody regulations, including such subjects as children born in and out of wedlock, recognition of custody orders made in other countries, laws affecting restrictions on issuance of travel documents, etc. Such a flyer could also detail each country's procedures for processing Hague applications, addressing everything from translations to legal fees to the number and nature of courts involved in the process and the enforcement of Hague return orders.

Question 2

Judicial Proceedings, including appeals and enforcement issues, and questions of interpretation

1. ***How many courts and how many judges potentially have jurisdiction to hear an application for the return of a child? If there is more than one level of jurisdiction at first instance, please specify the number of courts and judges for each level.***

   Under the Hague Convention's implementing legislation (the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601 - 11610) both state and federal courts have jurisdiction to adjudicate return petitions. At the first instance level, there are thousands of state and federal judges who could hear such a petition. There are approximately 2,000 judges who could hear the case on appeal, generally sitting on panels of three or more judges. (In the federal appellate system, such cases are heard by three-judge panels.)

2. ***Do you have any special arrangements whereby jurisdiction to hear return applications is concentrated in a limited number of courts? Are such arrangements being contemplated?***

   At this time, we do not have any special arrangements for concentrating the number of judges or courts that can adjudicate Hague petitions. The State of California is preliminarily looking into such a limitation.

3. ***What measures exist to ensure that Hague applications are dealt with promptly (Article 7) and expeditiously (Article 11)?***

   The State Department, through the National Center for Missing and Exploited Children (NCMEC), monitors the progress of incoming Hague petitions, reminding courts of the need to process these applications expeditiously. For example, the U.S. Central Authority (USCA) sends each court a packet of information regarding the handling of Hague Convention cases upon learning that such a case is pending in a court of the United States. Upon the passage of six weeks, the USCA routinely requests an update of the progress of the case and reminds the court that the case needs to be handled in an expeditious manner.

   a. ***Is it possible for the application to be determined on the basis of documentary evidence alone?***

      Yes. Many cases are heard on the basis of documentary evidence alone. In many U.S. courts, routine matters are heard on the basis of written declarations or upon affidavits. In other courts, however, it is the practice in sensitive matters to allow the parties to present evidence on their claims. This would be especially true where the party resisting the return of children wishes to put on evidence relating to an Article 13(b) defense.

b. What special measures/rules exist to control or limit the evidence (particularly the oral evidence) which may be admitted in Hague proceedings?

Hague proceedings in the United States may be brought in federal or state courts. There are general rules of relevance and admissibility which are applied by federal courts, with comparable state rules applied by courts in the various state systems. In many jurisdictions, the local practice and procedure of the court is to hear a number of family law related matters upon declaration or affidavit without allowing the presentation of oral testimony.

c. Who exercises control over the procedures following the filing of the application with the court and prior to the court proceedings, and how is that control exercised?

Proceedings are handled by individual judges and their clerks. In the federal courts, proceedings are conducted in accordance with applicable federal rules, such as the Federal Rules of Civil Procedure, while state courts would use relevant state rules. As stated above, the Central Authority attempts to monitor the progress of cases and ensure that they are handled expeditiously.

d. What appeal is possible from the grant or refusal of a return application, within what time limits do appeals operate, on what grounds and subject to what limitations?

Either party may appeal the grant or refusal of a return application. Time constraints for the filing of an appeal vary by jurisdiction, as do the available grounds for appeal. Under the U.S. system, all final orders granting or denying a petition for return of the child are appealable. Generally, a limited period is permitted after a final order in which to file an appeal. If an appeal is filed, it may, in some states, work to automatically stay the order of the trial court. In other states and in federal courts, a stay of the order must be requested from either the trial court or the appellate court.

4. In what circumstances, and by what procedures/methods, will a determination be made as to whether a child objects to being returned?

There are four possible ways in which to receive evidence concerning a child's wishes: first, by allowing the child to testify; second, by interviewing the child in the judge's chambers; third, by having the child evaluated by a court-appointed psychological professional; and fourth, by appointing an attorney or *guardian ad litem* for the child.

In what circumstances in practice will the objections of the child be held to justify a refusal to return? (Please indicate the statutory basis, if any.)

The International Child Abduction Remedies Act (ICARA) implements the Hague Convention in the United States. 42 U.S.C. §§ 11601-11610. Pursuant to ICARA, the child's objections will be determined within the scope of Article 13.

5. Where the person opposing return raises any other defenses under Article 13 or Article 20, what are the procedural consequences? What burden of proof rests on the defendant? Does the raising of defenses under Articles 13 or 20 in practice lead to delay? What measures, if any, exist to reduce such delay to a minimum?

Although the Convention itself does not deal with the subject of burdens of proof necessary to establish a defense, the International Child Abduction Remedies Act (ICARA), the legislation that implements the Convention in the United States, applies two different burdens of proof to the listed defenses.[2] The following defenses must be proven by the customary burden of proof in a civil case, the "preponderance of the evidence" standard: a) the person making the request for return of the child has delayed for more than one year since the wrongful removal or retention, and the child has become settled in the new environment; b) the person, institution or other body having the care of the child was not actually exercising custody rights at the time of removal or retention; and c) the person, institution, or other body having the care of the child consented to, or subsequently acquiesced, in the removal or retention. By contrast, a higher burden of proof, the "clear and convincing evidence" standard, applies if the defense is: a) that the return of the child would expose the child to a grave risk of physical or psychological harm, or otherwise place the child in an intolerable situation; or b) 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.

Asserting defenses may extend the duration of the hearing to allow the court to hear appropriate evidence.

6. Please specify the procedures in place in your jurisdiction to ensure that return orders are enforced promptly and effectively. Are there circumstances (apart from pending appeals) in which execution of a return order may not be effected? Do return orders require separate enforcement proceedings? Is there appeal from such proceedings? Are such enforcement procedures routinely invoked, and are they successful in achieving the enforcement of return orders?

In the United States, court orders are considered to be effective of their own accord, i.e., as a general matter, parties subject to an order are expected to comply with it absent circumstances such as an appeal coupled with a stay of the order. Non-compliance with a return order is rare and most children are returned once a court orders it. If, however, a parent fails to comply with a return order, the other parent has a variety of enforcement options available. For example, the most common enforcement mechanism entails the filing of a contempt/show cause motion by the aggrieved party. To be held in contempt of court is a very serious matter, a fact which encourages voluntary compliance with court orders once issued. In response to a contempt motion, the court may impose civil and criminal penalties (e.g., fines, incarceration) for non-compliance. In some jurisdictions, the aggrieved party may also file a habeas corpus or analogous motion that would request that law enforcement pick up and take the child into custody.

A delay in return might occur if the child is reabducted or has become involved with the state's abuse and neglect system. If there is an active investigation regarding the child's welfare, that agency might request and receive a stay of the return so it can make provisions for the child's safety.

[2] 42 U.S.C. §11603 (e) Burdens of proof. (1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence—(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and (B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights. (2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and (B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

7. Would you support any of the following recommendations?

a. Calling upon States Parties to consider the considerable advantages to be gained from a concentration of jurisdiction in a limited number of courts.

Yes, but the consolidation should be combined with judicial training and education in systems where consolidation of courts may not be possible or realistic, or does not seem warranted. This training is even more important in countries where consolidation of courts does not occur.

b. Underscoring the obligation of States Parties to process return applications expeditiously, and making it clear that this obligation extends also to appeal procedures.

Yes.

c. Calling upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications.

Yes.

d. Calling for firm judicial management , both at trial and appellate levels, of the progress of return applications.

Yes.

e. Calling upon States Parties to enforce return orders promptly and effectively.

Yes.

f. Recommending that the "grave risk" defense under Article 13 should be narrowly construed.

Yes.

g. Proposing any other measures to improve the efficiency and speed with which applications are processed and orders enforced.

Yes.

8. Please indicate any important developments since 1996 in your jurisdiction in the interpretation of Convention concepts, in particular the following:

The Hague Convention was implemented in the United States by the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610. Because ICARA is a federal statute, significant differences in its interpretation by federal or state appeals courts can be resolved by the U.S. Supreme Court, which has not yet heard the merits of a case arising under the Hague Convention and ICARA. Numerous Hague Convention cases have been heard by state and federal district or trial courts (courts of first instance). A small number of cases have been heard by state and federal courts of appeal. The most significant of these cases are Blondin v. Dubois, Diorinou v. Mezitis, and Croll v. Croll. Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999), remanding 19 F.Supp.2d 123 (S.D.N.Y. 1998); Blondin v. Dubois, 2001 U.S. App. Lexis 77 (2d Cir. 1/9/2001), aff'g 78 F.Supp.2d 283 (S.D.N.Y.

2000); Diorinou v. Mezitis, 2001 U.S. App. Lexis 266 (2d Cir. 1/9/2001); and Croll v. Croll, 229 F.3d 133 (2d Cir. 2000).

The Court of Appeals for the Second Circuit twice considered Blondin on appeal from a lower district court decision denying the return to France of two children under the grave risk provisions of Article 13(b). There was clear evidence that the children's father, the left-behind parent, had abused them and their mother in France. Considering this evidence in light of the Hague Convention's objective that custody decisions be made, whenever possible, by the courts of the habitual residence, and its understanding that Article 13(b) should be construed narrowly, the appeals court held that the lower court had erred in denying return based, among other things, on the father's history of abuse. Instead, the lower court should have explored, in consultation with the French Central Authority, whether French officials could take measures that would protect the children from harm from their father upon their return to France. On remand to the district court, the mother introduced uncontroverted expert testimony that the mere fact of returning to France would be psychologically damaging to the children, notwithstanding the considerable efforts that French authorities were prepared to take to protect them from abuse by their father. The Second Circuit then upheld the district court's second decision not to order the children's return as consistent with Article 13(b), emphasizing that it did so only because of the specific facts of the case, in particular, the abducting mother's uncontested expert testimony that any return to France, regardless of protective measures, would place the children at grave risk.

In Diorinou v. Mezitis, the Court of Appeals for the Second Circuit affirmed a lower district court decision that ordered the return of two dual-national U.S.-Greek siblings to their habitual residence in Greece in the face of conflicting U.S. and Greek custody orders held by their parents. The decision turned on the lower court's determination that Greece was the habitual residence of the children, which in turn relied on decisions by Greek courts in prior Hague litigation holding that the Greek mother had not wrongfully retained the children in Greece in 1995. Based on these earlier Greek decisions, the district court concluded that the mother was properly exercising custody rights in Greece and that the children's removal from Greece by their U.S. father in 2000 was wrongful. The court noted that if the children had been wrongfully retained in Greece, it would not be appropriate to regard Greece as their habitual residence, even though they had been there for five years. On appeal, the central issue was whether the lower court properly gave dispositive weight to the earlier Greek court decisions that the children were not wrongfully retained in Greece. The Second Circuit affirmed the district court's decision, finding that the Greek court decisions could be afforded recognition by the district court based on the principles of international comity as applied to the specific facts of the case.

In Croll v. Croll, the Court of Appeals for the Second Circuit reversed and remanded a lower district court decision ordering the return to Hong Kong of a child wrongfully removed from Hong Kong by her mother in the face of a Hong Kong *ne exeat* order providing that the child could not be removed without the consent of the child's father. The district court reasoned that the *ne exeat* order gave the father a right of custody within the meaning of the Hague Convention, which was violated by removing the child from Hong Kong without the father's permission. The Second Circuit reversed on the ground that the *ne exeat* order at issue did not give the father a right of custody. After examining the *ne exeat* order, the court concluded that, while the father had a veto power over whether the child left Hong Kong, he had no rights of care or control which might be understood as rights of custody. There therefore could not be a finding of wrongfulness on which to premise an order of return. The left-behind father filed a petition for rehearing with the Second Circuit, which was denied on January 25, 2001.

Question 3

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

1. ***To what extent are your courts, when considering a return application, entitled and prepared to employ "undertakings" (i.e. promises offered by, or required of the applicant) as a means of overcoming obstacles to the prompt return of a child? Please describe the subject matter of undertakings required/requested. At what point in return proceedings are possible undertakings first raised, and how?***

   As discussed in the paper on undertakings presented and circulated by the U.S. Government at the last Special Commission, the United States believes that, depending on their formulation, undertakings can be used in a manner consistent with the Hague Convention. Nevertheless, the concept of "undertakings" is not widely understood in the United States, and the term may not have a settled meaning. To the extent that the term means commitments on the return of the child, it is possible, as a result of Blondin, this practice will increase. See also Question 2, number 8 and Question 3, number 11b.

2. ***Will your courts/authorities enforce or assist in implementing such undertakings in respect of a child returned to your jurisdiction? Is a differentiation made between undertakings by agreement among the parties and those made at the request of the court?***

   See Question 3, part 1.

3. ***To what extent are your courts entitled and prepared to seek or require, or as the case may be to grant, safe harbour orders or mirror orders (advance protective orders made in the country to which the child is to be returned) to overcome obstacles to the prompt return of a child?***

   The use of such procedures has been cited with approval in various federal cases, including Croll v. Croll, 66 F.Supp.2d 554 (S.D.N.Y. 1999), rev'd on other grounds 229 F.3d 133 (2d Cir. 2000); Feder v. Evans-Feder, 63 F.3d 217 (3rd Cir. 1995); and Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999).

4. ***Is consideration being given to the possible advantages of 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*, in providing a jurisdictional basis for protective measures associated with return orders (Article 7), in providing for their recognition by operation of law (Article 23), and in communicating information relevant to the protection of the child (Article 34)?***

   The United States has the 1996 Children's Convention under review. See also Question 3, part 11a.

5. ***Have you experience of cases in which questions have arisen as to the right of the child and/or the abducting parent to re-enter the country from which the child was abducted or unlawfully retained? If so, how have such issues been resolved?***

   The United States has been the habitual residence for some non-U.S. citizen children taken out of the United States and then ordered returned. Hague applicants are cautioned that, while they are able to file an application seeking return of the child, a court order of return in a Hague case does not grant the child any immigration benefit to which he or she would not already be entitled. In a few cases, the child has had no legal right to re-enter the U.S. These have been handled on an individual basis

and the course of action determined by the family situation. For example, in a case where only the oldest (of three) children had no legal basis on which to enter the U.S., the U.S. Immigration and Naturalization Service (INS) nevertheless allowed the oldest child into the country. The two younger children were U.S. citizens and the left-behind parent had applied for legalization of status in the U.S. The oldest child was permitted entry to keep the family unified. INS has expressed a willingness to consider the cases on an individual basis, but is unable to offer blanket guarantees that children will automatically be permitted to return to the U.S.

Since June, 1998, the process for an abducting parent to enter the United States consists of the parent first applying for the issuance of a visa. "Significant Public Benefit Parole" (SPBP) procedures have been available to parents otherwise unable to enter the country. If that parent is found ineligible for a visa, a formal request for "parental SPBP" should be made through the foreign government office, typically the foreign Central Authority, for transmission to the U.S. Central Authority. The United States Central Authority will then assist in presenting the application to the Immigration and Naturalization Service. Although most parole request cases will be decided quickly and favorably, the INS may still find an abducting parent ineligible to come to the U.S. if, for example, there is a criminal warrant pending for his or her arrest (parental kidnapping warrants not included), if he or she is believed to be a terrorist, or if he or she is completely and totally destitute.

6. Please comment on any issues that arise, and how these are resolved, when criminal charges are pending against the abducting parent in the country to which the child is to be returned.

The United States believes that the preferred method of dealing with international parental abductions is through the application of the Hague Convention. The International Parental Kidnapping Crime Act[3] makes international parental kidnapping a federal crime, and each of the individual states in the United States has also criminalized parental child abduction. As a general matter, civil and criminal issues relating to the parental abduction are considered separately. Some jurisdictions may be willing to suspend or vacate warrants if the child is returned; in other jurisdictions, criminal proceedings will go forward when the abducting parent returns to the U.S.

At times, requests for the return of a child received by the United States are coupled with a criminal warrant for the abducting parent. In these cases, the National Center for Missing and Exploited Children (NCMEC) coordinates with Interpol to ensure that the civil Hague proceeding is ready to go forward at the time that law enforcement takes the abductor into custody. In our experience, judges in the U.S. are likely to separate the civil and criminal issues, allowing law enforcement to take action against the adult while the court determines the proper resolution with regard to the child. The child may be placed in protective custody briefly until the left-behind parent is able to retrieve the child or otherwise arrange for the child's return to the habitual residence.

In outgoing cases, it sometimes happens that a child's return to the United States is delayed because criminal charges are pending in the U.S. against the abducting parent. In some cases, those charges have been dropped. This decision is in the hands of the prosecutor, not the civil court and not the other parent.

The U.S. Central Authority is also aware of several cases in which the child has been returned to the United States through the Hague Convention and pending criminal charges served as an obstacle for

[3] President Clinton's comments upon signing of the bill reflect that "This Act expresses the sense of the Congress that proceedings under the Hague Convention, where available, should be the 'option of first choice' for the left-behind parent. H.R. 3378 should be read and used in a manner consistent with the Congress' strong expressed preference for resolving these difficult cases, if at all possible, through civil remedies." President's Statement Upon Signing H.R. 3378, 1993 U.S.C.C.A.N. 2424-1.

the parent who sought access to the child in the United States. In one such case, the U.S. Central Authority advised the parent seeking access to contact the prosecutor. The parent was able to arrange an agreement with the prosecutor to plead guilty to a misdemeanor charge, to avoid any confinement, and then to arrange a workable access agreement through the civil court.

7. Please comment on any experience, as a requesting or as a requested State, of cases in which the deciding judge has, before determining an application for return, communicated with a judge or other authority in the requesting State and, if so, for what purposes. What procedural safeguards surround such communications?

A few instances of communication between U.S. courts and those of other nations in Hague Convention cases are reflected in reported cases,[4] and others are anecdotally reported to have occurred. Judicial communication is a concept practiced in U.S. family law as state family court judges have found it necessary to communicate with their counterparts in other states within the U.S. on matters of jurisdiction. The National Center for Missing and Exploited Children (NCMEC) is aware of several cases in which a U.S. judge, faced with the question of whether or not to return a child to the requesting country, has contacted the relevant foreign judge by telephone to clarify questions the U.S. judge may have. In one case, the U.S. judge wanted to clarify the status of certain court orders in the requesting country; in another, the judge wanted to make sure that the judge in the other country agreed with the need for the child to be placed in the custody of a third party until the court in the requesting country had an opportunity to hold a hearing. In that case, the judge decided to coordinate with law enforcement in both the U.S. and the requesting country to ensure that the child and returning parent were escorted and did not attempt to flee again during the process of return. In all cases known to NCMEC, the U.S. judge was familiar with handling cases through inter-judicial communication and was dealing with other English-speaking countries.

8. Has an appointment been made in your country of a judge or other person competent to act as a focus or channel for communication between judges at the international level in child abduction/access cases?

No. The U.S. legal system does not lend itself to this kind of arrangement.

9. Where a child is returned to your Country, what provisions for legal aid and advice exist to assist the accompanying parent in any subsequent legal proceedings concerning the custody or protection of the child?

Parents returning with children may seek pro bono or reduced-fee services from legal services organizations that exist in the jurisdiction where the case is being litigated. Some organizations may provide free legal services to these parents. Many local bar associations also have lists of attorneys who can handle cases on a reduced-fee basis.

10. Where a custody order has been granted in the jurisdiction of, and in favour of, the left behind parent, is the order subject to review if the child is returned, upon application of the abducting parent?

Yes. Custody orders pertaining to minor children are never considered "final". U.S. state courts are considered to have continuing jurisdiction to modify orders as may be necessary in the best interests

[4] Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999)(appellate court suggests contact)[U.S. and France]; Turner v. Frowein, 253 Conn. 312, 752 A.2d 955 (2000)(appellate court suggests contact)[U.S. and Netherlands].

of the child. Consequently, all custody orders may be modified at the request of either party, in accordance with the rules of the jurisdiction.

If the order was obtained on an *ex parte* basis (without providing notice and an opportunity to be heard to the other party), the order is presumed to be temporary and, upon application of either party, can be modified once the court has had an opportunity to conduct a full hearing on the merits. *Ex parte* orders are not intended to grant permanent custody; rather, they are intended to stabilize matters until a full hearing can be convened.

11. Would you support any of the following recommendations?

a. that Contracting States should consider ratification of or accession to* 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*, to provide a basis for jurisdiction, recognition and enforcement, and co-operation in respect of measures of protection of a child which are attached to return orders.

The United States is studying 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. The United States has not yet completed its assessment of the Convention, however, and thus cannot support a general call at this time for ratification or access. It can support the recommendation on the understanding that it calls only for consideration of ratification or accession.

b. that Contracting States should provide swift and accessible procedures for obtaining, in the jurisdiction to which the child is to be returned, any necessary protective measures prior to the return of the child.

No. As with undertakings, there is no settled meaning to the term "necessary protective measures". Necessary protective measures may be consistent or inconsistent with the Hague Convention. Such measures must be carefully analyzed and considered because they can be misused to delay returns or to encourage the use of Article 13 to deny returns. See also Question 3, part 1.

c. that Contracting States should take measures to ensure that, save in exceptional cases, the abducting parent will be permitted to enter the Country to which the child is returned for the purpose of taking part in legal proceedings concerning custody or protection of the child.

The United States supports this recommendation in principle, noting the importance of the reservation "in exceptional cases". The U.S. program of Significant Public Benefit Parole speaks to this issue and is fully addressed in our response to question five of this section.

d. that Contracting States should provide a rapid procedure for the review of any criminal charges arising out of a child's abduction/unlawful retention by a parent in cases where the return of the child is to be effected by judicial order or by agreement.

The United States encourages close coordination between prosecutors' offices and others working to facilitate return of the child. In the United States, however, the processing of criminal charges varies widely between state and federal prosecutors' offices and there is no central body that reviews criminal charges. It would therefore be very difficult to create and

implement a uniform standard.

e. that Contracting States should nominate a judge or other person or authority with responsibility to facilitate at the international level communications between judges or between a judge and another authority.

No. The U.S. Central Authority already plays the role of facilitator, so this recommendation is unnecessary. In addition, the U.S. legal system does not lend itself to appointment of a single judge to perform such a function.

f. that the Permanent Bureau of the Hague Conference on Private International Law should continue to explore practical mechanisms for facilitating direct judicial communications, taking into account the administrative and legal aspects of this development.

The United States supports the Permanent Bureau's present role as a clearinghouse for information on the 1980 Convention. The recommendation as phrased leaves unclear what is being asked or what measures are being recommended. The United States therefore cannot provide a more specific response.

Question 4

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

1. What provisions for legal aid/advice/representation in respect of a foreign applicant for an access order exist in your jurisdiction?

The U.S. Central Authority, through the National Center for Missing and Exploited Children, makes reasonable attempts to secure legal assistance from private counsel for applicants in both return and access cases by assisting applicants in securing pro bono or reduced fee legal services as possible.

2. On what basis do your courts at present exercise jurisdiction to:
a grant and
b modify access/contact orders?

State courts in the United States base their exercise of jurisdiction in child custody and access matters upon one of two state laws: the Uniform Child Custody Jurisdiction Act (UCCJA) or the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The UCCJA is the earlier of the two uniform acts, and was adopted in all fifty states, Washington D.C., and the Territory of the Virgin Islands.[5]

The basic scheme of these laws is for the exercise of initial jurisdiction over the issue of custody or access to occur in the child's "home state". "Home state" is the state where the child has been resident for six months before the initial filing of the action, and was living with a parent or person acting as parent. In general terms, a state retains jurisdiction to modify a custody order so long as one party or the child still lives in the state. For example, if an initial custody decree is given by a court in the state of New York, and thereafter the mother and child move to the state of Florida, but the father

[5] While the UCCJA is a "uniform" act, some states have modified certain provisions of the act for application in their individual state.

still lives in New York, then New York has continuing exclusive jurisdiction to modify the custody decree. No other state may modify that decree.

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is a uniform act that is designed to supercede the UCCJA, harmonize its provisions with the federal Parental Kidnapping Prevention Act, and provide a single source of law to govern child custody jurisdiction issues. This Act is being gradually adopted in the United States, with fewer than half of the states having adopted the UCCJEA as of this writing.

3. What provisions exist for the recognition and enforcement in your jurisdiction of foreign access orders, in particular where the order has been made by a court or other authority of the country of the child's habitual residence? In this context is consideration being given to implementation of 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?

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) provides that (a) a foreign country will be treated like a state of the United States in the application of articles 1 [General Provisions] and 2 [Jurisdiction]; and (b) a child custody determination of a foreign country must be recognized and enforced under article 3 [Enforcement] if made in factual circumstances in substantial conformity with the jurisdictional standards of the act unless (c) it is determined that the child custody law of the foreign country violates fundamental principles of human rights. U.L.A. Child Cust. Jur. & Enf. Act §105 (1999).

Under the UCCJEA, a state has the duty to recognize and enforce a child custody determination by the court of another state if the court had jurisdiction under the standards of the Act (in effect, if the court is the "home state") and the order had not been modified under the standards of the Act. Enforcement may be accomplished by using the rapid remedy provided under the Act or by any other remedy available. The expedited enforcement procedure established by the Act provides for an immediate order setting a hearing date on the petition for enforcement within one judicial day (or the first possible judicial day after service of the order), directing the respondent to appear, and making any order necessary to protect the child or the parties. A custody determination may be registered and may be challenged on only very limited grounds: lack of jurisdiction, lack of notice, and modification, vacating or staying by a court of a state with jurisdiction. Confirmation of registration precludes further challenge on these grounds.

With regard to the 1996 Convention see Question 3, number 11a.

4. What, if any, provision exists to ensure that cross-frontier access applications (including appeals) are processed expeditiously?

There are no specific procedures to ensure expeditious handling of access cases. Procedures are controlled by the local rules of the jurisdiction. Counsel may seek to have a case expedited, but it will be difficult to convince a court to expedite an access proceeding since the court's docket is likely to be filled with equally compelling non-Hague cases.

5. What facilities/procedures are in place to promote agreement between parents in international access/contact cases?

Many jurisdictions have implemented mandatory mediation in family law cases. In those jurisdictions, parents who file, or wish to file, a custody or visitation case are required to participate in

mediation to attempt to resolve their differences. Mediation services may also be available in jurisdictions where mediation is not mandatory.

6. Do your courts in practice accept a presumption in favour of allowing access/contact to the non-custodial parent?

Yes. Under the U.S. Constitution, natural parents are considered to have a fundamental right to raise and care for their children, which can be legally terminated only under strict standards. Non-custodial parents are presumed to have the right to meaningful contact with their children and, unless they have waived that right or acted in a way that is detrimental to the best interests of their children, will be granted meaningful visitation with them. Many states have written this presumption into their state statutes controlling custody and visitation proceedings. In general, the substantive law of the individual states in the United States encourages orders directing frequent and continuing contact by a non-custodial parent.

7. What conditions are likely to be imposed on access in respect of a non-custodial abducting parent?

Where the court is concerned about the welfare of the child, the court may restrict visitation to preserve the child's safety. Practices vary in different jurisdictions but generally courts may:
a) order that visitation be supervised by a professional or a family member;
b) restrict visitation by forbidding overnight visits or extended visits that could enable the parent to flee with the child;
c) restrict the locations where visitation may occur, and order explicitly that the parent may not take the child out of a certain geographic location;
d) order that the visiting parent surrender his or her own passport and the child's passport, as well as any documents that would enable the parent to travel with the child outside of the jurisdiction; and
e) order the parent to post a monetary bond as a guarantee that the child will be returned.

8. What information concerning services and what other facilities are available to overseas applicants for access/contact orders?

The services and facilities available to overseas applicants for access/contact are the same services available at the state level to U.S. residents. For example, some states have supervised visitation centers for situations in which domestic violence between the parents is present; other states may use court-appointed mediators to resolve access disputes. Typically, the range of services available in the state where the child is residing would be communicated to the overseas applicant parent by the attorney who has undertaken his or her representation in the U.S. When no written order exists for access, an attorney in the U.S. will attempt to have the court order such contact according to the desires of the applicant parent. If a written order already exists, the services of a private attorney are still typically utilized to bring an action in court to require the non-compliant parent to follow the terms of the order or to face sanctions.

9. What problems have you experienced and what procedures exist in your country as regards co-operation with other jurisdictions in respect of:

- ***a the effective exercise of rights of access in your/in the other jurisdiction;***
- ***b the granting or maintaining of access rights to a parent residing abroad/in your jurisdiction;***
- ***c the restriction or termination of access rights to a parent residing abroad/in your jurisdiction.***

As explained above, the jurisdiction of a court in the United States in matters of access and custody is governed by the individual state's adoption of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) or the Uniform Child Custody Jurisdiction Act (UCCJA). Under either act, for the most part, the prevailing law is that once a forum has made an order for access and/or custody, then no other forum may vary that order so long as one of the parties (typically the non-custodial parent) continues to reside in the forum that made the original orders. This is true even if the child has moved from the original forum and now has established a new habitual residence in a new forum.

10. What, if any, measures are available to your courts to help guarantee adherence by parents to access conditions (e.g. financial guarantees, surrender of passports)?

The mechanisms that are available to enforce visitation orders vary by jurisdiction. In addition to those listed in 4.7 above, they generally include:

- finding a parent to be in contempt of court and imposing a fine and/or incarcerating the parent for failure to adhere to a prior court order;
- imposing a monetary bond to ensure compliance;
- ordering injunctive and equitable relief, including the imposition of make-up visits;
- modifying existing custody orders, including giving custody to the other parent;
- modifying, suspending or terminating child support or alimony orders;
- assessing monetary damages;
- using criminal penalties in accordance with state and federal law.

11. How in practice are access orders enforced?

Access orders are enforced by application to the court with jurisdiction over the case. The party seeking relief can, depending on the jurisdiction, ask for a combination of the remedies listed above.

12. Would you support recommendations in respect of any of the particular issues raised in the preceding questions? If so, please specify.

In addition to the answers provided above, the United States supports judicial training on access**.**

Question 5

Securing State compliance with Convention obligations

1. Please comment upon any serious problems of non-compliance with Convention obligations of which your authorities have knowledge or experience and which have affected the proper functioning of the Convention.

In 1999 and 2000, the U.S. Congress required the U.S. Central Authority to provide a report on compliance with the Convention by other signatory countries. Those reports focused on the U.S. concerns with serious compliance problems by certain signatory countries, notably their lack of implementing legislation or a Central Authority or their failure to enforce court orders for return. The 2000 report is available on the Department of State's website at www.travel.state.gov./children's_issues/. The next report is due in April 2001.

2. What measures, if any, do your authorities take, before deciding whether or not to accept a new accession (under Article 38), to satisfy themselves that the newly acceding State is in a position to comply with Convention obligations?

Until 1998, the U.S. Government accepted the accession of all parties to the Hague Convention. Experience has shown, however, that not every country is able, or willing, to fulfill its obligations under the treaty, and we now consider whether to accept new accessions more selectively.

The Department of State assesses the country's overall ability to comply with its obligations under the Hague Convention, including the relative independence of its judiciary. The Department will look at such factors as:

- Has the acceding country designated a Central Authority as mandated by Article 6 of the Convention?
- Is the Central Authority sufficiently staffed and funded to administer the Convention?
- Are the country's courts able to handle the additional burden of Hague cases?
- Is the country able to enforce return orders?
- Is implementing legislation required in the country to enact the terms of the treaty, and, if so, has such legislation been passed?
- Is the implementing legislation gender neutral, so that mothers or fathers seeking assistance are treated equally?

A decision not to accept a country's accession is not a permanent refusal, but rather a determination that the U.S. government cannot at this time accept a country's accession. This assessment is reviewed regularly. In addition, the Department of State endeavors to assist the country to understand the U.S. Government's concerns and to work with local authorities to address those concerns.

3. Would you favour the drawing up of a standard questionnaire to be submitted by Contracting States to each newly acceding State with a view to assisting them to decide whether or not to accept the accession? What questions would you include?

We would favor a standard questionnaire and would expect the responses to such a questionnaire to supplement the information we would gather independently in order to decide whether to accept a new accession. A standard questionnaire would not only aid Contracting States in deciding whether to accept a new accession, but would also aid newly acceding States to assess their own readiness to fulfill Convention obligations and apprise them of the steps they should take to do so. The questions the U.S. would like to see included are:

- What office is designated as the Central Authority? What staff will handle incoming and outgoing Convention cases? Is that staff now in place? What are the telephone and fax numbers for that office? Are those numbers already functioning?
- Is legislation required to implement the Convention? If so, has that legislation been passed? Please submit a copy of the pertinent legislation.
- What courts will hear Convention cases? Can those courts absorb the additional workload, giving Hague cases appropriate priority? Have the judges been given any information about the Convention and its requirements?
- What procedure do you envision for handling an incoming Convention case? An outgoing case?
- How will return/access orders be enforced?

4. Are you in favour of an increase in the number of Special Commissions (or similar meetings) to review the practical operation of the Convention? Would you also favour the idea that additional Special Commissions should review particular aspects of the operation of the Convention (for

example, the problems surrounding the protection of rights of access, or the issues that arise when allegations of abuse or domestic violence are raised in return proceedings or the practical and procedural issues surrounding direct communications between judges at the international level, or the enforcement of return orders by Contracting States)?

The United States does not favor an increase in the number of Special Commissions. If a specific issue of concern were identified and agreed to, the United States would consider supporting a carefully considered working group meeting to focus on that issue.

5. ***Are there any other measures or mechanisms which you would recommend:***
   - ***a to improve the monitoring of the operation of the Convention;***
   - ***b to assist States in meeting their Convention obligations;***
   - ***c to evaluate whether serious violations of Convention obligations have occurred?***

The United States supports the Permanent Bureau's present role as an information clearinghouse and its work in judicial education. The United States does not believe that additional measures by the Permanent Bureau are warranted at this time.

Question 6

Miscellaneous and General

1. ***Have you any comments or suggestions concerning the activities in which the Permanent Bureau engages to assist in the effective functioning of the Convention, and on the funding of such activities?***

Clearly, as more and more attorneys and courts become aware of the INCADAT database of the Permanent Bureau and what its search engine permits, we should see better and more informed arguments to the courts and a higher level of awareness by the courts of the purpose and appropriate operation of the Convention, which should in turn enhance their decision-making. The existence of INCADAT should also make it possible for scholars to welcome "good" decisions and to criticize decisions that are based on a misunderstanding of the Convention or on facile resort by courts to the Convention's exceptions to the fundamental return obligation.

2. ***Are there any additional ways in which the Permanent Bureau might provide assistance? Do you favour the preparation of a list of potential Permanent Bureau functions and tasks that could only be performed if the Permanent Bureau were to receive additional financial and human resources either through approval of an increased budget or through voluntary contributions to accounts set aside for that purpose?***

The participation of the Permanent Bureau at conferences of judges and others involved in operation of the Convention when possible is valuable because the Permanent Bureau can bring a neutral perspective focused on the object and purpose of the Convention, without regard to national interests.

3. ***Would you favour a recommendation that States Parties should, on a regular annual basis, make returns of statistics concerning the operation of the Convention on the standard forms established by the Permanent Bureau, and that these statistics should be collated and made public (for example on the Hague Conference website) on an annual basis?***

The United States favors the development of well-defined guidelines for the statistics that every State party to the 1980 Hague Convention should maintain and report annually to the Permanent Bureau. The guidelines must ensure that the statistics reported to the Permanent Bureau are comparable and developed from the corresponding basic information in the same way. They should permit identification of national weaknesses in the issuance and enforcement of return orders, focusing not only on court orders but also on whether such orders actually result in returns or in the meaningful exercise of access.

We are not prepared at this time to support posting statistics on the Hague Conference website or in some other publicly accessible manner.

4. Would you favour a recommendation supporting the holding of more judicial and other seminars, both national and international, on the subject-matter of the Convention?

Yes, particularly for the newer states party and if the Permanent Bureau staff participates.

5. Are there any particular measures which you would favour to promote further ratifications of and accessions to the Convention?

We would favor conferences and other programs on the purpose and application of the Convention, particularly ones to which influential persons from non-party countries are invited and exposed to information about the operation and beneficial effects of the Convention. We could also support encouraging scholars to publish articles that discuss the advantages offered by the Convention.

6. Please provide information concerning any bilateral arrangements made with non-Hague States with a view to achieving all or any of the objectives set out in Article 1 of the Convention.

The United States has not, to date, entered into any bilateral arrangements for the return of abducted children or for the exercise of access rights aimed at enabling the child located in a different country from the country of residence of the U.S.-based parent to maintain his or her relationship with both parents.

7. Do you have any comments on the following proposition:

"Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Hague Child Abduction Convention was drafted. Courts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention."

Relocation issues present extremely difficult questions for courts because judges must balance a parent's freedom to relocate against the child's right to have meaningful contact with both parents. It is a fundamental tenet of U.S. family law that it is in the child's best interests to have meaningful relationships with both parents; this ideal is reflected in joint custody statutes and other laws that protect the parent/child relationship. Because of the sheer geographic size of the U.S., relocation by one parent can effectively defeat the other parent's ability to have meaningful contact with, and access to, the child. In contrast to smaller countries, where relocation might simply create an inconvenience for the "left-behind" parent, in the U.S., relocation might separate a child from the other parent by thousands of miles.

As a consequence, when arrangements cannot be made to ensure meaningful access to both parents post-relocation, courts have traditionally favored the child's rights over a parent's desire to relocate

and have therefore been reluctant to permit relocation, except in exceptional circumstances. This practice reflects the high priority placed on the parent/child relationship in U.S. law, and the belief, expressed in the Hague Convention, that unilateral actions by one parent that undermine a child's relationship with the other parent should be deterred. We should note, however, that in the past five years, some states have adopted a more permissive view of parental relocation. In these states, courts look more generally at what is in the child's best interests, rather than focusing on what impact relocation will have on the individual parent/child relationships. It is not clear as of yet whether other states will follow this trend. Though not dispositive, maintenance of meaningful contact remains an extremely high priority in the United States and relocations that involve large geographic distances and/or which foreclose meaningful contact are given careful scrutiny.