No. 21-35210

In The

United States Court of Appeals for the Ninth Circuit

SETH BASIL COLCHESTER,
Petitioner-Appellee,

v.

JEWEL LAZARO,
Respondent-Appellant.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:20-cv-01571-JCC
Hon. John C. Coughenour

APPELLANT'S OPENING BRIEF

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INTRODUCTION

"Get downstairs before I kick you downstairs!" That's what Petitioner-Appellee Seth Colchester screamed at his then-five-year-old daughter.[1] The girl, S.L.C., told mental health providers that she was afraid of her father, that he had hit her, and that he had left her outside all day without food despite her crying. Her mother, Respondent-Appellant Jewel Lazaro, testified that after first threatening to kick S.L.C., Mr. Colchester did so, compelling Ms. Lazaro to race up the stairs to prevent S.L.C. from falling. Mr. Colchester's abuse of S.L.C. prompted Ms. Lazaro to flee with S.L.C. to the United States, where both are citizens.

This case arises under the 1980 Hague Convention on the Civil Aspects of International Child Abduction and its implementing legislation, the International Child Abduction Remedies Act. Under the Convention and the Act, courts must return children to their country of habitual residence unless an applicable defense applies. One of those defenses is that returning the child would pose a grave risk of exposing the child to physical or psychological harm. Ms. Lazaro would have

[1] An audio recording of that threat played in the proceedings below.

proven that grave risk below by clear and convincing evidence but for the district court's errors.

First, the district court barred, sua sponte, crucial evidence that Mr. Colchester's illegal drug trafficking and money laundering risked exposing S.L.C. to harm. The district court did so despite letting Mr. Colchester deny these accusations and present evidence that his income was legitimate, and even though Ms. Lazaro was ready to offer expert and percipient witness testimony on his crimes. But although Ms. Lazaro's character was not at issue below, the trial court showed no comparable hesitation about allowing irrelevant evidence on whether she had neglected pet rabbits, failed to cook as many dinners as agreed with a friend, and enjoyed partying.

Next, the district court refused to let Ms. Lazaro retain a psychological expert to conduct a thorough evaluation of the child with an eye toward the Convention's standards, even though such evaluations are routine in Convention cases involving the grave risk defense. Ms. Lazaro had to rely instead on the testimony of a psychologist who had spoken to the girl and her mother for just 90 minutes in Spain, through an interpreter, over Skype, just days after

Ms. Lazaro and her daughter fled Mr. Colchester's violence. Cementing the prejudice from this ruling, the district court commented during closing arguments that the short duration of the Spanish psychologist's preliminary evaluation made her conclusions unreliable.

Nor did the district court grapple with the extensive evidence of abuse at trial in its threadbare order, transgressing Federal Rule of Civil Procedure 52(a).

The district court compounded these errors by extending comity to a foreign court decision that misapplied the Convention and to state court decisions answering different legal questions than those at issue. That decision flouted this Court's precedents.

The ultimate disposition also restricted Ms. Lazaro's visitation rights in an unprecedented manner beyond the district court's power under the Convention or the Act—abruptly preventing Ms. Lazaro from having any real relationship with her daughter for the foreseeable future.

Last, the district court abused its discretion by awarding expenses, including attorneys' fees, to Mr. Colchester. Those expenses—more than $100,000 charged to a woman with $970 in her bank account

and totaling about 500% of her earnings in the preceding two years—will prevent Ms. Lazaro from seeing S.L.C. and are inappropriate in a domestic violence case.

Even the district court acknowledged that this is a "tough case." A trial cleansed of the serious errors of law and abuses of discretion here would have led to a far different result: safety for a young girl now in the hands of her abuser. This Court should reverse.

STATEMENT OF JURISDICTION

Mr. Colchester started this case by petitioning under the Convention and the Act—federal law—in state court in July 2020. 6-ER-1124. Ms. Lazaro timely removed the matter to the district court on October 25, 2020—the same day she accepted service of the petition. 6-ER-1133, 6-ER-1130. The district court therefore had jurisdiction under 28 U.S.C. §§ 1331, 1441(a) & 1446. After an evidentiary hearing, the district court entered judgment for Mr. Colchester on February 26, 2021. 1-ER-5–10. Ms. Lazaro timely appealed on March 22, 2021. 6-ER-1139; *see also* Fed. R. App. P. 3 & 4(a). This Court thus has jurisdiction under 28 U.S.C. § 1291.

STATUTORY AND TREATY AUTHORITIES

All relevant statutory and treaty authorities are in the Addendum to this brief.

ISSUES PRESENTED

1. Did the district court abuse its discretion by excluding evidence of Mr. Colchester's drug trafficking and money laundering—both core to showing the risk of exposing S.L.C. to harm—on grounds not pressed by Mr. Colchester and after allowing Mr. Colchester to present evidence opposing these accusations and admitting irrelevant evidence about Ms. Lazaro's character?

2. Did the district court abuse its discretion in barring Ms. Lazaro from taking any discovery, including an evaluation of the child by a psychological expert, when Ms. Lazaro offered a targeted discovery plan, both discovery and psychological evaluations of the child are routine in Convention cases, and the evidence sought was central to her grave risk defense?

3. Did the district court's order violate Federal Rule of Civil Procedure 52(a) by failing to adequately address the evidence introduced at trial when it ignored most of the trial testimony?

4. Did the district court abuse its discretion by extending comity to a Spanish court decision plagued by procedural unfairness that misapplied the Convention and by giving weight to state court domestic violence decisions that neither considered the same evidence here nor answered the same legal questions?

5. Did the district court abuse its discretion by restricting Ms. Lazaro's custody rights beyond courts in the country of habitual residence have authorized and without warrant under the Convention or the Act?

6. Did the district court abuse its discretion in awarding more than $100,000 in expenses to Mr. Colchester, even though Ms. Lazaro's combined income for the last three years is less than a third of that sum and despite the evidence of domestic violence in the record?

STATEMENT OF THE CASE

A. Mr. Colchester launches this case by claiming that Ms. Lazaro wrongfully removed S.L.C. from her place of habitual residence in violation of his custody rights.

Mr. Colchester's petition starting this case alleged that Ms. Lazaro had wrongfully removed S.L.C. from his custody in Spain following a dispute between the parties over custody issues there in

April 2020. 6-ER-1126. That action led to a four-day bench trial marked by deep fault-lines separating the evidence each party presented.

B. Ms. Lazaro's defenses highlight Mr. Colchester's physical and emotional abuse of her and S.L.C.—and his drug trafficking—from the start.

From the outset, Ms. Lazaro claimed that Mr. Colchester's abuse and his drug trafficking activities posed a grave risk of harm to S.L.C. 6-ER-1108–09. As the case progressed, the district court narrowed the facts at issue. In denying a dispositive motion by Mr. Colchester, the district court determined that "Ms. Lazaro cannot meaningfully dispute that her April 2020 removal of S.L.C. was wrongful under Spanish law." 6-ER-1087. But the district court needed an evidentiary hearing to decide other issues, including whether S.L.C. was "habitually resident" in Spain when she left.[2] 6-ER-1087–88.

Ms. Lazaro then went to work crafting a discovery plan aimed at proving Mr. Colchester's drug trafficking and the risks it would create

[2] At trial, the parties disputed whether S.L.C. was "habitually resident" in Spain or the United States. The district court found that S.L.C.'s country of habitual residence was Spain. 1-ER-7, 12. Ms. Lazaro does not challenge that finding on appeal, though the evidence shows that S.L.C.—who is not a Spanish citizen—spent half her life in the State of Washington with her primary caretaker, Ms. Lazaro.

for S.L.C. if she were in his sole care. 6-ER-1080–81. She also asked permission for an expert psychologist to conduct a thorough evaluation of S.L.C. 6-ER-1069–70, 1077 & n.3, 1082–84.

But the district court rejected those proposals without explanation. At a status conference, the court stated simply that there would be "no more discovery" when none had been allowed in the first place. The district court added, "I'm not going to order the evaluation to take place." 6-ER-1072. It next set a trial date for three-and-a-half weeks after the status conference. *Id.*

Despite this pace, Ms. Lazaro's expert investigator and risk specialist prepared a report based on public information about Mr. Colchester's business income and expenses, concluding that Mr. Colchester appeared to have no meaningful income to support his lifestyle. *See* 5-ER-946–62.

C. At trial, Ms. Lazaro presents evidence of Mr. Colchester's abuse, but the district court's rulings frustrate her ability to prove Mr. Colchester's drug trafficking.

Trial began just over three weeks after the status conference. When Ms. Lazaro tried to put on evidence of Mr. Colchester's illegal drug activities, the district court stopped her, saying that it would not

be "trying a drug case." Ms. Lazaro did, however, present extensive evidence of the abuse Mr. Colchester inflicted on both her and S.L.C.

1. The district court prohibits evidence of Mr. Colchester's illegal drug trafficking.

At the start, the district court sidestepped most of the evidentiary issues the parties had briefed. But the court refused Ms. Lazaro's request that it interview S.L.C. and barred Ms. Lazaro's expert investigator from testifying as either an expert or fact witness. *Compare* 1-ER-18–19, *with* 5-ER-994–1007, 1024–40.

The district court later clarified—and in fact expanded—this ruling, barring Ms. Lazaro from presenting evidence about Mr. Colchester's drug trafficking in her case in chief. Ms. Lazaro offered—but the district court refused—testimony from a witness who rented space in Mr. Colchester's warehouse in Spain and saw thousands of marijuana plants and grow lights there. 2-ER-244–45. According to a written offer of proof, Ms. Lazaro and another witness also saw marijuana plants and grow lights in several places, including Mr. Colchester's residence, and would have testified about his fears of law enforcement scrutiny. 2-ER-244–46. Yet the district court considered none of this.

In shutting down this line of inquiry, the district court reasoned at first that the evidence was irrelevant, but announced on the third day of trial that it also carried "the potential for prejudice and potential for delay" from "putting [Mr. Colchester] on trial in a civil case, forcing him to testify in matters that might impact his criminal liability." *See* 1-ER-19–20, 21–22, 28–29 & 32. These comments were unprompted by objections from Mr. Colchester. *See id.*

2. Lay and expert testimony at trial, medical records, and audio recordings of both Mr. Colchester and S.L.C. support Ms. Lazaro's abuse contentions.

The evidence the district court allowed Ms. Lazaro to present pointed to a long history of physical and psychological abuse by Mr. Colchester.

Among other episodes, Ms. Lazaro described instances from her pregnancy in which Mr. Colchester verbally abused her, and still others in which he became physical—kicking her in the stomach when she was pregnant with S.L.C. and forcing her to sleep in the closet. 3-ER-482–83. Mr. Colchester dragged her from a car when she was seven months pregnant and left her on the side of the road for hours. 3-ER-484–85. Ms. Lazaro contacted a domestic violence advocacy group in response

and told Mr. Colchester's parents about the assault. 3-ER-483; 4-ER-679; 5-ER-855.

Ms. Lazaro also introduced a text exchange between her and Mr. Colchester in which, in response to her complaint that Mr. Colchester threw a bag at her head in front of S.L.C., he said that it "[c]ould of been worst [sic] you could of got a slap in the head." 3-ER-485–86; 5-ER-854. On cross-examination, Mr. Colchester justified this message by explaining that Ms. Lazaro had "wasted [his] time." 3-ER-386.

The district court also heard an audio recording of a then-three-year-old S.L.C. telling Ms. Lazaro that Mr. Colchester had hit her. 3-ER-379–81.

As for the events that led Ms. Lazaro to remove S.L.C. from Spain, they occurred in April 2020. Ms. Lazaro testified about her visit with S.L.C. at the home of Mr. Colchester, who had recently been granted full custody over S.L.C. by a Spanish court because, at least in part, Ms. Lazaro lacked the resources to live in Spain fulltime. *See* 5-ER-798. Ms. Lazaro explained that, during her stay in Spain that spring to visit her daughter, Mr. Colchester often screamed at and acted aggressively

toward both her and S.L.C., even grabbing S.L.C. by the arm and throwing her down in the hallway. 3-ER-445–47.

Events came to a head when Mr. Colchester screamed at S.L.C. that he would kick her down the stairs and, according to Ms. Lazaro, kicked at the girl, forcing Ms. Lazaro to race upstairs to take S.L.C. to safety, first in another room and then by fleeing the house. 3-ER-435–41.

Mr. Colchester offered conflicting explanations for this incident. In a pretrial brief, he argued that he was recorded screaming at S.L.C.—"get downstairs, before I kick you downstairs"—because Ms. Lazaro had "provoke[ed] a brief … confrontation … by encouraging the child to knock on his closed home office door." 3-ER-368; 5-ER-1002. He abandoned that story at trial, testifying that he was carrying laundry down the stairs and that S.L.C. had been "defiant and bold" standing in his way. 3-ER-370.

Days after this incident, a forensic psychologist in Spain, Alicia Romero Fernandez, conducted a preliminary evaluation of S.L.C. over a videoconference system and through an interpreter. *See* 4-ER-721. Ms. Romero saw no signs of deception in Ms. Lazaro, and no sign that

S.L.C. was manipulated, though she acknowledged that it was possible. 4-ER-722–23. During that assessment, S.L.C. conveyed that she feared Mr. Colchester and that he had physically abused her. 4-ER-723. Ms. Romero testified that physical abuse against a child by the sole custodial parent would put the child "in a situation of maximum vulnerability and very unprotected." 4-ER-727. Because of the limitations in what she described as "an emergency situation," Ms. Romero did not reach any conclusion about whether S.L.C. had been abused but determined that there were substantial grounds for suspicion and further evaluation. 4-ER-726, 728–30, 734–36.

Ms. Lazaro also introduced medical records showing that, after coming to the United States, S.L.C. told a therapist that Mr. Colchester had thrown her out a window and left her outside without food all day, despite her crying to be let back in. This provider diagnosed S.L.C. with separation anxiety disorder in connection with her fear of being separated from Ms. Lazaro. 3-ER-493; 5-ER-860–65.

D. The district court lets Mr. Colchester deny that he traffics drugs or launders money and allows him to introduce evidence impugning Ms. Lazaro's character.

Mr. Colchester, for his part, denied all the allegations of abuse, claiming that he had never threatened S.L.C., despite the audio recording to the contrary. 3-ER-373–74.

He also testified about his business operations and sources of income. *See* 3-ER-272–83. The district court also allowed him to admit several exhibits related to his business income into evidence, despite limiting Ms. Lazaro's investigation into the sources of Mr. Colchester's income. *See* 2-ER-211–12 (noting admission of Trial Exhibits 65–69 and 71–75). Mr. Colchester stated that he had undeclared income from a loan, an inheritance, and disbursements from a family equity fund. 3-ER-282–83. But he provided no corroboration of this.

Mr. Colchester also presented evidence about Ms. Lazaro's character. The district court let witnesses testify, for example, that Ms. Lazaro "wanted to … be with her friends, and drink," and that she did not cook as many meals for a friend as she had agreed. 3-ER-366, 512–13, 515. The court also allowed Mr. Colchester—despite

Ms. Lazaro's objections—to elicit testimony on whether Ms. Lazaro had neglected pet rabbits. 4-ER-584–85, 616–17.

A central focus of Mr. Colchester's presentation was the wrongful removal of the child from Spain, even though Ms. Lazaro fled with S.L.C. because of her fear of Mr. Colchester, and even though the district court had already decided that issue. He also focused on other litigation between himself and Ms. Lazaro. These included state court orders dismissing petitions for orders of protection for lack of jurisdiction. *See* 3-ER-332–36, 359–61. Mr. Colchester also discussed a prior Convention proceeding against Ms. Lazaro in state court, 3-ER-302–03, and a January 2021 Spanish family court decision ruling that Ms. Lazaro's removal of S.L.C. from Spain was wrongful, 3-ER-363–64.

E. The district court rules for Mr. Colchester, restricts Ms. Lazaro's custody rights, and orders her to pay Mr. Colchester $115,000.

The day after the evidentiary hearing ended, the district court issued an order granting Mr. Colchester's petition. 1-ER-6. The only evidence this order discussed related to the parties' prior litigation and what the district court described as Ms. Lazaro's "abuse of the legal process and disregard for resulting orders." 1-ER-7–8. The district court

incorporated by reference several of Mr. Colchester's proposed findings of fact—the heart of which also focused on other litigation between the parties. *See* 1-ER-7, 14–15. The district court also required that "to mitigate the risk of harm to S.L.C.," Mr. Colchester must "facilitate daily electronic communications between S.L.C. and Ms. Lazaro" and limited Ms. Lazaro to supervised visitation with S.L.C. in Spain for no more than two days per month, subject to Spanish custody orders.[3] 1-ER-10.

The district court later awarded Mr. Colchester $100,000 in attorneys' fees and $15,000 in other expenses. 1-ER-2.

This appeal follows.

SUMMARY OF THE ARGUMENT

The Convention and the Act generally require children wrongfully taken from their home country to go back to that country. But courts may decline to award that relief if the responding parent who removed the child proves by clear and convincing evidence that the child would face a grave risk of exposure to physical or psychological harm if

[3] The operative Spanish custody order gave Ms. Lazaro at least seven days of unsupervised visits each month. 5-ER-799–800

returned to the country of habitual residence.

Ms. Lazaro presented compelling evidence that Mr. Colchester had a history of abusing her and S.L.C. both psychologically and physically. That evidence went beyond Ms. Lazaro's testimony and the recording of Mr. Colchester threatening to kick S.L.C. down the stairs. S.L.C. herself also established the abuse by stating in a recording that her father had hit her and telling treating providers in the United States and a forensic psychologist in Spain that she had been abused.

The evidence at trial would have compelled a finding of grave risk but for the district court's errors. ***First***, the district court abused its discretion in excluding evidence showing that Mr. Colchester is a drug trafficker. This lifestyle alone creates an extreme risk of exposing S.L.C. to harm and is at the core of the factual issues in dispute. The district court rationalized the exclusion as one under Federal Rule of Evidence 403, but that Rule does not apply in bench trials. Nor do the district court's repeated statements that the evidence was irrelevant square with decisions admitting similar evidence in other cases. The district court's lack of even-handed application of the evidentiary rules underscores the prejudice to Ms. Lazaro. The bar on the drug evidence

persisted even though Mr. Colchester opened the door by denying his illegal activities and testifying about his source of income. Nor did the district court's evident concern about putting Mr. Colchester on trial extend to Ms. Lazaro, as it allowed irrelevant evidence about undisputed issues that went to her character.

Second, the district court should have allowed Ms. Lazaro to take discovery on Mr. Colchester's income, expenses, and illegal activities, and authorized a thorough evaluation of S.L.C. by an expert psychologist. The district court did not explain denying these requests, which itself justifies a remand. Discovery is also routine in Convention cases. So too are psychological evaluations in cases raising the grave risk defense. The district court itself highlighted the prejudice to Ms. Lazaro from disallowing an evaluation by commenting that S.L.C. was an unreliable reporter and disregarding the preliminary analysis of a psychologist in Spain because it rested on a brief videoconference interview. Yet Ms. Lazaro had argued precisely that a thorough evaluation was needed because the psychologist in Spain had spoken to the child relatively briefly and through an interpreter.

Third, the district court's written findings did not adequately

evaluate the evidence presented at trial under Federal Rule of Civil Procedure 52(a). The district court instead just stated that Ms. Lazaro had not met her burden to show a grave risk and focused its analysis on her conduct in other cases and the undisputed wrongfulness of her removing S.L.C. from Spain—castigating her for purportedly abusing the legal process. The discussion of the grave risk defense incorporated several of Mr. Colchester's proposed findings by reference, but those too turned on the decisions of other courts rather than the evidence at trial.

Fourth, the district court abused its discretion and violated this Court's precedents in extending comity to a foreign decision that egregiously misapplied the Convention and flowed from a proceeding riddled with flaws that cast doubt on that case's fairness. The district court also abused its discretion by deferring to rulings of state courts considering different evidence and addressing different legal questions that denied Ms. Lazaro orders of protection on jurisdictional grounds.

Fifth, the district court abused its discretion by turning the "ameliorative measures" inquiry upside down. Courts may grant a petition under the Convention and order the parties to take certain measures to ameliorate potential harm to the child. Even if—as this

Court has held—ameliorative measures allowing the child to return to the country of habitual residence are appropriate in grave risk cases, the district court's punitive measures were improper. The district court restricted Ms. Lazaro's visitation and communication rights with her child beyond what the applicable Spanish custody order mandates. Nothing authorized these restrictions.

And ***sixth***, the district court's harsh $115,000 award of expenses to Mr. Colchester was "clearly inappropriate" under the Act and an abuse of discretion. Ms. Lazaro depends on the services of pro bono counsel and lacks the resources to pay even a fraction of that amount—about three times her income from the last three years combined. The Court should join the First and Eighth Circuits in holding that a respondent's ability to pay is an important consideration in awarding expenses under the Act. The Court should also join the Second Circuit and hold that awarding expenses when the respondent has faced unilateral domestic violence prompting the wrongful removal is an abuse of discretion.

Each of these errors justifies reversal. Their cumulative effect should compel this Court to reverse the judgment below.

ARGUMENT

A. The Convention creates an affirmative defense to a petition for return of a child when the child would face a grave risk of exposure to harm.

The Convention generally requires that a child wrongfully removed from her country of "habitual residence" go back to that country. *See* Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11. But the return remedy "is inappropriate when the abductor is a primary caretaker who is seeking to protect herself and the children from the other parent's violence." *Khan v. Fatima*, 680 F.3d 781, 784 (7th Cir. 2012) (quotations omitted). The Convention "was never intended to be used as a vehicle to return children to abusive situations." *Simcox v. Simcox*, 511 F.3d 594, 609 (6th Cir. 2007).

To strike this balance, Article 13(b) of the Convention creates an affirmative defense allowing courts "to refrain from ordering a child's return to her habitual residence if 'there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'" *Monasky v. Taglieri*, 140 S. Ct. 719, 729 (2020) (quoting Convention, art. 13(b)).

This defense is the Convention's "mechanism for guarding children from the harms of domestic violence." *Id.*

Under the Act, a respondent must prove the grave risk defense by clear and convincing evidence. *See* 22 U.S.C. § 9003(e)(2)(a). The defense should be "narrowly drawn" and its existence does not authorize courts to "speculate on where the child would be happiest." *Cuellar v. Joyce*, 596 F.3d 505, 509 (9th Cir. 2010).

A respondent like Ms. Lazaro can show a grave risk of exposure to harm when the "petitioning parent had actually abused, threatened to abuse, or inspired fear in the children in question." *Ermini v. Vittori*, 758 F.3d 153, 164 (2d Cir. 2014). When it occurs in the presence of the child, spousal violence can also establish the grave risk defense. *See id.*; *Gomez v. Fuenmayor*, 812 F.3d 1005, 1007 (11th Cir. 2016).

Without the district court's erroneous rulings—whether considered in isolation or together—Ms. Lazaro would have carried her burden to show a grave risk of exposure to harm. Thus, the Court should reverse the judgment below.

B. Because evidence of Mr. Colchester's drug trafficking and money laundering goes to the heart of whether S.L.C. would face a grave risk of exposure to harm, the district court abused its discretion in excluding that evidence.

A child living with a drug trafficker faces severe risks. Criminal conduct is inherently risky and shows contempt for the law. Narcotics operations also hazard exposing the child to traumatic and even dangerous encounters with violent criminals, law enforcement, and domestic instability should the parent ever face prosecution. Thus, it is no surprise that courts deciding Convention cases admit evidence related to both drug trafficking and drug use.

Ms. Lazaro tried to present testimony from a witness who rented space in Mr. Colchester's warehouse in Spain and saw thousands of marijuana plants and grow lights there. Ms. Lazaro and another witness also saw marijuana plants and grow lights in several places, including Mr. Colchester's residence, and would have testified about his fears of law enforcement scrutiny. 2-ER-244–46. And even without the benefit of discovery, Ms. Lazaro offered an expert witness who had investigated Mr. Colchester's business activities and income and would have concluded that none of Mr. Colchester's known businesses

appeared to generate the income needed to support his lifestyle. 2-ER-246–47; 5-ER-960–61.

But although Mr. Colchester did not object to this evidence in its entirety—only challenging one of Ms. Lazaro's experts under Federal Rules of Evidence 403 and 702—the district court excluded all of it. *See* 1-ER-19–20, 21–22, 28–29, 32; 5-ER-999–1001. The district court ruled that the evidence was of just "tangential relevance" and carried "the potential for prejudice and potential for delay" from "putting [Mr. Colchester] on trial in a civil case, forcing him to testify in matters that might impact his criminal liability." 1-ER-32.

That sua sponte exclusion of relevant evidence was an abuse of discretion. To reverse based on an erroneous evidentiary ruling, this Court must conclude that the district court abused its discretion and that the error was prejudicial. *See Tritchler v. Cty. of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004). Prejudice means that, more probably than not, the lower court's error tainted the verdict. *See Harper v. City of Los Angeles*, 533 F.3d 1010, 1030 (9th Cir. 2008). Ms. Lazaro meets that standard. Together with strong evidence of his threats and physical violence toward S.L.C. and his long history of terrorizing Ms. Lazaro,

showing Mr. Colchester's criminal conduct would have proven the risk S.L.C. faces by clear and convincing evidence.

The district court grounded its ruling in Federal Rule of Evidence 403—an improper basis to exclude evidence in a bench trial and erroneous in any event. The district court's failure to apply its ruling even-handedly also cements that excluding the drug evidence was an abuse of discretion. The court allowed Mr. Colchester to testify at length about the sources of his income and to deny his involvement in the narcotics trade. And the district court let Mr. Colchester introduce irrelevant evidence about Ms. Lazaro's character conflicting with its stated reasons for barring the drug evidence.

1. The proffered evidence was relevant and important to the case.

The district court was wrong to decide that the evidence of drug trafficking and money laundering by Mr. Colchester was "tangential." In fact, courts deciding Convention cases properly hear evidence related to both drug trafficking and drug abuse for precisely the reasons Ms. Lazaro argued below.

In *Flores Castro v. Renteria*, for instance, the District of Nevada considered evidence that the child would face harm because the

petitioner's relatives were members of a drug trafficking cartel. *See* 2018 WL 7680608, at *9 (D. Nev. Nov. 29, 2018), *report and recommendation adopted in part, rejected in part*, 382 F. Supp. 3d 1123 (D. Nev. 2019), *aff'd sub nom. Flores Castro v. Hernandez Renteria*, 971 F.3d 882 (9th Cir. 2020). While the court did not ultimately find a grave risk of harm, it emphasized that the petitioner was not the alleged drug trafficker and that there was no "evidence of neglect or abuse" there. *Id.* at *11. Not so here. Ms. Lazaro was prepared to offer proof that Mr. Colchester himself illegally traffics marijuana for a living and *did* present evidence of his abuse. *See also Castro v. Martinez*, 872 F. Supp. 2d 546, 550 & n.2 (W.D. Tex. 2012) (considering expert testimony that child's area of habitual residence was at the intersection of drug trafficking routes but noting that, unlike here, no evidence showed that the child's home or nearby area had been affected by cartel activity).

Courts also weigh evidence of drug abuse—at least conceptually similar to trafficking—in deciding grave risk. *See, e.g.*, *In re Application of Adan*, 437 F.3d 381, 386 (3d Cir. 2006) (noting testimony that petitioner admitted using marijuana); *Wertz v. Wertz*, 2018 WL 1575830, at *1 (W.D. Va. Mar. 30, 2018) (ruling that evidence of

prolonged and prolific drug abuse justified finding of grave risk of harm); *Mlynarski v. Pawezka*, 931 F. Supp. 2d 277, 284–85 (D. Mass. 2013) (considering effect of drug use evidence on grave risk analysis).

Ms. Lazaro's proffered evidence lies at the core of the grave risk inquiry. Drug trafficking raises the specter of encounters—perhaps violent ones—with both other criminals and with law enforcement.[4] Masking the illegal source of his income goes straight to Mr. Colchester's credibility, as does whether he lied in his testimony denying that he was involved in the illegal marijuana business. And whether Mr. Colchester breaks the law for a living is relevant to any ameliorative measures the district court may have ordered to mitigate, if appropriate, the grave risk of harm. *See* 1-ER-28.

The drug evidence was therefore not just relevant but crucial to the issues.

[4] Ms. Lazaro could have introduced more evidence of the potential risk to S.L.C. from living with a drug trafficker had the district court granted her request for an evaluation of S.L.C. by an expert psychologist.

2. Rule 403 is not a proper basis to exclude relevant evidence in a bench trial.

The district court ultimately justified excluding the drug evidence under Rule 403, after balancing the probative value of the evidence against its potential for prejudice and delay. 1-ER-32. But as this Court has explained, "Rule 403 is inapplicable to bench trials." *United States v. Preston*, 706 F.3d 1106, 1117 (9th Cir. 2013), *as amended* (Feb. 27, 2013), *vacated on other grounds on reh'g en banc,* 751 F.3d 1008 (9th Cir. 2014). Both this Court and several of its sister circuits have explained that the risk of prejudice from admitting even irrelevant evidence in a bench trial is remote. *See EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 898 (9th Cir. 1994); *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) ("[I]n the context of a bench trial, evidence should not be excluded under 403 on the ground that it is unfairly prejudicial."); *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. Unit A Jan. 1981) (ruling that exclusion of evidence under Rule 403 "was improper" because the Rule "has no logical application to bench trials").

Even if excluding evidence as unduly prejudicial were proper, the standard isn't met here. The evidence that Mr. Colchester is an illegal drug trafficker is a central plank in Ms. Lazaro's defense that S.L.C.

faces a grave risk of exposure to harm with him. Nor does the record support the district court's concern about delay. The transcript instead reveals that the Court's rulings created substantial extra time shortening the trial. *See* 3-ER-423; 4-ER-648–49, 775–776. Ms. Lazaro had moreover requested a longer hearing to ensure time to hear all the issues—a request the district court denied. *See* 1-ER-40; 6-ER-1079.

The district court's oral rulings in trial also offer more than a hint that the Rule 403 exclusion was a post-hoc rationalization. The district court stated repeatedly that the drug evidence was not "relevant" to the case and that it could not "think of any relevance of this inquiry other than … trying to show that [Mr. Colchester] has undisclosed sources of income or the like." 1-ER-19–21. This Court should be especially skeptical of a sua sponte ruling untethered to any objection by Mr. Colchester. *See Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 846–47 (9th Cir. 2004) (holding that district court abused its discretion in excluding evidence opposing summary judgment even though the defendant "had waived any objection" to the evidence). The district court's ruling lacked any basis in law.

3. The district court abused its discretion by not allowing Ms. Lazaro to introduce evidence countering Mr. Colchester's testimony.

Even if the district court had correctly excluded the drug evidence in the first instance, Ms. Lazaro had a right to prove that Mr. Colchester was untruthful when he opened the door to these issues. *See, e.g.*, *United States v. Whitman*, 771 F.2d 1348, 1351 (9th Cir. 1985) (holding that it was reversible error for district court to refuse to let the defendant rebut evidence of prosecution's motive theory, even though the motive may have been irrelevant at the start of trial); *see also Gillette v. Delmore*, 979 F.2d 1342, 1345–46 (9th Cir. 1992) (noting district court's grant of judgment notwithstanding the verdict after concluding it had committed prejudicial error in excluding evidence of plaintiff's emotional state after plaintiff opened the door to this evidence, but overturning district court's decision to grant remittitur rather than grant a new trial).

Mr. Colchester testified at length about his business operations and sources of income. *See* 3-ER-272–83. He explained that he had undeclared income from a loan, an inheritance, and disbursements from a family equity fund. 3-ER-282–83. But when Ms. Lazaro pressed these

issues on cross-examination, the district court repeatedly intervened even though Mr. Colchester raised no objection. *See, e.g.*, 3-ER-400, 402, 408. These interventions compounded the error of excluding Ms. Lazaro's proffered drug evidence.

Worse, the district court's stated unease about the "inappropriate nature of putting [Mr. Colchester] on trial in a civil case" did not extend to Ms. Lazaro. When it came to her, the district court did not hesitate to allow Mr. Colchester to try to develop a child abduction case against her, even though S.L.C.'s wrongful removal was an uncontested issue at trial. *See* 4-ER-579–80; 6-ER-1087 (district court's pretrial ruling that Ms. Lazaro could not dispute that her removal of S.L.C. from Spain was wrongful). Indeed, the district court explained that evidence about the wrongful removal of S.L.C. and efforts to hide from Mr. Colchester was "interesting to the Court because it bears on the respondent's credibility and overall conduct in the case." 4-ER-694. So extensive testimony about an undisputed issue raising potential criminal liability for Ms. Lazaro was "interesting" to the district court, but whether Mr. Colchester perjured himself testifying about the source of his

income and made a living smuggling drugs was ruled irrelevant and prejudicial.

The district court allowed witnesses to opine that Ms. Lazaro "wanted to … be with her friends, and drink," that she did not cook as many meals for a friend as she agreed, and that she sold prescription medication. 3-ER-366, 512–13, 515. The court even allowed Mr. Colchester—over Ms. Lazaro's objections—to seek testimony from two witnesses about whether Ms. Lazaro had neglected S.L.C.'s pet rabbits. 4-ER-584–85, 616–17. All this while zealously policing any effort to show that Mr. Colchester is a criminal whose lifestyle would endanger S.L.C. This unequal treatment underscores the unfairness Ms. Lazaro faced below.

In sum, the district court had no proper basis for preventing Ms. Lazaro from proving her affirmative defense by showing that Mr. Colchester is a drug trafficker. That abuse of discretion alone requires reversal.

C. The district court abused its discretion by denying discovery and rebuffing Ms. Lazaro's request for an evaluation of S.L.C.

Ms. Lazaro presented a discovery plan tailored to the disputed issues. She sought to propound discovery on Mr. Colchester to secure information in his exclusive possession about his income and expenses. 6-ER-1079–81. She also asked the Court for permission to have an expert psychologist thoroughly evaluate S.L.C. 6-ER-1082–84. Such evaluations are routine in Convention cases involving the grave risk defense. By denying those requests without justification, the district court abused its discretion and made the trial unfair.

1. The district court did not explain why it denied discovery, and that denial prejudiced Ms. Lazaro.

In general, a "district court is vested with broad discretion to permit or deny discovery, and a decision to deny discovery will not be disturbed except upon the clearest showing that the denial of discovery results in actual and substantial prejudice to the complaining litigant." *Laub v. United States Dep't of Interior*, 342 F.3d 1080, 1084, 1093 (9th Cir. 2003) (internal quotation marks and citation omitted). But this Court has also explained that for it to review a decision for an abuse of discretion, it "must be able to ascertain how the district court exercised

its discretion." *Traxler v. Multnomah Cty.*, 596 F.3d 1007, 1015 (9th Cir. 2010). When the district court does not explain its discretionary decision, the reviewing court has "no basis on which to evaluate" the exercise of discretion and must remand. *See, e.g.*, *id.* at 1015–16 (remanding discretionary denial of liquidated damages); *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery*, 490 F.3d 718, 724–25 (9th Cir. 2007) (remanding discretionary grant of stay); *United Nat'l Ins. Co. v. R & D Latex Corp.*, 141 F.3d 916 (9th Cir. 1998) (remanding district court's unreasoned decision to hear an action under the Declaratory Judgment Act).

The district court nowhere explained why Ms. Lazaro could not take discovery. Indeed, though Ms. Lazaro had briefed her request for discovery, 6-ER-1079–82, and the district court held a hearing, it began the hearing with a strong hint that its mind was made up: "Anybody want to say anything, before I tell you what we're going to do?," 6-ER-1053. At the close of arguments, the district court stated just that "[w]e're going to have no more discovery."[5] 1-ER-40. The lack of

[5] This was so even though neither party had taken any discovery.

explanation deprives this Court of the chance to meaningfully review the district court's decision. That is reason enough for a remand.

But the district court's decision was also unjustified on the merits. Discovery is a routine feature of civil litigation and authorized by the Federal Rules. *See, e.g.*, Fed. R. Civ. P. 26–37. Even in Convention cases, which courts often expedite, discovery is so common that Ms. Lazaro knows of no federal appellate court to have addressed a district court's denying it wholesale.

District courts hearing these cases allow discovery routinely and without comment. *See, e.g.*, *Matovski v. Matovski*, 2007 WL 1575253, at *1, 3 (S.D.N.Y. May 31, 2007) (noting imperative to "balance *the need for pre-hearing discovery* and the need for expeditious adjudication" (emphasis added)). Discovery in Convention cases runs the gamut from interrogatories to requests for production to depositions. *See, e.g.*, *Teller v. Helbrans*, 2019 WL 5842649, at *1 (E.D.N.Y. Nov. 7, 2019) (noting petitioner's failure to produce documents requested in discovery or appear for his deposition); *Eubanks v. Eubanks*, 2017 WL 3380476, at *1 (E.D. La. Aug. 4, 2017) (sanctioning petitioner for ignoring written discovery requests); *Fuentes-Rangel v. Woodman*, 2015 WL 12999707,

at *2 (N.D. Ga. July 29, 2015) (noting that petitioner had to move to compel after respondent failed to answer discovery requests); *White v. White*, 2012 WL 13194761, at *1 (E.D. Va. May 22, 2012) (considering motion for protective order after party complied with some, but not all, discovery requests); *Demaj v. Sakaj*, 2012 WL 476168, at *3–5 (D. Conn. Feb. 14, 2012) (granting in part motion to compel responses to requests for production); *cf. Ostos v. Vega*, 2015 WL 569124, at *6 (N.D. Tex. Feb. 11, 2015) (denying discovery when respondent "did not explain what discovery is needed").

The information Ms. Lazaro sought—including any licenses Mr. Colchester or his companies had to market or sell CBD oil or medical marijuana, his communications with law enforcement in Spain and elsewhere about his activities, and business records for his companies—is in Mr. Colchester's exclusive possession. Compulsory process was the only way to get that information, which was in turn critical to proving that Mr. Colchester is a career criminal and thus that S.L.C. faces a grave risk of harm in his sole care. The district court should not have closed off discovery.

2. Denying an evaluation of S.L.C. by a psychologist lacks justification and departs from routine practice in Convention cases.

It is customary for a respondent asserting a grave risk defense to retain a testifying psychological expert who can offer an opinion, after evaluating the adult party (if not both parties) and the child, on whether the child would be at grave risk if returned to the country of habitual residence. As with denying discovery generally, the district court did not explain denying the evaluation. 1-ER-40. So this Court is again left with no reasoned basis to review the decision.

But the record makes plain the district court's abuse of discretion even beyond the lack of explanation. Both appellate and trial courts have coalesced around the importance of expert psychological evidence in Convention cases raising the grave risk defense. The Seventh Circuit, for example, has faulted a district court that failed to make adequate findings of fact and conclusions of law for not "adjourn[ing] the hearing for a few days to enable additional evidence to be obtained and presented; in particular he could have had [the child] examined by a child psychologist." *Khan*, 680 F.3d at 785–88 (holding that the "failure to allow psychological evidence was … error"). Even in affirming

findings of no grave risk, courts have observed that failing to seek an evaluation can hamstring efforts to prove the likelihood of psychological harm to support the defense. *See Gil-Leyva v. Leslie*, 780 F. App'x 580, 591 (10th Cir. 2019) ("Notably, neither party has requested a psychological evaluation of the children to assess the effects of any of [the petitioner's] past abuse. … [The respondent] has adduced no expert testimony or evidence that the children suffered emotionally in the past or that they would unavoidably suffer from spanking or thrown objects in the future.").

Courts confronted with disputes over retaining psychological experts in Convention cases regularly authorize the evaluations. *See, e.g.*, Order, *Saada v. Golan*, No. 18-cv-05292 (AMD) (E.D.N.Y. Nov. 15, 2018) (granting respondent's request for evaluation of child)[6]; Order, *Tsarbopoulous v. Tsarbopoulos*, No. 00-cv-0083 (E.D. Wash. Feb. 1, 2001), ECF 83 (granting petitioner's motion for psychological evaluation of minor children); *see also Acosta v. Acosta*, 725 F.3d 868, 873–75 (8th Cir. 2013) (affirming district court's decision admitting expert testimony

[6] Unnumbered minute entry granting request in ECF 32.

of professor of social work about risk facing children in Peru and affirming finding of grave risk).

And in many other cases, trial courts have relied on expert psychological and psychiatric testimony about the risks that children would face in their countries of habitual residence. *See, e.g.*, *Farr v. Kendrick*, 2019 WL 2568843, at *2 (D. Ariz. June 21, 2019) ("[B]oth Father and Mother wished to—and were ultimately allowed to—present expert testimony."), *aff'd*, 824 F. App'x 480 (9th Cir. 2020); *Davies v. Davies*, 2017 WL 361556, at *1, 16–17 (S.D.N.Y. Jan. 25, 2017) (crediting testimony of respondent mother's expert psychologist, one of five testifying experts), *aff'd*, 717 F. App'x 43 (2d Cir. 2017); *Militiadous v. Tetervak*, 686 F. Supp. 2d 544, 555–57 (E.D. Pa. 2010) (weighing testimony of expert psychologists retained by both parties); *Steffan F. v. Severina P.*, 966 F. Supp. 922, 924 (D. Ariz. 1997) (allowing expert testimony based on evaluation of a three-year-old child). Prohibiting Ms. Lazaro from retaining an expert psychologist to thoroughly evaluate S.L.C. was a mistake.

And a mistake that mattered to the outcome. During closing arguments, the district court reached beyond the record to observe

based on a case involving alleged Satanic rituals that young children are unreliable reporters of abuse. 4-ER-767–68. The court expressed doubt over whether it should have admitted the testimony of Ms. Romero, the expert psychologist from Spain who performed a preliminary evaluation of S.L.C. *Id.*

Yet the concern the district court identified—the brief interview through videoconference—was exactly the reason Ms. Lazaro gave for needing a thorough evaluation. The issues demanded an expert who could devote enough time to examining S.L.C. in person and in her own language. *See* 5-ER-1039–40; 6-ER-1069 (contending that preliminary evaluation over videoconference and through an interpreter was no substitute for the complete evaluation Ms. Lazaro sought).

Had Ms. Lazaro been allowed to secure an expert to evaluate the child, that expert could have addressed—and likely assuaged—the district court's concerns: was S.L.C. believable when she told Ms. Romero that she feared her father and that she had suffered physical abuse, and when she told Ms. Lazaro that Mr. Colchester hit her on the head, and when she told a provider in Washington state that she had been left outside all day? *See* 4-ER-723 & 768; 3-ER-379–81; 5-

ER-860–65. Barring the evaluation thus led to actual and substantial prejudice to Ms. Lazaro.[7] *See Laub*, 342 F.3d at 1084, 1093.

The Court should reverse the judgment below and remand with instructions that Ms. Lazaro may pursue her course of discovery and an expert evaluation of S.L.C.

D. The district court's failure to enter findings adequately addressing the testimony at trial violated Federal Rule of Civil Procedure 52(a).

The decision below offered no meaningful analysis of the evidence at trial. The district court did not discuss Ms. Lazaro's extensive testimony about the abuse she and S.L.C. faced. It did not address the recording of S.L.C. saying Mr. Colchester had hit her, or the recording of Mr. Colchester screaming that he would kick S.L.C. down the stairs. It did not mention S.L.C.'s statements to Ms. Romero or her provider in Washington about being abused by Mr. Colchester and the provider's diagnosis that S.L.C. suffers from separation anxiety disorder. The district court made no credibility findings about either Ms. Lazaro or

[7] The district court also denied itself and Ms. Lazaro the chance to address its concerns over S.L.C.'s reliability by refusing Ms. Lazaro's request that the district court interview the child. *See* 1-ER-18–19; 5-ER-1037–38.

Mr. Colchester, and nowhere addressed Mr. Colchester's apparent false testimony that he had never threatened S.L.C. or been aggressive with Ms. Lazaro. *See generally* 1-ER-6–10, 12–15.

Instead, the only analysis of the record prepared by the district court centered on the uncontested issue of whether Ms. Lazaro had wrongfully removed S.L.C. from Spain and the court's concern over Ms. Lazaro's "abuse" of the legal process and disrespect for court orders. 1-ER-7–8. The rest of the ruling incorporates by reference Mr. Colchester's proposed findings, which turn on decisions by other courts reviewing different evidence and applying different legal standards to answer different legal questions.[8]

Failing to engage with the evidence on the disputed issues flouts Federal Rule 52(a). District courts presiding over bench trials "must find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1). The findings must be "explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1090–91 (9th

[8] As discussed below, abdicating the fact-finding role to decisions of other courts not entitled to comity under this Court's precedents was also reversible error.

Cir. 2002) (vacating judgment and remanding for district court to make clear findings).[9]

This requirement "is at its most exacting" when the parties "testify inconsistently and it is impossible to demonstrate by objective evidence which one is telling the truth, or more of the truth." *Khan*, 680 F.3d at 785. In *Khan*, the Seventh Circuit remanded a ruling for the petitioning husband because the district court's order—two pages long and (like the order here) issued the day after the hearing—did not address the extensive factual disputes in the testimony at trial. *Id.* at 786. There, as here, the mother testified at length about abuse by the father, and a third-party witness testified that the child experienced "separation anxiety," but the order mentioned "very little" of this testimony. *Id.* at 786–87; *see also Adan*, 437 F.3d 396–98 (holding that district court abused its discretion in the manner it considered evidence and glossed over the totality of the evidence of child abuse and failed to explain in a reasoned way why the respondent's evidence was unavailing). So too here.

[9] Issues involving interpreting the Federal Rules of Civil Procedure are reviewed de novo. *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520 (9th Cir. 1984).

The district court's order fell short of Rule 52(a)'s mandate, and the judgment should be reversed on that basis.

E. The district court abused its discretion by extending comity to a Spanish court decision that egregiously misapplied the Convention and to state court proceedings addressing different legal issues.

Rather than address any of the evidence of abuse that Ms. Lazaro introduced, and Mr. Colchester denied, the district court's order highlighted separate litigation between the parties. While the district court did not make clear what significance these rulings had for its decision on the merits, they are the only issue to which the court's order devotes substantial attention. *See* 1-ER-7–8, 14–15. But extending comity to a January 2021 Spanish order finding Ms. Lazaro's removal of S.L.C. was wrongful was an abuse of discretion. As was deferring to the jurisdictional dismissals of Ms. Lazaro's petitions for protection orders in Washington state courts.

1. Granting comity to the January 2021 Spanish custody determination flouts this Court's law.

The Spanish court order on which Mr. Colchester fixates has no claim to comity. The Spanish court ruled that Ms. Lazaro's removing S.L.C. from Spain was wrongful. 5-ER-817–29. And the district court relied on it in rejecting Ms. Lazaro's grave risk defense. 1-ER-14. But

this Court has reversed a trial court for abusing its discretion in affording comity to foreign decisions that arose under the Convention when those decisions presented defects disqualifying them for recognition. *See Asvesta v. Petroutsas*, 580 F.3d 1000, 1011 (9th Cir. 2009) (reversing district court for abusing its discretion in extending comity to a Convention decision by a foreign court when misapplication of the Convention and considerations of fairness weighed against comity).

As this Court has explained, "a court's decision to extend comity to a foreign judgment may be guided by a more searching inquiry into the propriety of the foreign court's application of the Convention, in addition to the considerations of due process and fairness[.]" *Id.* at 1013. The January 2021 order contains the same sort of analytical errors that made the district court's extension of comity to a Greek court an abuse of discretion in *Asvesta*.

First, by basing its decision in part on Ms. Lazaro's removal of S.L.C. during the COVID-19 pandemic, the Spanish court improperly engaged in a "best interest of the child" analysis. *See id.* at 1020. The Spanish court noted that Ms. Lazaro "decided to go back to the United

States of America with her daughter in the middle of the state of alarm due to the pandemic[.]" *See* 5-ER-827. The court also found that, in Washington, S.L.C. "is not going to school in person and her assistance through remote learning has not been proved"—implying that living with Ms. Lazaro in the U.S. impaired S.L.C.'s education. *See id.* These findings may be appropriate in child custody adjudications, but not when deciding petitions under the Convention. It was thus inappropriate to extend comity to the Spanish ruling. *See Asvesta*, 580 F.3d at 1020 (noting that Greek court "stepped out of its role as a Hague Convention tribunal by inquiring into the best interests of the child").

Second, as in *Asvesta*, the Spanish court failed to analyze whether S.L.C.'s habitual residence is in Spain or the U.S. Though the Spanish court referenced "habitual residence" generally several times in its opinion, it offered no reasoning on the subject. *See id.* at 1017.

Third, other deficiencies support denying this order any weight. *See id.* at 1013 ("[I]n the context of the Hague Convention, a court's decision to extend comity to a foreign judgment may be guided by … considerations of due process and fairness"). The evidence below showed that faulty interpretation of Ms. Lazaro's testimony plagued the

Spanish evidentiary hearing leading up to the January 2021 order. *See, e.g.*, 4-ER-635–37 (interpretation error led to confusion by the judge, who admonished Ms. Lazaro for "rambl[ing]"); 5-ER-915–16 (showing other interpretation errors). No wonder, then, that the judge in Spain suggested that Ms. Lazaro's testimony contained "contradictions" and "incoherent explanations": the interpretation errors were severe enough to cause the judge—who supposedly understood English—to chastise Ms. Lazaro even though she had accurately answered the question asked of her. *See* 5-ER-827.

These flaws prevented Ms. Lazaro from sharing her full story with the court in Spain. Nor does the record suggest that Ms. Lazaro could call third-party witnesses in the proceedings leading up the January 2021 order, or that she could take discovery and present arguments about Mr. Colchester's drug trafficking in that proceeding either. The lack of procedural rights undermines whatever confidence this Court can have in the Spanish proceedings even more.

Thus, a straightforward application of *Asvesta* erodes whatever weight the district court attached to the Spanish ruling in its final order.

2. Deferring to state court decisions dismissing Ms. Lazaro's petitions for protection under different legal standards than those here was an abuse of discretion.

This Court has held that state court judgments that do not arise under the Convention have no preclusive effect in Convention cases. *See Holder v. Holder*, 305 F.3d 854, 866 (9th Cir. 2002). And the arguments Mr. Colchester himself made in state court underscore how different those proceedings—neither of which involved an evidentiary hearing—were from this case. The state courts answered different legal questions under different standards based on different evidence. It was improper for the district court to rely on them in rejecting Ms. Lazaro's grave risk defense.

State court domestic violence proceedings do not arise under the Convention. Nor do the procedures used or the substantive legal analysis relevant there answer the legal questions here. In fact, despite the district court's flawed legal conclusion that Washington law required the state courts to "determine whether there were any credible allegations of abuse or domestic violence that should cause the court to assert jurisdiction over Mr. Colchester or the child," the state court

orders and Mr. Colchester's arguments in those proceedings show otherwise. 1-ER-14.

The first state court assessed whether there was evidence of abuse in Washington that would have justified exercising personal jurisdiction over Mr. Colchester. *See* 5-ER-783 (finding no "credible allegations of any acts of domestic violence that occurred between the parties *in Washington*" and no threats of violence or stalking "after [Ms. Lazaro] left Spain" (emphasis added)). And Mr. Colchester's briefing in that case confirms at least three times that the lack of evidence of domestic violence in Washington drove the outcome, no matter what happened in Spain, and that jurisdiction over the child was barred by the existence of Spain as her "home country" under the statute at issue there. 6-ER-1099–1104.

Under Washington law, "a dismissal for lack of personal jurisdiction … is a dismissal without prejudice, whereas [summary judgment] is a dismissal on the merits which if affirmed would have preclusive effect." *Modumental, Inc. v. Xtalic Corp.*, 425 P.3d 871, 884 (Wash. Ct. App. 2018). State procedural law also confirms the difference

between dismissals "for lack of jurisdiction" and "adjudication[s] on the merits." Wash. Civ. R. 41(b)(3).

The same analysis applies to Ms. Lazaro's efforts to secure an order of protection in another county in Washington. The court there did no more than follow the prior state court order as res judicata.[10] 5-ER-787–88.

That the district court's order hangs its hat on these cases rather than even address the evidence of abuse highlights the need for reversal.

F. The district court abused its discretion by restricting Ms. Lazaro's custody rights beyond what the governing Spanish custody order allowed.

Convention cases do not decide child custody. They instead decide which jurisdiction is the proper forum for doing so. *See Monasky*, 140 S. Ct. at 727 (noting that the Convention's aim is "to ensure that custody is adjudicated in what is presumptively the most appropriate forum—the country where the child is at home").

[10] The district court's conclusion that the second state court domestic violence dismissal found Ms. Lazaro's allegations "not credible" lacks support in the record. *Compare* 1-ER-14, *with* 5-ER-786–89.

In this circuit, courts that find a grave risk of exposing the child to harm if she returns to the country of habitual residence also consider whether there are any reasonable measures[11] or other remedies that can facilitate a safe return. *See Gaudin v. Remis*, 415 F.3d 1028, 1035–36 (9th Cir. 2005) (explaining standard for considering alternative remedies under the Convention). A court may impose ameliorative measures to protect the child even without a finding of grave risk. *See In re Tsarbopoulos*, 243 F.3d 550, at *2 (9th Cir. 2000) (unpublished).[12]

The district court's purported ameliorative measures here reflect an abuse of discretion. "[T]o mitigate the risk of harm to S.L.C.," the district court ordered Mr. Colchester to "facilitate daily electronic communications between S.L.C. and Ms. Lazaro" and limited Ms. Lazaro to *supervised* visitation with S.L.C. in Spain for no more

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[11] Some cases call these ameliorative measures undertakings.

[12] Several circuits have concluded that, once the trial court determines that a grave risk of exposure to harm exists, it need not consider ameliorative measures before denying the petition. *See Acosta*, 725 F.3d at 877; *Barran v. Beaty*, 526 F.3d 1340, 1351–52 (11th Cir. 2008); *Danaipour v. McLarey*, 386 F.3d 289, 303–04 (1st Cir. 2004). While Ms. Lazaro acknowledges the law of the circuit, either the Supreme Court or an en banc panel of this Court should consider whether ameliorative measures can ever justify returning a child after a finding of grave risk.

than two days per month. 1-ER-10. Yet under the prevailing Spanish custody order, Ms. Lazaro has a right to seven days each month of *unsupervised* visitation (plus longer visits during the summer and on some holidays) and to daily calls with S.L.C. *See* 5-ER-799–800.

Having found that Spain was S.L.C.'s country of habitual residence—and having rejected Ms. Lazaro's grave risk defense—the district court had no right to twist a Convention proceeding into a custody case and interfere with the existing rulings of the Spanish courts.[13] Ms. Lazaro has found no other case in which a court imposed ameliorative measures that disadvantaged a respondent—much less a victim of domestic abuse—by frustrating the custody order in the place of habitual residence. The district court's ruling serves no non-punitive purpose and has no support in either the Convention or the Act.

[13] Nor does the district court's caveat that its new restrictions are subject to Spanish custody orders save it. Unless those restrictions are a nullity for conflicting with *preexisting* custody orders, they still curtail Ms. Lazaro's custody rights without warrant in the treaty or the statute.

G. The district court abused its discretion by awarding excessive expenses to Mr. Colchester despite Ms. Lazaro's inability to pay and the evidence of domestic abuse.

Because of what the district court found to be Ms. Lazaro's "abuse of the legal process"—mainly in other cases—it imposed an award of $100,000 in attorneys' fees and $15,000 in other expenses against Ms. Lazaro. 1-ER-2. But the record shows that she had less than $1,000 in her checking account at the time, and her combined income from the last three years was less than a third of the district court's award. 2-ER-43–44. This impossible burden will eliminate her ability to see and care for S.L.C.—who is now in Spain—and is unjust. It was Mr. Colchester's acts of domestic violence that spurred Ms. Lazaro to flee to the United States with S.L.C. This Court should join the First and Eighth Circuits in requiring district courts to consider a respondent's ability to pay—and to do so more meaningfully than the court below did. It should also join the Second Circuit in holding that unilateral domestic violence toward a respondent makes awarding expenses under the Act "clearly inappropriate."

The Act requires awarding a petitioner's "necessary expenses … during the course of proceedings in the action, and transportation costs

related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate." 22 U.S.C. § 9007(b)(3). The right to expenses is "subject to a broad caveat denoted by the words 'clearly inappropriate.'" *Whallon v. Lynn*, 256 F.3d 138, 140 (1st Cir. 2004). The Court has "broad discretion in its effort to comply with the Hague Convention consistently with our own laws and standards." *Id.*

Two circuits have concluded that "preserving the ability of a respondent to care for her child is an important factor to consider" in addressing expenses. *Id.*; *Rydder v. Rydder*, 49 F.3d 369, 373–74 (8th Cir. 1995) (reducing award of legal fees and costs from $18,000 to $10,000—plus $10,000 in other expenses—because the respondent's "straitened financial circumstances" made original award an abuse of discretion).

District courts around the country have followed that guidance in reducing or eliminating large expense awards in Convention cases. *See, e.g.*, *LaSalle v. Adams*, 2019 WL 6135127, at *11 (D. Ariz. Nov. 9, 2019) (awarding transportation costs for returning children and petitioner's airfare, but no other fees or expenses because the respondent "had little

in the way of financial resources" and rather than acting "solely [because of] spite and resentment … genuinely love[d] the Children"); *Rehder v. Rehder*, 2015 WL 4624030, at *2–4 (W.D. Wash. Aug. 3, 2015) (concluding that awarding any of the petitioner's $100,000 in attorneys' fees was "clearly inappropriate" when the respondent had just $2,600 in her checking account and her tax returns showed little income); *Mendoza v. Silva*, 985 F. Supp. 2d 910, 916–17 (N.D. Iowa 2014) (declining to award costs based on, among other things, the complexity of the case, equitable principles, and the respondent's inability to pay); *Lyon v. Moreland-Lyon*, 2012 WL 5384558, at *3 (D. Kan. Nov. 1, 2012) ("Given the respondent's financial position, this court finds that awarding any of petitioner's attorneys' fees against the respondent would be clearly inappropriate."); *Vale v. Avila*, 2008 WL 5273677, at *2 (C.D. Ill. Dec. 17, 2008) (finding an award of any attorneys' fees inappropriate because of the respondent's inability "to shoulder the burden of the $115,872.26 in attorney fees, copying costs, etc. that Petitioner's counsel is requesting" and awarding only the petitioner's out-of-pocket costs).

Ms. Lazaro has no hope of ever paying the massive award the district court imposed here. Its only effect—and the district court's order suggests this was deliberate—is to punish her. While reversing the judgment below on the grounds already discussed would vacate the expenses award, the Court should offer guidance to trial courts throughout the circuit on the importance of considering a party's ability to pay.

Beyond Ms. Lazaro's limited means, the Second Circuit has held that a petitioner's acts of domestic violence toward the respondent, absent other equitable factors favoring awarding expenses, make any such award improper. *See Souratgar v. Lee Jen Fair*, 818 F.3d 72, 80–82 (2d Cir. 2016) (reversing district court for abusing its discretion in awarding expenses to prevailing petitioner despite record of multiple acts of unilateral domestic violence). Ms. Lazaro asks this Court to reach the same conclusion.

* * *

Whether considered individually or together, the district court's errors warrant a reversal. *See Gonzalez v. Police Dept., City of San Jose*, 901 F.2d 758, 762 (9th Cir. 1990) (holding that there was "no doubt that

a remand is required in light of the cumulative effect of the two material errors").

CONCLUSION

The errors below were so many and so fundamental as to make the judgment unfair and illegitimate. That is unacceptable in any case. Here, where the safety of a child is at stake, it is also tragic. Ms. Lazaro asks the Court to reverse the judgment below. On remand, the district court should allow discovery and an evaluation of S.L.C. by a psychological expert. It should also admit the evidence on Mr. Colchester's illegal activity and confine the decisions of other courts to the role established by this Court's precedents. The district court should support its findings and conclusions by engaging with the evidence at trial and explaining how that evidence supports its decision.

The Court should award Ms. Lazaro her costs on appeal.

Date: May 7, 2021 Respectfully submitted,

s/Aaron P. Brecher

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature */s/ Aaron P. Brecher* **Date:** May 7, 2021
*(use "*s/[typed name]*" to sign electronically-filed documents)*

ADDENDUM

INDEX TO ADDENDUM

22 U.S.C. § 9002 – Definitions.

For the purposes of this chapter—

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 653 of title 42;

(4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 9006(a) of this title.

22 U.S.C. § 9003 - Judicial remedies.

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence—

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter—

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

22 U.S.C. §9007. Costs and fees.

(a) Administrative costs

No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 9003 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 9003 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

99TH CONGRESS
1st Session

SENATE

TREATY DOC.
99-11

HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, ADOPTED ON OCTOBER 24, 1980, AT THE 14TH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW AND SIGNED ON BEHALF OF THE UNITED STATES ON DECEMBER 23, 1981

NOVEMBER 5, 1985.—Convention was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for use of the Senate

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U.S. GOVERNMENT PRINTING OFFICE

71-118 O

WASHINGTON : 1985

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *October 30, 1985.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a certified copy of the Hague Convention on the Civil Aspects of International Child Abduction, adopted on October 24, 1980 by the Fourteenth Session of the Hague Conference on Private International Law and opened for signature on October 25, 1980.

The Convention is designed to secure the prompt return of children who have been abducted from their country of habitual residence or wrongfully retained outside that country. It also seeks to facilitate the exercise of visitation rights across international borders. The Convention reflects a worldwide concern about the harmful effects on children of parental kidnapping and a strong desire to fashion an effective deterrent to such conduct.

The Convention's approach to the problem of international child abduction is a simple one. The Convention is designed promptly to restore the factual situation that existed prior to a child's removal or retention. It does not seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children. The international abductor is denied legal advantage from the abduction to or retention in the country where the child is located, as resort to the Convention is to effect the child's swift return to his or her circumstances before the abduction or retention. In most cases this will mean return to the country of the child's habitual residence where any dispute about custody rights can be heard and settled.

The Convention calls for the establishment of a Central Authority in every Contracting State to assist applicants in securing the return of their children or in exercising their custody or visitation rights, and to cooperate and coordinate with their counterparts in other countries toward these ends. Moreover, the Convention establishes a judicial remedy in wrongful removal or retention cases which permits an aggrieved parent to seek a court order for the prompt return of the child when voluntary agreement cannot be achieved. An aggrieved parent may pursue both of these courses of action or seek a judicial remedy directly without involving the Central Authority of the country where the child is located.

The Convention would represent an important addition to the State and Federal laws currently in effect in the United States that are designed to combat parental kidnapping—specifically, the Uniform Child Custody Jurisdiction Act now in effect in every State in the country, the Parental Kidnapping Prevention Act of 1980, the 1982 Missing Children Act and the Missing Children's Assistance

Act. It would significantly improve the chances a parent in the United States has of recovering a child from a foreign Contracting State. It also provides a clear-cut method for parents abroad to apply for the return of children who have been wrongfully taken to or retained in this country. In short, by establishing a legal right and streamlined procedures for the prompt return of internationally abducted children, the Convention should remove many of the uncertainties and the legal difficulties that now confront parents in international child abduction cases.

Federal legislation will be submitted to provide for the smooth implementation of the Convention within the United States. This legislation will be consistent with the spirit and intent of recent congressional initiatives dealing with the problem of interstate child abduction and missing children.

United States ratification of the Convention is supported by the American Bar Association. The authorities of many States have indicated a willingness to do their part to assist the Federal government in carrying out the mandates of the Convention.

I recommend that the Senate give early and favorable consideration to the Convention and accord its advice and consent to ratification, subject to the reservations described in the accompanying report of the Secretary of State.

RONALD REAGAN.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, October 4, 1985.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Hague Convention on the Civil Aspects of International Child Abduction with the recommendation that it be transmitted to the Senate for its advice and consent to ratification.

The Convention was adopted on October 24, 1980 at the Fourteenth Session of the Hague Conference on Private International Law in Plenary Session by unanimous vote of twenty-three member states of that organization. The Convention was opened for signature on October 25, 1980, at which time it was signed by Canada, France, Greece and Switzerland. It was signed on behalf of the United States on December 23, 1981, and has also been signed by Belgium and Portugal. The Convention is in force for France, Portugal, Switzerland and most parts of Canada.

The Convention stemmed from a proposal first advanced at a Hague Conference Special Commission meeting in 1976 that the Conference prepare a treaty responsive to the global problem of international child abduction. The overriding objective was to spare children the detrimental emotional effects associated with transnational parental kidnapping.

The Convention establishes a system of administrative and legal procedures to bring about the prompt return of children who are wrongfully removed to or retained in a Contracting State. A removal or retention is wrongful within the meaning of the Convention if it violates custody rights that are defined in an agreement or court order, or that arise by operation of law, provided these rights are actually exercised (Article 3), i.e., custody has not in effect been abandoned. The Convention applies to abductions that occur both before and after issuance of custody decrees, as well as abductions by a joint custodian (Article 3). Thus, a custody decree is not a prerequisite to invoking the Convention with a view to securing the child's return. By promptly restoring the *status quo ante,* subject to express requirements and exceptions, the Convention seeks to deny the abductor legal advantage in the country to which the child has been taken, as the courts of that country are under a treaty obligation to return the child without conducting legal proceedings on the merits of the underlying conflicting custody claims.

Each country must establish at least one national Central Authority primarily to process incoming and outgoing requests for assistance in securing the return of a child or the exercise of visitation rights (Article 6). In the United States the Central Authority

is to be located in an existing agency of the federal government which will, however, need to rely on state and local facilities, including the Federal Parent Locator Service and the private bar, in carrying out the measures listed in Article 7 of the Convention. These measures include best efforts to locate abducted or retained children, explore possibilities for their voluntary return, facilitate provision of legal services in connection with judicial proceedings, and coordinate arrangements for the child's return travel (Article 7).

Articles 11–17 are the major provisions governing legal proceedings for the return of an abducted child. Under the Convention, if a proceeding is brought less than a year from the date of the removal or retention and the court finds that the conduct was wrongful, the court is under a treaty obligation to order the child returned. When proceedings are brought a year or more after the date of the removal or retention, the court is still obligated to order the child returned unless the person resisting return demonstrates that the child is settled in the new environment (Article 12).

Although the Convention ceases to apply as soon as a child reaches sixteen years of age (Article 4), it does not limit the power of appropriate authorities to order the return of an abducted or wrongfully retained child at any time pursuant to other laws or procedures that may make return in the absence of a treaty obligation possible (Article 18).

Articles 13 and 20 enumerate those exceptional circumstances under which the court is not obligated by the Convention to order the child returned. The person opposing return of the child bears the burden of proving that: (1) custody rights were not actually being exercised at the time of the removal or retention by the person seeking return or the person seeking return had consented to or subsequently acquiesced in the removal or retention; or (2) there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. A court also has discretion to refuse to order a child returned if it finds that the child objects to being returned and has reached an age or degree of maturity making it appropriate to consider his or her views (Article 13). A court may also deny a request to return a child if the return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20). Unless one of the enumerated exceptions to the return obligation is deemed to apply, courts in Contracting States will be under a treaty obligation to order a child returned.

Visitation rights are also protected by the Convention, but to a lesser extent than custody rights (Article 21). The remedies for breach of the "access rights" of the non-custodial parent do not include the return remedy provided by Article 12. However, the non-custodial parent may apply to the Central Authority under Article 21 for "organizing or securing the effective exercise of rights of access." The Central Authority is to promote the peaceful enjoyment of these rights. The Convention is supportive of the exercise of visitation rights, i.e., visits of children with non-custodial parents, by providing for the prompt return of children if the non-custodial parent should seek to retain them beyond the end of the visi-

tation period. In this way the Convention seeks to address the major concern of a custodial parent about permitting a child to visit the non-custodial parent abroad.

If the Convention machinery succeeds in rapidly restoring children to their pre-abduction or pre-retention circumstances, it will have the desirable effect of deterring parental kidnapping, as the legal and other incentives for wrongful removal or retention will have been eliminated. Indeed, while it is hoped that the Convention will be effective in returning children in individual cases, the full extent of its success may never by quantifiable as an untold number of potential parental kidnappings may have been deterred.

This country's participation in the development of the Convention was a logical extension of U.S. membership in the Hague Conference on Private International Law and bipartisan domestic concern with interstate parental kidnapping, a phenomenon with roots in the high U.S. divorce rate and mobility of the population. In response to the public outcry over parental kidnapping, all states and the District of Columbia enacted the Uniform Child Custody Jurisdiction Act (UCCJA), and Congress has enacted the Parental Kidnapping Prevention Act (PKPA), the Missing Children Act, and the Missing Children's Assistance Act. These statutes address almost exclusively problems associated with inter-state parental kidnapping. The Convention will expand the remedies available to victims of parental kidnapping from or to the United States.

The Convention will be of great assistance to parents in the United States whose children are wrongfully taken to or retained in other Contracting States. Such persons now have no choice but to utilize laws and procedures applicable to recognition and enforcement of foreign custody decrees in the country in which the child is located. It is often necessary to retain a foreign lawyer and to apply or reapply for custody to a foreign court, which typically pits the U.S. petitioner against the abducting parent who may have his or her origins in that foreign country and may thus have the benefit of defending the custody suit in what may be a friendly forum. The Convention will be especially meaningful to parents whose children are abducted before U.S. custody orders have been issued because return proceedings under the Convention are not contingent upon the existence of such orders.

At any given time during the past several years, about half of the several hundred requests to the Department of State for assistance in recovering children taken out of the United States have involved abductions to countries which participated in the preparation and negotiation of the Hague Convention. This suggests that U.S. ratification of the Convention, and its ultimate ratification by many of those other countries, is likely to benefit a substantial number of future victim children and parents residing in the United States.

For parents residing outside the United States whose children have been wrongfully taken to or retained in this country, the Convention will likewise serve as a vehicle for prompt return. In such cases involving violations of existing foreign court orders, the victim parent outside the United States may either invoke the Convention or seek return of the child in connection with an action for recognition of the foreign custody decree pursuant to the UCCJA

or other available means. The Convention will be expecially advantageous in pre-decree abduction cases where no court order exists that may be enforced under the UCCJA.

The Convention has received widespread support. The Secretary of State's Advisory Committee on Private International Law—on which ten major national legal organizations interested in international efforts to unify private law are represented—has endorsed the Convention for U.S. ratification. The House of Delegates of the American Bar Association adopted a resolution in February, 1981 urging U.S. signature and ratification of the Convention. U.S. ratification is also supported by the Department of Justice and the Department of Health Services. In reply to a State Department letter inquiring whether and how the states of the United States could assist in implementing the Convention if it were ratified by the United States, officials of many states welcomed the Convention in principle and expressed general willingness to cooperate with the federal Central Authority in its implementation.

The Department believes that federal legislation will be needed fully to give effect to various provisions of the Convention. Draft legislation is being prepared for introduction in both houses of Congress. The United States instrument of ratification would be deposited only after satisfactory legislation has been enacted.

I recommend that the United States enter two reservations at the time of deposit of its instrument of ratification, both of which are specifically permitted by the Convention.

(1) The United States should enter a reservation to ensure that all documents sent to the U.S. Central Authority in a foreign language are accompanied by a translation into English. The reservation should read:

> Pursuant to the second paragraph of Article 24, and Article 42, the United States makes the following reservation: All applications, communications and other documents sent to the United States Central Authority should be accompanied by their translation into English.

(2) The second reservation should read:

> Pursuant to the third paragraph of Article 26, the United States declares that it will not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except insofar as those costs or expenses are covered by a legal aid program.

It is hoped that the Senate will promptly consider this Convention and give its advice and consent to its ratification by the United States.

Respectfully submitted,

GEORGE P. SHULTZ.

Convention sur les aspects civils de l'enlèvement international d'enfants

Les Etats signataires de la présente Convention,

Profondément convaincus que l'intérêt de l'enfant est d'une importance primordiale pour toute question relative à sa garde,

Désirant protéger l'enfant, sur le plan international, contre les effets nuisibles d'un déplacement ou d'un non-retour illicites et établir des procédures en vue de garantir le retour immédiat de l'enfant dans l'Etat de sa résidence habituelle, ainsi que d'assurer la protection du droit de visite,

Ont résolu de conclure une Convention à cet effet, et sont convenus des dispositions suivantes:

CHAPITRE I
CHAMP D'APPLICATION DE LA CONVENTION

Article premier

La présente Convention a pour objet:

a d'assurer le retour immédiat des enfants déplacés ou retenus illicitement dans tout Etat contractant;

b de faire respecter effectivement dans les autres Etats contractants les droits de garde et de visite existant dans un Etat contractant.

Article 2

Les Etats contractants prennent toutes mesures appropriées pour assurer, dans les limites de leur territoire, la réalisation des objectifs de la Convention. A cet effet, ils doivent recourir à leurs procédures d'urgence.

Article 3

Le déplacement ou le non-retour d'un enfant est considéré comme illicite:

a lorsqu'il a lieu en violation d'un droit de garde, attribué à une personne, une institution ou tout autre organisme, seul ou conjointement, par le droit de l'Etat dans lequel l'enfant avait sa résidence habituelle immédiatement avant son déplacement ou son non-retour; et

b que ce droit était exercé de façon effective seul ou conjointement, au moment du déplacement ou du non-retour, ou l'eût été si de tels événements n'étaient survenus.

Le droit de garde visé en *a* peut notamment résulter d'une attribution de plein droit, d'une décision judiciaire ou administrative, ou d'un accord en vigueur selon le droit de cet Etat.

Article 4

La Convention s'applique à tout enfant qui avait sa résidence habituelle dans un Etat contractant immédiatement avant l'atteinte aux droits de garde ou de visite. L'application de la Convention cesse lorsque l'enfant parvient à l'âge de 16 ans.

Article 5

Au sens de la présente Convention:

a le «droit de garde» comprend le droit portant sur les soins de la personne de l'enfant, et en particulier celui de décider de son lieu de résidence;

b le «droit de visite» comprend le droit d'emmener l'enfant pour une période limitée dans un lieu autre que celui de sa résidence habituelle.

Convention on the Civil Aspects of International Child Abduction

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I
SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPITRE II
AUTORITÉS CENTRALES

Article 6

Chaque Etat contractant désigne une Autorité centrale chargée de satisfaire aux obligations qui lui sont imposées par la Convention.
Un Etat fédéral, un Etat dans lequel plusieurs systèmes de droit sont en vigueur ou un Etat ayant des organisations territoriales autonomes, est libre de désigner plus d'une Autorité centrale et de spécifier l'étendue territoriale des pouvoirs de chacune de ces Autorités. L'Etat qui fait usage de cette faculté désigne l'Autorité centrale à laquelle les demandes peuvent être adressées en vue de leur transmission à l'Autorité centrale compétente au sein de cet Etat.

Article 7

Les Autorités centrales doivent coopérer entre elles et promouvoir une collaboration entre les autorités compétentes dans leurs Etats respectifs, pour assurer le retour immédiat des enfants et réaliser les autres objectifs de la présente Convention.
En particulier, soit directement, soit avec le concours de tout intermédiaire, elles doivent prendre toutes les mesures appropriées:

a pour localiser un enfant déplacé ou retenu illicitement;

b pour prévenir de nouveaux dangers pour l'enfant ou des préjudices pour les parties concernées, en prenant ou faisant prendre des mesures provisoires;

c pour assurer la remise volontaire de l'enfant ou faciliter une solution amiable;

d pour échanger, si cela s'avère utile, des informations relatives à la situation sociale de l'enfant;

e pour fournir des informations générales concernant le droit de leur Etat relatives à l'application de la Convention;

f pour introduire ou favoriser l'ouverture d'une procédure judiciaire ou administrative, afin d'obtenir le retour de l'enfant et, le cas échéant, de permettre l'organisation ou l'exercice effectif du droit de visite;

g pour accorder ou faciliter, le cas échéant, l'obtention de l'assistance judiciaire et juridique, y compris la participation d'un avocat;

h pour assurer, sur le plan administratif, si nécessaire et opportun, le retour sans danger de l'enfant;

i pour se tenir mutuellement informées sur le fonctionnement de la Convention et, autant que possible, lever les obstacles éventuellement rencontrés lors de son application.

CHAPITRE III
RETOUR DE L'ENFANT

Article 8

La personne, l'institution ou l'organisme qui prétend qu'un enfant a été déplacé ou retenu en violation d'un droit de garde peut saisir soit l'Autorité centrale de la résidence habituelle de l'enfant, soit celle de tout autre Etat contractant, pour que celles-ci prêtent leur assistance en vue d'assurer le retour de l'enfant.
La demande doit contenir:

a des informations portant sur l'identité du demandeur, de l'enfant et de la personne dont il est allégué qu'elle a emmené ou retenu l'enfant;

CHAPTER II
CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.
Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.
In particular, either directly or through any intermediary, they shall take all appropriate measures –

a to discover the whereabouts of a child who has been wrongfully removed or retained;

b to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III
RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.
The application shall contain –

a information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b la date de naissance de l'enfant, s'il est possible de se la procurer;

c les motifs sur lesquels se base le demandeur pour réclamer le retour de l'enfant;

d toutes informations disponibles concernant la localisation de l'enfant et l'identité de la personne avec laquelle l'enfant est présumé se trouver.

La demande peut être accompagnée ou complétée par:

e une copie authentifiée de toute décision ou de tout accord utiles;

f une attestation ou une déclaration avec affirmation émanant de l'Autorité centrale, ou d'une autre autorité compétente de l'Etat de la résidence habituelle, ou d'une personne qualifiée, concernant le droit de l'Etat en la matière;

g tout autre document utile.

Article 9

Quand l'Autorité centrale qui est saisie d'une demande en vertu de l'article 8 a des raisons de penser que l'enfant se trouve dans un autre Etat contractant, elle transmet la demande directement et sans délai à l'Autorité centrale de cet Etat contractant et en informe l'Autorité centrale requérante ou, le cas échéant, le demandeur.

Article 10

L'Autorité centrale de l'Etat où se trouve l'enfant prendra ou fera prendre toute mesure propre à assurer sa remise volontaire.

Article 11

Les autorités judiciaires ou administratives de tout Etat contractant doivent procéder d'urgence en vue du retour de l'enfant.
Lorsque l'autorité judiciaire ou administrative saisie n'a pas statué dans un délai de six semaines à partir de sa saisine, le demandeur ou l'Autorité centrale de l'Etat requis, de sa propre initiative ou sur requête de l'Autorité centrale de l'Etat requérant, peut demander une déclaration sur les raisons de ce retard. Si la réponse est reçue par l'Autorité centrale de l'Etat requis, cette Autorité doit la transmettre à l'Autorité centrale de l'Etat requérant ou, le cas échéant, au demandeur.

Article 12

Lorsqu'un enfant a été déplacé ou retenu illicitement au sens de l'article 3 et qu'une période de moins d'un an s'est écoulée à partir du déplacement ou du non-retour au moment de l'introduction de la demande devant l'autorité judiciaire ou administrative de l'Etat contractant où se trouve l'enfant, l'autorité saisie ordonne son retour immédiat.

L'autorité judiciaire ou administrative, même saisie après l'expiration de la période d'un an prévue à l'alinéa précédent, doit aussi ordonner le retour de l'enfant, à moins qu'il ne soit établi que l'enfant s'est intégré dans son nouveau milieu.

Lorsque l'autorité judiciaire ou administrative de l'Etat requis a des raisons de croire que l'enfant a été emmené dans un autre Etat, elle peut suspendre la procédure ou rejeter la demande de retour de l'enfant.

b where available, the date of birth of the child;

c the grounds on which the applicant's claim for return of the child is based;

d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e an authenticated copy of any relevant decision or agreement;

f a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Nonobstant les dispositions de l'article précédent, l'autorité judiciaire ou administrative de l'Etat requis n'est pas tenue d'ordonner le retour de l'enfant, lorsque la personne, l'institution ou l'organisme qui s'oppose à son retour établit:

a que la personne, l'institution ou l'organisme qui avait le soin de la personne de l'enfant n'exerçait pas effectivement le droit de garde à l'époque du déplacement ou du non-retour, ou avait consenti ou a acquiescé postérieurement à ce déplacement ou à ce non-retour; ou

b qu'il existe un risque grave que le retour de l'enfant ne l'expose à un danger physique ou psychique, ou de toute autre manière ne le place dans une situation intolérable.

L'autorité judiciaire ou administrative peut aussi refuser d'ordonner le retour de l'enfant si elle constate que celui-ci s'oppose à son retour et qu'il a atteint un âge et une maturité où il se révèle approprié de tenir compte de cette opinion.

Dans l'appréciation des circonstances visées dans cet article, les autorités judiciaires ou administratives doivent tenir compte des informations fournies par l'Autorité centrale ou toute autre autorité compétente de l'Etat de la résidence habituelle de l'enfant sur sa situation sociale.

Article 14

Pour déterminer l'existence d'un déplacement ou d'un non-retour illicite au sens de l'article 3, l'autorité judiciaire ou administrative de l'Etat requis peut tenir compte directement du droit et des décisions judiciaires ou administratives reconnues formellement ou non dans l'Etat de la résidence habituelle de l'enfant, sans avoir recours aux procédures spécifiques sur la preuve de ce droit ou pour la reconnaissance des décisions étrangères qui seraient autrement applicables.

Article 15

Les autorités judiciaires ou administratives d'un Etat contractant peuvent, avant d'ordonner le retour de l'enfant, demander la production par le demandeur d'une décision ou d'une attestation émanant des autorités de l'Etat de la résidence habituelle de l'enfant constatant que le déplacement ou le non-retour était illicite au sens de l'article 3 de la Convention, dans la mesure où cette décision ou cette attestation peut être obtenue dans cet Etat. Les Autorités centrales des Etats contractants assistent dans la mesure du possible le demandeur pour obtenir une telle décision ou attestation.

Article 16

Après avoir été informées du déplacement illicite d'un enfant ou de son non-retour dans le cadre de l'article 3, les autorités judiciaires ou administratives de l'Etat contractant où l'enfant a été déplacé ou retenu ne pourront statuer sur le fond du droit de garde jusqu'à ce qu'il soit établi que les conditions de la présente Convention pour un retour de l'enfant ne sont pas réunies, ou jusqu'à ce qu'une période raisonnable ne se soit écoulée sans qu'une demande en application de la Convention n'ait été faite.

Article 17

Le seul fait qu'une décision relative à la garde ait été rendue ou soit susceptible d'être reconnue dans l'Etat requis ne peut justifier le refus de renvoyer l'enfant dans le cadre de cette Convention, mais les autorités judiciaires ou administratives de l'Etat requis peuvent prendre en considération les motifs de cette décision qui rentreraient dans le cadre de l'application de la Convention.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

Les dispositions de ce chapitre ne limitent pas le pouvoir de l'autorité judiciaire ou administrative d'ordonner le retour de l'enfant à tout moment.

Article 19

Une décision sur le retour de l'enfant rendue dans le cadre de la Convention n'affecte pas le fond du droit de garde.

Article 20

Le retour de l'enfant conformément aux dispositions de l'article 12 peut être refusé quand il ne serait pas permis par les principes fondamentaux de l'Etat requis sur la sauvegarde des droits de l'homme et des libertés fondamentales.

CHAPITRE IV
DROIT DE VISITE

Article 21

Une demande visant l'organisation ou la protection de l'exercice effectif d'un droit de visite peut être adressée à l'Autorité centrale d'un Etat contractant selon les mêmes modalités qu'une demande visant au retour de l'enfant.

Les Autorités centrales sont liées par les obligations de coopération visées à l'article 7 pour assurer l'exercice paisible du droit de visite et l'accomplissement de toute condition à laquelle l'exercice de ce droit serait soumis, et pour que soient levés, dans toute la mesure du possible, les obstacles de nature à s'y opposer.

Les Autorités centrales, soit directement, soit par des intermédiaires, peuvent entamer ou favoriser une procédure légale en vue d'organiser ou de protéger le droit de visite et les conditions auxquelles l'exercice de ce droit pourrait être soumis.

CHAPITRE V
DISPOSITIONS GÉNÉRALES

Article 22

Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé pour garantir le paiement des frais et dépens dans le contexte des procédures judiciaires ou administratives visées par la Convention.

Article 23

Aucune légalisation ni formalité similaire ne sera requise dans le contexte de la Convention.

Article 24

Toute demande, communication ou autre document sont envoyés dans leur langue originale à l'Autorité centrale de l'Etat requis et accompagnés d'une traduction dans la langue officielle ou l'une des langues officielles de cet Etat ou, lorsque cette traduction est difficilement réalisable, d'une traduction en français ou en anglais.
Toutefois, un Etat contractant pourra, en faisant la réserve prévue à l'article 42, s'opposer à l'utilisation soit du français, soit de l'anglais, dans toute demande, communication ou autre document adressés à son Autorité centrale.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

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

CHAPTER IV
RIGHTS OF ACCESS

Article 21

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

CHAPTER V
GENERAL PROVISIONS

Article 22

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

Article 23

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

Article 24

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

Article 25

Les ressortissants d'un Etat contractant et les personnes qui résident habituellement dans cet Etat auront droit, pour tout ce qui concerne l'application de la Convention, à l'assistance judiciaire et juridique dans tout autre Etat contractant, dans les mêmes conditions que s'ils étaient eux-mêmes ressortissants de cet autre Etat et y résidaient habituellement.

Article 26

Chaque Autorité centrale supportera ses propres frais en appliquant la Convention.
L'Autorité centrale et les autres services publics des Etats contractants n'imposeront aucun frais en relation avec les demandes introduites en application de la Convention. Notamment, ils ne peuvent réclamer du demandeur le paiement des frais et dépens du procès ou, éventuellement, des frais entraînés par la participation d'un avocat. Cependant, ils peuvent demander le paiement des dépenses causées ou qui seraient causées par les opérations liées au retour de l'enfant.
Toutefois, un Etat contractant pourra, en faisant la réserve prévue à l'article 42, déclarer qu'il n'est tenu au paiement des frais visés à l'alinéa précédent, liés à la participation d'un avocat ou d'un conseiller juridique, ou aux frais de justice, que dans la mesure où ces coûts peuvent être couverts par son système d'assistance judiciaire et juridique.
En ordonnant le retour de l'enfant ou en statuant sur le droit de visite dans le cadre de la Convention, l'autorité judiciaire ou administrative peut, le cas échéant, mettre à la charge de la personne qui a déplacé ou qui a retenu l'enfant, ou qui a empêché l'exercice du droit de visite, le paiement de tous frais nécessaires engagés par le demandeur ou en son nom, notamment des frais de voyage, des frais de représentation judiciaire du demandeur et de retour de l'enfant, ainsi que de tous les coûts et dépenses faits pour localiser l'enfant.

Article 27

Lorsqu'il est manifeste que les conditions requises par la Convention ne sont pas remplies ou que la demande n'est pas fondée, une Autorité centrale n'est pas tenue d'accepter une telle demande. En ce cas, elle informe immédiatement de ses motifs le demandeur ou, le cas échéant, l'Autorité centrale qui lui a transmis la demande.

Article 28

Une Autorité centrale peut exiger que la demande soit accompagnée d'une autorisation par écrit lui donnant le pouvoir d'agir pour le compte du demandeur, ou de désigner un représentant habilité à agir en son nom.

Article 29

La Convention ne fait pas obstacle à la faculté pour la personne, l'institution ou l'organisme qui prétend qu'il y a eu une violation du droit de garde ou de visite au sens des articles 3 ou 21 de s'adresser directement aux autorités judiciaires ou administratives des Etats contractants, par application ou non des dispositions de la Convention.

Article 30

Toute demande, soumise à l'Autorité centrale ou directement aux autorités judiciaires ou administratives d'un Etat contractant par application de la Convention, ainsi que tout document ou information qui y serait annexé ou fourni par une Autorité centrale, seront recevables devant les

Article 25

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

Article 26

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

Article 27

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

Article 28

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

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central

tribunaux ou les autorités administratives des Etats contractants.

Article 31

Au regard d'un Etat qui connaît en matière de garde des enfants deux ou plusieurs systèmes de droit applicables dans des unités territoriales différentes:

a toute référence à la résidence habituelle dans cet Etat vise la résidence habituelle dans une unité territoriale de cet Etat;

b toute référence à la loi de l'Etat de la résidence habituelle vise la loi de l'unité territoriale dans laquelle l'enfant a sa résidence habituelle.

Article 32

Au regard d'un Etat connaissant en matière de garde des enfants deux ou plusieurs systèmes de droit applicables à des catégories différentes de personnes, toute référence à la loi de cet Etat vise le système de droit désigné par le droit de celui-ci.

Article 33

Un Etat dans lequel différentes unités territoriales ont leurs propres règles de droit en matière de garde des enfants ne sera pas tenu d'appliquer la Convention lorsqu'un Etat dont le système de droit est unifié ne serait pas tenu de l'appliquer.

Article 34

Dans les matières auxquelles elle s'applique, la Convention prévaut sur la *Convention du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs*, entre les Etats Parties aux deux Conventions. Par ailleurs, la présente Convention n'empêche pas qu'un autre instrument international liant l'Etat d'origine et l'Etat requis, ni que le droit non conventionnel de l'Etat requis, ne soient invoqués pour obtenir le retour d'un enfant qui a été déplacé ou retenu illicitement ou pour organiser le droit de visite.

Article 35

La Convention ne s'applique entre les Etats contractants qu'aux enlèvements ou aux non-retours illicites qui se sont produits après son entrée en vigueur dans ces Etats.
Si une déclaration a été faite conformément aux articles 39 ou 40, la référence à un Etat contractant faite à l'alinéa précédent signifie l'unité ou les unités territoriales auxquelles la Convention s'applique.

Article 36

Rien dans la Convention n'empêche deux ou plusieurs Etats contractants, afin de limiter les restrictions auxquelles le retour de l'enfant peut être soumis, de convenir entre eux de déroger à celles de ses dispositions qui peuvent impliquer de telles restrictions.

CHAPITRE VI
CLAUSES FINALES

Article 37

La Convention est ouverte à la signature des Etats qui étaient Membres de la Conférence de La Haye de droit international privé lors de sa Quatorzième session.

Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.
Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI
FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

Elle sera ratifiée, acceptée ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès du Ministère des Affaires Etrangères du Royaume des Pays-Bas.

Article 38

Tout autre Etat pourra adhérer à la Convention.
L'instrument d'adhésion sera déposé auprès du Ministère des Affaires Etrangères du Royaume des Pays-Bas.

La Convention entrera en vigueur, pour l'Etat adhérant, le premier jour du troisième mois du calendrier après le dépôt de son instrument d'adhésion.
L'adhésion n'aura d'effet que dans les rapports entre l'Etat adhérant et les Etats contractants qui auront déclaré accepter cette adhésion. Une telle déclaration devra également être faite par tout Etat membre ratifiant, acceptant ou approuvant la Convention ultérieurement à l'adhésion.
Cette déclaration sera déposée auprès du Ministère des Affaires Etrangères du Royaume des Pays-Bas; celui-ci en enverra, par la voie diplomatique, une copie certifiée conforme, à chacun des Etats contractants.

La Convention entrera en vigueur entre l'Etat adhérant et l'Etat ayant déclaré accepter cette adhésion le premier jour du troisième mois du calendrier après le dépôt de la déclaration d'acceptation

Article 39

Tout Etat, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, pourra déclarer que la Convention s'étendra à l'ensemble des territoires qu'il représente sur le plan international ou à l'un ou plusieurs d'entre eux. Cette déclaration aura effet au moment où elle entre en vigueur pour cet Etat.
Cette déclaration, ainsi que toute extension ultérieure, seront notifiées au Ministère des Affaires Etrangères du Royaume des Pays-Bas.

Article 40

Un Etat contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par cette Convention pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la présente Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.
Ces déclarations seront notifiées au Ministère des Affaires Etrangères du Royaume des Pays-Bas et indiqueront expressément les unités territoriales auxquelles la Convention s'applique.

Article 41

Lorsqu'un Etat contractant a un système de gouvernement en vertu duquel les pouvoirs exécutif, judiciaire et législatif sont partagés entre des Autorités centrales et d'autres autorités de cet Etat, la signature, la ratification, l'acceptation ou l'approbation de la Convention, ou l'adhésion à celle-ci, ou une déclaration faite en vertu de l'article 40, n'emportera aucune conséquence quant au partage interne des pouvoirs dans cet Etat.

Article 42

Tout Etat contractant pourra, au plus tard au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, ou au moment d'une déclaration faite en vertu

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.
The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.
Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make

des articles 39 ou 40, faire soit l'une, soit les deux réserves prévues aux articles 24 et 26, alinéa 3. Aucune autre réserve ne sera admise.
Tout Etat pourra, à tout moment, retirer une réserve qu'il aura faite. Ce retrait sera notifié au Ministère des Affaires Etrangères du Royaume des Pays-Bas.
L'effet de la réserve cessera le premier jour du troisième mois du calendrier après la notification mentionnée à l'alinéa précédent.

Article 43

La Convention entrera en vigueur le premier jour du troisième mois du calendrier après le dépôt du troisième instrument de ratification, d'acceptation, d'approbation ou d'adhésion prévu par les articles 37 et 38.

Ensuite, la Convention entrera en vigueur:

1 pour chaque Etat ratifiant, acceptant, approuvant ou adhérant postérieurement le premier jour du troisième mois du calendrier après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion;

2 pour les territoires ou les unités territoriales auxquels la Convention a été étendue conformément à l'article 39 ou 40, le premier jour du troisième mois du calendrier après la notification visée dans ces articles.

Article 44

La Convention aura une durée de cinq ans à partir de la date de son entrée en vigueur conformément à l'article 43, alinéa premier, même pour les Etats qui l'auront postérieurement ratifiée, acceptée ou approuvée ou qui y auront adhéré.
La Convention sera renouvelée tacitement de cinq ans en cinq ans, sauf dénonciation.
La dénonciation sera notifiée, au moins six mois avant l'expiration du délai de cinq ans, au Ministère des Affaires Etrangères du Royaume des Pays-Bas. Elle pourra se limiter à certains territoires ou unités territoriales auxquels s'applique la Convention.
La dénonciation n'aura d'effet qu'à l'égard de l'Etat qui l'aura notifiée. La Convention restera en vigueur pour les autres Etats contractants.

Article 45

Le Ministère des Affaires Etrangères du Royaume des Pays-Bas notifiera aux Etats Membres de la Conférence, ainsi qu'aux Etats qui auront adhéré conformément aux dispositions de l'article 38:

1 les signatures, ratifications, acceptations et approbations visées à l'article 37;

2 les adhésions visées à l'article 38;

3 la date à laquelle la Convention entrera en vigueur conformément aux dispositions de l'article 43;

4 les extensions visées à l'article 39;

5 les déclarations mentionnées aux articles 38 et 40;

6 les réserves prévues aux articles 24 et 26, alinéa 3, et le retrait des réserves prévu à l'article 42;

7 les dénonciations visées à l'article 44.

EN FOI DE QUOI, les soussignés, dûment autorisés, ont signé la présente Convention.

FAIT à La Haye, le 25 octobre 1980, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Etats Membres de la Conférence de La Haye de droit international privé lors de sa Quatorzième session.

one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.
Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it. If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

1 the signatures and ratifications, acceptances and approvals referred to in Article 37;

2 the accessions referred to in Article 38;

3 the date on which the Convention enters into force in accordance with Article 43;

4 the extensions referred to in Article 39;

5 the declarations referred to in Articles 38 and 40;

6 the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

7 the denunciations referred to in Article 44.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at The Hague, on the 25th day of October 1980 in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Pour la République Fédérale d'Allemagne,
For the Federal Republic of Germany,

Pour l'Argentine,
For Argentina,

Pour l'Australie,
For Australia,

Pour l'Autriche,
For Austria,

Pour la Belgique,
For Belgium,

Pour le Canada,
For Canada,

(s.) GEORGES H. BLOUIN
(s.) ALLAN LEAL

Pour le Danemark,
For Denmark,

Pour la République Arabe d'Egypte,
For the Arab Republic of Egypt,

Pour l'Espagne,
For Spain,

Pour les Etats-Unis d'Amérique,
For the United States of America,

Pour la Finlande,
For Finland,

Pour la France,
For France,

(s.) J. D. JURGENSEN
(s.) H. BATIFFOL

Pour la Grèce,
For Greece,

(s.) D. EVRIGÉNIS

Pour l'Irlande,
For Ireland,

Pour Israël,
For Israel,

Pour l'Italie,
For Italy,

Pour le Japon,
For Japan,

Pour la Suisse,
For Switzerland,

(s.) FRANK VISCHER

Pour le Luxembourg,
For Luxemburg,

Pour le Surinam,
For Surinam,

Pour la Norvège,
For Norway,

Pour la Tchécoslovaquie,
For Czechoslovakia,

Pour le Portugal,
For Portugal,

Pour la Turquie,
For Turkey,

Pour le Royaume des Pays-Bas,
For the Kingdom of the Netherlands,

Pour le Vénézuela,
For Venezuela,

Pour le Royaume-Uni de Grande Bretagne
et d'Irlande du Nord,
For the United Kingdom of Great Britain
and Northern Ireland,

Pour la Yougoslavie,
For Yugoslavia,

Pour la Suède,
For Sweden,

Copie certifiée conforme à l'original

Certified true copy of the original

Le Directeur des Traités
du Ministère des Affaires Etrangères
du Royaume des Pays-Bas:

The Director of Treaties
of the Ministry of Foreign Affairs
of the Kingdom of the Netherlands: