

CLE Materials: Panel 1

TABLE OF CONTENTS

Alone and Underrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors

Shani M. King, 38 Harv. J. Legis. 50 (2013)

An International Human Right to Free Legal Counsel For Unaccompanied and Separated Children in U.S. Immigration Proceedings

Sanjula S. Weerasinghe and Andrew I. Schoenholtz, Institute for the Study of International Migration

Balancing the Scales of Justice: An Exploration into How Lack of Education, Employment, and Housing Opportunities Contribute to Disparities in the Criminal Justice System

ACLU of Northern California and W. Haywood Burns Institute

Border Security Act (excerpt)

Panovits v. Cyprus, Application No. 4268/04, European Court of Human Rights (2008)

Salduz v. Turkey, Application No. 36391/02, European Court of Human Rights (2008)

Centre for Child Law v. Minister for Justice and Constitutional Development, Case CCT 98/08 (2009)

ZACC 18, Constitutional Court of South Africa

Recommendations of the International Convention on the Elimination of All Forms of Racial Discrimination

Concluding Observations of International Convention on the Elimination of All Forms of Racial Discrimination

Dyett High School and the 3 Ds of Chicago School Reform

Rhoda Rae Gutierrez and Pauline Lipman

Freedom School Curriculum: Mississippi Freedom Summer, 1964

Kathy Emery, Sylvia Braselmann, and Linda Gold (2004)

Litigating International Child Abduction Cases Under the Hague Convention

Kilpatrick Townshend and Stockton LLP and the National Center for Missing and Exploited Children (2012)

Immigrant Detainees and the Right to Counsel

Ian Urbina and Catherine Rentz, The New York Times (March 30, 2013)

J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011)

Midwest Coalition for Human Rights: Letter of Allegation Regarding the Closing of 49 Public Elementary Schools in Chicago

Office of the U.N. High Commissioner on Human Rights (2013)

Children's Rights in Juvenile Justice, General Comment No. 10 (2007), Convention on the Rights of the Child (CRC)

ARTICLE

ALONE AND UNREPRESENTED: A CALL TO CONGRESS TO PROVIDE COUNSEL FOR UNACCOMPANIED MINORS

SHANI M. KING*

The legal rights of children who enter a country without their parents or other guardians, including the right to legal representation in immigration proceedings, differ vastly across the globe. This Article is the first to show that unaccompanied minors lie at the nexus of international and regional human rights standards governing the treatment of immigrants, children, and civil counsel and to show how the development of human rights standards in these three areas underscores the importance of and the need for counsel for unaccompanied minors. Part I illustrates why unaccompanied minors in the United States need legal representation by focusing on the complexity of immigration proceedings, the likelihood that children will be deprived of their liberty at some point in the process, and the law and practice relating to representation. Part II analyzes how developing regional and international legal standards for children's rights, refugee rights, and the right to free civil counsel support the right to free legal counsel for unaccompanied children in immigration proceedings. Part III identifies the differing approaches to legal representation for unaccompanied minors around the world, and Part IV endorses a model for representation for unaccompanied minors based on developing human rights law as well as best practices and ethical standards in the United States. The Article concludes that the recommended model should be at the forefront of U.S. legislative consideration so that the United States does not continue to run afoul of well-developed principles of human rights law affecting unaccompanied minors.

* Associate Professor of Law and Co-Director, Center on Children and Families, University of Florida Levin College of Law. B.A., Brown University; Mst., International Human Rights Law, University of Oxford; J.D., Harvard Law School. I would like to thank Chris Sherman, Jeanne Cassin, and Laquesha Sanders for outstanding research assistance. I would also like to thank the AALS International Human Rights Section for choosing this Article to be presented at the 2011 AALS Annual Meeting, as well as participants in the 4th Annual Midwest Family Law Consortium, faculty at Boston College Law School, the Cumberland School of Law, and faculty at the University of San Francisco School of Law. I would like to thank my thesis review committee at the University of Oxford for their helpful comments on an earlier version of this Article. I continue to be grateful to Martha Minow for her kindness and unwavering support and to Jacqueline Bhabha, Kris Henning, Barbara Woodhouse, Carolyn Patty Blum, Gabriela Ruiz, and Sara McDowell for their helpful comments on earlier drafts of this Article. I would also like to thank Anne Marie Mulcahy, the Director of the Unaccompanied Children Program at the Vera Institute of Justice, Tricia Swartz from the National Center for Refugee & Immigrant Children, and Lisa Frydman from the Center for Gender & Refugee Studies, for their assistance with this project. Lastly, thank you to the many advocates, governmental representatives, and others all over the world who were responsive to requests for information and helped make this project possible.

I. INTRODUCTION

In recent decades, the rights of the child have become a central focus of evolving refugee law, as the human rights community has recognized an increasing number of children in the refugee population and embraced the “best interests of the child standard,” as well as the rights of refugees and indigent civil litigants. But despite growing consensus around these principles, the legal rights of children who enter a country without their parents or other guardians, including the right to legal representation in immigration proceedings, differ vastly across the globe. Some countries provide these unaccompanied minors free representation, although not necessarily by a lawyer, either from the outset of immigration proceedings, or at later stages. Other countries, such as the United States, afford the legal right to counsel at any stage of immigration proceedings, but do not provide counsel at the expense of the government. In these countries, unaccompanied minors only obtain legal representation through nonprofit groups or pro bono attorneys, which often means that the children go without legal representation.

Many scholars have recognized compelling humanitarian considerations that support the appointment of free legal counsel to unaccompanied minors¹ in the United States.² The existing literature highlights unaccompanied minors’ vulnerability as they negotiate an unfamiliar and arduous legal process,³ the minors’ unfamiliarity with the nature and consequences of immigration proceedings,⁴ the complexity of immigration law,⁵ counsel’s abil-

¹ In the United States, an “unaccompanied minor” means an “unaccompanied alien child” as defined in the Homeland Security Act of 2002. The Act defines an “unaccompanied alien child” as:

[A] child who has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is no parent or legal guardian in the United States, or no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g)(2) (2006).

² See Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT’L J. REFUGEE L. 84, 86 (1999); Sharon Finkel, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1106 (2001); Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL’Y REV. 159, 162 (1990).

³ See Bhabha & Young, *supra* note 2, at 86; Finkel, *supra* note 2, at 1106; Olivas, *supra* note 2, at 162.

⁴ See Bhabha & Young, *supra* note 2, at 118; Devon A. Corneal, *On the Way to Grandmother’s House: Is U.S. Immigration Policy More Dangerous Than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN ST. L. REV. 609, 649 (2004); Finkel, *supra* note 2, at 1114; Andrew Morton & Wendy A. Young, *Children Asylum Seekers Face Challenges in the United States*, REFUGEE, Feb. 2002, at 13, 18, available at <http://pi.library.yorku.ca/ojs/index.php/refuge/article/viewFile/21250/19921>; Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 256 (2010); WOMEN’S REFUGEE COMM’N, ORRICK HERRINGTON & SUTCLIFFE LLP, HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 23 (2009), available at <http://www.unhcr.org/refworld/docid/498c41bf2.html>.

ity to help minors navigate a complicated process,⁶ and the increased likelihood for minors to prevail on their claims when they are represented, in large part because minors with attorneys are more likely to pursue viable claims and present a defense to removal.⁷ The literature also recognizes the importance of counsel to matters such as conditions of detention.⁸

With the understanding that unaccompanied minors fare better when they are represented, the next query is why the United States should take on the responsibility of providing free legal representation to these children. Few scholars have written that unaccompanied minors in the United States have a legal right to free counsel. Linda Kelly Hill has argued that unaccompanied minors have a right to counsel under the Due Process Clause of the U.S. Constitution.⁹ But since U.S. courts have thus far refused to recognize a federal constitutional right to representation, the answer necessarily implicates congressional policy and the creation of statutory rights.

This Article is the first to show that unaccompanied minors lie at the nexus of international and regional human rights standards governing the treatment of immigrants, children, and civil counsel and to show how the development of human rights standards in these three areas underscores the importance of and the need for attorneys for unaccompanied minors. While the Article does not advance the idea that the United States is required by any specific international instrument or principle of customary international law to provide counsel for unaccompanied minors, the Article analyzes how the current state of representation for unaccompanied minors in the United

⁵ See Jacqueline Bhabha, “Not a Sack of Potatoes”: *Moving and Removing Children Across Borders*, 15 B.U. PUB. INT. L.J. 197, 203 (2006); Bhabha & Young, *supra* note 2, at 118; Corneal, *supra* note 4, at 649; Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 62 (2011); Morton & Young, *supra* note 4, at 18; Olivas, *supra* note 2, at 162; Carolyn J. Seugling, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT’L L. 861, 879 (2004); MARICELA GARCIA, UNACCOMPANIED CHILDREN IN THE UNITED STATES: CHALLENGES AND OPPORTUNITIES 5, available at <http://www.latinopolicyforum.org/assets/Unaccompanied%20Children%20Article.pdf>; WOMEN’S REFUGEE COMM’N, *supra* note 4, at 22.

⁶ See Bhabha, *supra* note 5, at 203; Morton & Young, *supra* note 4, at 15; Olivas, *supra* note 2, at 162; JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S. 102 (2006), available at <http://idcoalition.org/wp-content/uploads/2009/06/seeking-asylum-alone-us.pdf>.

⁷ See Bhabha & Young, *supra* note 2, at 118; Corneal, *supra* note 4, at 650; Hill, *supra* note 5, at 65; Morton & Young, *supra* note 4, at 18; JACQUELINE BHABHA, INDEPENDENT CHILDREN, INCONSISTENT ADULTS: CHILD MIGRATION AND THE LEGAL FRAMEWORK 14–15, available at <http://www.childmigration.net/files/Bhabha12Sept-paper.pdf>; BHABHA & SCHMIDT, *supra* note 6, at 7; WOMEN’S REFUGEE COMM’N, *supra* note 4, at 23; see also Bhabha, *supra* note 5, at 207; Finkel, *supra* note 2, at 1133.

⁸ See Corneal, *supra* note 4, at 649; Hill, *supra* note 5, at 67; BHABHA, *supra* note 7, at 8.

⁹ See Hill, *supra* note 5. In 2002, the United States District Court for the Eastern District of Washington explicitly rejected the argument that unaccompanied minors have a due process right to appointed counsel. Order Granting Motion to Dismiss, *Gonzalez Machado v. Ashcroft*, No. CS-01-0066-FVS (E.D. Wa. June 18, 2002), available at www.clearinghouse.net/chDocs/public/IM-WA-0017-0002.pdf (last visited Aug. 23, 2012).

States runs afoul of the principles that have developed across three separate areas of human rights law.

The Article proceeds in four parts. Part I illustrates why unaccompanied minors in the United States need legal representation by focusing on the complexity of immigration proceedings, the likelihood that children will be deprived of their liberty at some point in the process, and the law and practice relating to representation. This part also tells the story of an unaccompanied minor named Catherine Wong to illustrate the process that unaccompanied minors navigate in the United States and the significance of free attorneys to these minors. Part II analyzes how developing regional and international legal standards for children's rights, refugee rights, and the right to free civil counsel support the right to free attorneys for unaccompanied children in immigration proceedings. Part III identifies the differing approaches to legal representation for unaccompanied minors around the globe, and Part IV endorses a model for representation for unaccompanied minors based on developing human rights law as well as best practices and ethical standards in the United States. The Article concludes that the recommended model should be at the forefront of U.S. legislative consideration so that the United States does not continue to run afoul of well-developed principles of human rights law affecting unaccompanied minors.

II. WHY UNACCOMPANIED MINORS IN THE UNITED STATES NEED LEGAL REPRESENTATION

The United States apprehended and detained approximately 6,855 unaccompanied minors in FY 2011.¹⁰ Some of these children spend years in detention,¹¹ and all of them must navigate complex immigration laws, including international law and domestic laws that vary by federal judicial circuit, to submit their defenses to removal or deportation from the United States to their countries of origin.¹² For these children the stakes are high; many are fleeing abuse, gang violence, human trafficking, and poverty, while others are seeking to reunite with friends and family.¹³ In addition, some of these children are trafficked to the United States for forced labor or

¹⁰ *About Unaccompanied Children's Services*, OFF. OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/orr/programs/ucs/about> (last visited Mar. 10, 2013).

¹¹ Detention in the immigration context includes a range of facilities: non-secure juvenile shelter care facilities, group homes, foster homes, and secure or medium-secure juvenile detention facilities. Children who are housed in secure detention are frequently housed with children who are in delinquency proceedings. AMNESTY INT'L USA, UNITED STATES OF AMERICA: UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION 17–26, (2003), available at <http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/unaccompanied%20children%20in%20immigration%20detention.pdf>.

¹² Bhabha and Young conclude that the role of counsel is particularly crucial for children claiming asylum because “[m]ost children lack the experience and sophistication to grasp the complexity and personal implications of an asylum application.” Bhabha & Young, *supra* note 2, at 118.

¹³ *Id.* at 86, 115. See also *About Unaccompanied Children's Services*, *supra* note 10.

commercial sex exploitation.¹⁴ Nearly all of them face immigration proceedings in which they must fight removal to their home countries, and at least half of these children must do so without ever speaking with an attorney.¹⁵ Losing their immigration cases means returning to the dangerous conditions they seek to leave behind. In addition to facing removal proceedings, unaccompanied minors seeking to stay in the United States are often detained for extended periods of time—mostly in group homes and foster homes, but some also in juvenile detention facilities.¹⁶

A. *Removal, Detention, and Custody of Unaccompanied Minors in the United States*

The immigration system that affects unaccompanied minors is complex. It involves multiple agencies, including Customs and Border Patrol (“CBP”), Immigration and Customs Enforcement (“ICE”), and United States Citizenship and Immigration Services (“USCIS”), all part of the United States Department of Homeland Security (“DHS”); the Department of Justice’s Executive Office for Immigration Review (“EOIR”); the United States Department of Health and Human Services’s Office of Refugee Resettlement Division of Unaccompanied Children’s Services (“ORR/DUCS”); and the United States Department of State. Each of these agencies plays a role in one or more of the following functions: immigration enforcement, the proceedings that may result in the removal of the child from the United States,¹⁷ and the custody of the child pending these proceedings. CBP and ICE are principally responsible for enforcement. Since enforcement includes apprehension and detention of individuals who are suspected of entering or being in the United States without authorization, CBP and ICE may also take custody of unaccompanied minors when these children initially have contact with federal officials. Upon an unaccompanied minor’s initial contact with ICE, this agency will initiate intake procedures, which include collecting demographic information, medical history, the location and contact in-

¹⁴ Bhabha & Young, *supra* note 2, at 113.

¹⁵ *See id.* at 118; Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 222 (2006); e-mail from Tricia Swartz, Dir., Nat’l Ctr. for Refugee & Immigrant Children, U.S. Comm. for Refugees & Immigrants, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Apr. 20, 2011, 14:46 EST) (on file with author).

¹⁶ Nugent, *supra* note 15, at 224–25; OLGA BYRNE, VERA INST. OF JUSTICE, UNACCOMPANIED CHILDREN IN THE UNITED STATES: A LITERATURE REVIEW 21 (2008), available at <http://www.vera.org/content/unaccompanied-children-united-states-literature-review>.

¹⁷ “Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days” 8 U.S.C. § 1231(a)(1)(a) (2006). *See also* OFFICE OF IMMIGRATION LITIG., U.S. DEP’T OF JUST., IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: *Padilla v. Kentucky* 1–6 (2010) (providing an overview of the removal process), available at <http://www1.spa.american.edu/justice/document.php?ID=2987>.

formation of immediate family members (including those living in the United States), and any smuggling arrangements that become apparent.¹⁸

Some children never even make it past CBP. During an initial intake interview, the agent determines if the unaccompanied minor is a national of a contiguous country and is willing to return voluntarily. If so, that child can be repatriated without ever being placed in immigration proceedings, as long as the child has not been a victim of trafficking, the child does not express a fear of return, and the child is able to make an independent decision to accept voluntary return.¹⁹ According to a Women's Refugee Commission report issued in 2009, most of the 90,000 children apprehended along the southern U.S. border in 2007 were repatriated immediately.²⁰ The Women's Refugee Commission also notes that Border Patrol agents lack an "effective screening mechanism to identify trafficking victims or other children who may be in need of protection."²¹

Pursuant to a stipulated settlement agreement in *Flores v. Reno*, custody of those children who do make it past CBP should be transferred to ORR/DUCS within seventy-two hours.²² ORR/DUCS is responsible for "coordinating and implementing care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status."²³ The Homeland Security Act of 2002 ("HSA") defines "placement" as "the placement of an unaccompanied alien child in either a detention facility or an alternative to such a facility."²⁴ To fulfill its mandate, ORR/DUCS contracts with more than forty-one state-licensed providers, located in ten different states, who offer foster care,²⁵ shelters or group homes,²⁶ staff secure,²⁷

¹⁸ WOMEN'S REFUGEE COMM'N, *supra* note 4, at 6.

¹⁹ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232(2) (Supp. II 2008).

²⁰ WOMEN'S REFUGEE COMM'N, *supra* note 4, at 5.

²¹ *Id.*

²² Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV85-4544-RJK (C.D. Cal. 1996).

²³ 6 U.S.C. § 279(b)(1)(A) (2006).

²⁴ 6 U.S.C. § 279(g)(1) (2006).

²⁵

Temporary (short-term) foster care is reserved primarily for children under the age of 12, pregnant and parenting teens, and sibling groups. These children receive services through a DUCS-funded care provider but live in private homes. Special-needs children with disabilities or medical or mental health concerns may be placed in therapeutic foster care. Long-term foster care is available as a secondary placement (transfer from another facility) for children who have been or are likely to be in custody for extended periods of time, such as children for whom reunification is not a possibility and whose immigration cases are not likely to be resolved quickly, such as asylum seekers.

WOMEN'S REFUGEE COMM'N, *supra* note 4, at 56.

²⁶

Children who cannot be released or placed in foster care but who do not need a higher level of supervision or services are placed in shelter or group homes. Shelters can vary widely in size. Group homes typically house 15 or fewer children and tend to be less restrictive. . . . [M]any shelters house a large number of children and have

secure,²⁸ and residential treatment centers.²⁹ In fiscal year 2011, ORR/DUCS cared for 6,855 minors.³⁰ Most of these children are from Guatemala, El Salvador, Honduras, and Mexico, and seventeen percent were below the age of fourteen.³¹

As part of its responsibility for care and placement, ORR/DUCS coordinates and approves the reunification of the child with relatives or other qualified sponsors in the United States, pending resolution of the child's removal proceedings.³² In 2008, less than sixty percent of children in ORR/DUCS care were reunified with an adult in the United States.³³ Some children's attorneys have expressed concern that many children are not released because ORR/DUCS unfairly rejects their sponsors.³⁴ On the other hand, social workers are concerned that some children are reunified with adults who do not provide safe environments.³⁵

a more institutional feel as a result. In the large shelters, there tend to be more restrictive measures in place to maintain control.

Id.

²⁷

Children who are deemed to be high risk are placed in staff-secure facilities. According to the DUCS Manual, staff-secure placement is designated for children who require close supervision but who do not need placement in a secure facility. The DUCS Manual provides a list of criteria to consider in assessing the appropriateness of a staff-secure placement. These criteria include inappropriate sexual behavior, disruptive acts, such as destruction of property and non-specific threats to commit a violent act that do not involve a significant risk to harm another person. In practice, children with an offender history that is not serious, children who are flight risks and children who have displayed disruptive behavior in a shelter program are also considered for staff-secure placement. The DUCS Manual states that staff-secure facilities use staff supervision rather than architectural barriers, such as barred windows or locked doors to control the children. However, we observed that at least in some cases, staff-secure facilities did utilize architectural barriers such as bars, fences and locked doors and in at least one case . . . the staff-secure sections were physically indistinguishable from the secure sections of the facility.

Id. at 57.

²⁸

Secure facilities are the highest level of restrictiveness in the DUCS placement continuum. The DUCS Manual considers secure placement to be appropriate for children (i) charged with or convicted of a crime or adjudicated as delinquent; (ii) who have committed or threatened acts of crime or violence while in DUCS custody; (iii) who have engaged in unacceptably disruptive acts; (iv) who are a flight risk; or (v) who need extra security for their own protection.

Id.

²⁹ *About Unaccompanied Children's Services*, *supra* note 10.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*; see also Stipulated Settlement Agreement, *supra* note 22.

³³ WOMEN'S REFUGEE COMM'N, *supra* note 4, at 19 n.148.

³⁴ *Id.* at 19.

³⁵ *Id.* The Women's Refugee Commission concluded that "greater communication with attorneys, continued jurisdiction over children after release and more assessments would alleviate some of these tensions." *Id.*

Once in ORR/DUCS custody, unaccompanied minors undergo removal proceedings before the EOIR.³⁶ Removal proceedings are adversarial administrative hearings in which children must face attorneys from the United States Department of Homeland Security who are tasked with proving that the child should be removed to his or her home country and an administrative judge who has practically no domestic legal basis to consider the best interests of the child in ruling on the merits of the case.³⁷ The proceedings allow for the examination of evidence against the child, the child's presentation of evidence on her own behalf, and the opportunity for the child to cross-examine government witnesses.³⁸ In addition to this evidentiary complexity, the proceedings are governed by a complicated substantive legal scheme, which includes international law,³⁹ federal statutes and regulations,⁴⁰ and case law that varies by jurisdiction.⁴¹ Despite this complexity and the high stakes for unaccompanied minors, at least half of these children face removal proceedings without an attorney.⁴² This is true even though representation is often considered the most important factor affecting the outcome of immigration proceedings, whether for children or adults, given that studies show a correlation between representation and outcome.⁴³ In 2010, immi-

³⁶ William Wilberforce Trafficking Victims Reauthorization Act, 8 U.S.C. § 1232(a)(5)(D) (Supp. II 2008); 8 U.S.C. § 1229a (2006) (governing removal proceedings).

³⁷ See Susan M. Akram, *Are They Human or Just Border Rats?*, 15 B.U. PUB. INT. L.J. 187, 189 (2006) (noting that there is no required consideration of the best interests of children in immigration proceedings). In 2008, Congress created an exception to the adversarial proceedings for children who seek asylum; now unaccompanied minors have the option to have their asylum petitions heard initially by an asylum officer in a non-adversarial setting. These asylum cases are eventually referred to immigration court, however, if the asylum officer denies the application. William Wilberforce Trafficking Victims Reauthorization Act, Pub. L. No. 110-457, § 235(d)(7)(B), 112 Stat. 5044, 5081 (2008); 8 U.S.C. § 1158(b)(3)(C) (2006).

³⁸ 8 U.S.C. § 1229a(b)(4)(B) (Supp. II 2008).

³⁹ See, e.g., Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

⁴⁰ See generally 8 U.S.C. §§ 1101–1537 (2006); 8 C.F.R. §§ 1001–1299 (2012).

⁴¹ Justice Alito has recently noted that many of the terms in the Immigration and Nationality Act are ambiguous and that:

The task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the “length and type of sentence” and the determination “whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen.”

Padilla v. Kentucky, 130 S. Ct. 1473, 1489–90 (2010) (Alito, J., concurring).

⁴² E-mail from Tricia Swartz, *supra* note 15.

⁴³ In asylum cases before the EOIR, representation is the single most important factor affecting outcomes, with represented asylum seekers winning asylum in 45.6% of cases, ver-

gration judges granted fifty-four percent of asylum applications for individuals who were represented and only twenty percent for those who were not.⁴⁴ In light of these statistics, among other findings, the authors of a 2012 report to the Administrative Conference of the United States concluded that basic fairness to respondents in removal proceedings calls for the appointment of government-funded representation.⁴⁵ The next subsection further explains the current state—both legal and practical—of representation for unaccompanied minors in the United States.

B. Legal Representation for Unaccompanied Minors in the United States

Unaccompanied minors in the United States do not have a recognized legal right to free representation in removal proceedings. While the 2002 HSA provides that ORR must develop a plan “on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that is in effect on November 25, 2002,”⁴⁶ this provision does not guarantee the appointment of free attorneys for unaccompanied minors. On the contrary, read together with the federal statute governing removal proceedings, the 2002 HSA may be read to prohibit legal counsel at the government’s expense, as the removal statute provides that “the alien [has] the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”⁴⁷

Since 1999, Congress has periodically considered legislation that would provide free legal counsel to each unaccompanied minor. The primary sponsor of the bill has been Senator Dianne Feinstein, the long-serving Democratic Senator from California.⁴⁸ The 2000 version of the Unaccompanied

sus 16.3% for unrepresented asylum seekers. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *STAN. L. REV.* 295, 340 (2007).

⁴⁴ Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication 100* (June 7, 2012) (draft report for Administrative Conference of the United States), <http://www.acus.gov/wp-content/uploads/downloads/2012/06/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf>.

⁴⁵ *Id.* at 56.

⁴⁶ 6 U.S.C. § 279(b)(1)(A) (2006).

⁴⁷ 8 U.S.C. § 1229a(b)(4)(A) (2006).

⁴⁸ According to a Feinstein press release:

[D]uring the 108th and 109th Congress, Senator Feinstein introduced legislation to provide clear direction on protecting these children from human traffickers and smugglers; isolating criminal justice offenders from other children; and ensuring that each child, including refugee minors, has access to a guardian ad litem and pro bono legal representation in immigration proceedings. The Senate approved this legislation twice, however it stalled both times in the House of Representatives.

Press Release, Office of U.S. Senator Dianne Feinstein, *Senators Feinstein and Hagel Continue Effort to Protect Unaccompanied Alien Children* (Mar. 13, 2007), available at <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=6b60b814-9a1d-e980-b34b-61cf39368905>.

Alien Child Protection Act (“UACPA”) ensured guardian ad litem and counsel for all unaccompanied minors, including counsel appointed at the expense of the government.⁴⁹ Years later, the 2004 UACPA softened the language a little bit, and required the ORR director to ensure that all UACs have competent counsel to represent them in immigration matters, but provided exceptions to this if a factual determination had been made that the minor is not in need of an attorney, and also stressed that pro bono counsel should be utilized to the maximum extent possible, dropping the “at the expense of government” language.⁵⁰ The 2004 UACPA also directed EOIR to “develop model guidelines for the legal representation of alien children in immigration proceedings based on the children’s asylum guidelines, the American Bar Association Model Rules of Professional Conduct, and other relevant domestic or international sources.”⁵¹

Unfortunately, no iteration of the UACPA has made it past the House of Representatives, despite the fact that it has enjoyed widespread support in the Senate.⁵² It is unclear why the UACPA has failed to pass the House after it has enjoyed so much support in the Senate. There appear to be no records of any House committee hearings on these bills. There is testimony from a Subcommittee hearing within the Senate Judiciary Committee, but this material is not very illuminating⁵³—especially since the U.S. Senate would later pass this bill by unanimous consent (although not in that session).⁵⁴ It is also possible, of course, that someone on the Judiciary Committee or Subcommittee really disliked this bill; given the current political climate, it is certainly feasible to imagine that any bill that seems “pro-immigration” might engender strong opposition. At the end of the day, there is still no Congressional mandate to provide free legal counsel—whether at the expense of the government or pro bono—to all unaccompanied minors.

Armed with only the HSA’s directive to develop a plan to ensure representation for each unaccompanied minor, in 2005 ORR/DUCS contracted with the Vera Institute of Justice, an independent nonprofit center, to develop and test ways to provide legal representation for unaccompanied minors.⁵⁵ To carry out its responsibilities under this contract, the Vera Institute of Justice manages the Unaccompanied Children Program, which oversees programs at seventeen nonprofit agencies that provide legal assistance to unaccompanied minors throughout the country.⁵⁶ These nonprofit agencies

⁴⁹ Unaccompanied Alien Child Protection Act, S. 3117, 106th Cong. (2000).

⁵⁰ Unaccompanied Alien Child Protection Act, S. 1129, 108th Cong. (2004).

⁵¹ *Id.*

⁵² See Unaccompanied Alien Child Protection Act, S. 844, 110th Cong. (2007); Office of U.S. Senator Dianne Feinstein, *supra* note 48.

⁵³ *The Unaccompanied Alien Child Protection Act: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. (2002).

⁵⁴ 150 CONG. REC. 23,332 (2004).

⁵⁵ *Unaccompanied Children Program*, VERA INST. OF JUST., <http://www.vera.org/project/unaccompanied-children-program> (last visited Aug. 20, 2012).

⁵⁶ *Id.*

deliver various services, including: know your rights presentations at detention facilities prior to each child's first court appearance; individual screenings to identify the children's legal needs and provide additional information about rights and immigration law; pro bono assistance and referrals; and coordination with detention facility staff, ORR staff, child welfare practitioners, and immigration authorities to address the children's needs.⁵⁷ While this project has increased the percentage of children who receive free legal assistance in immigration proceedings from ten percent in 2003⁵⁸ to fifty percent in 2011,⁵⁹ it has not guaranteed free legal representation to all unaccompanied minors. In short, the HSA mandate to ORR leaves unaccompanied minors to the goodwill of nonprofit organizations and pro bono attorneys who reach only a fraction of the children who need representation.

C. Case Study of Catherine Wong

The complexity of the U.S. immigration process inevitably leads to the removal of unaccompanied minors who would otherwise qualify to remain in the United States. As an example, those unaccompanied minors who seek asylum may not have the knowledge or resources to present evidence about country conditions which is often essential to successful asylum claims.⁶⁰ And those unaccompanied minors who are fleeing abuse may not have the knowledge or resources to access the domestic dependency systems that would provide them the opportunity to remain in the United States as lawful permanent residents. These injustices occur partly because unaccompanied minors seeking to enter the United States do not have access to free legal counsel.

Take, for example, the journey of fourteen-year-old Catherine Wong.⁶¹ Catherine fled China because her parents arranged a marriage for her, and

⁵⁷ *Id.*

⁵⁸ JACQUELINE BHABHA, IMMIGRATION POLICY CENTER POLICY BRIEF: CROSSING BORDERS ALONE: THE TREATMENT OF UNACCOMPANIED CHILDREN IN THE UNITED STATES 3 (2003), <http://www.immigrationpolicy.org/sites/default/files/docs/Brief13%20-%20Crossing%20Border%20Alone.pdf>.

⁵⁹ E-mail from Tricia Swartz, *supra* note 15; *see also* KIDS IN NEED OF DEFENSE, 2010 ANNUAL REPORT 5 (2011), *available at* http://www.supportkind.org/en/about-us/fact-sheets/doc_download/5-2010-annual-report (stating that approximately 50% of unaccompanied minors face immigration judges without an attorney).

⁶⁰ *See* 8 U.S.C. § 1158 (2006) (providing that country conditions evidence may be considered in an asylum claim); *Tegeneghe v. Holder*, 472 F. App'x 844 (9th Cir. 2012) (country conditions evidence, including Amnesty International report, showed that half-Ethiopian individuals were persecuted in Eritrea, thus supporting Eritrean alien's asylum application and withholding of removal); *Chen v. Gonzales*, 417 F.3d 268, 272, 275 (2d Cir. 2005) (requiring consideration of favorable country conditions report submitted in an asylum case to corroborate an applicant's subjective fear of future persecution). *See also* CALS Asylum Case Research Guide, GEO. U. L. CTR., <http://www.law.georgetown.edu/library/research/guides/CALSAsylumLawResearchGuide.cfm> (last visited Mar. 13, 2013).

⁶¹ This account is based on real events. Catherine Wong is a pseudonym and identifying characteristics have been changed.

when she objected to the marriage, the promised suitor raped her. Thinking they had been disgraced by their daughter, Catherine's parents were going to force her to marry the rapist, until Catherine's older sister gave her the money she needed to board a plane and flee to the United States. When she arrived at an international airport in the United States, Catherine had no passport and no visa. She was taken to a back room, where she was interrogated by an immigration official who spoke very little Cantonese. Catherine was too ashamed to tell her story and simply told the official that she came to the United States for a better life. The official then processed a notice for Catherine to appear in immigration court for a removal hearing, and only at that time, contacted ORR.

Once in ORR custody, Catherine was taken to a Christian group foster home, where the foster parents did not speak or understand Cantonese. Some of the other children were Chinese, but most spoke Mandarin. While she waited for her immigration hearing, Catherine's foster parents insisted that she attend church, even though Catherine told them she was Buddhist, and they began to call her Catherine, rather than her given name. Catherine also waited in vain for an immigration attorney that her sister had promised her.

Fortunately for Catherine, her group foster home was one of the few connected with a nonprofit legal services provider that offered legal representation to the children there. Feeling lost and alone in completely unfamiliar surroundings and not understanding the concept of free lawyers, however, Catherine was extremely distrustful of the legal service providers. She refused to meet with them on at least four occasions, until she realized that one of the lawyers spoke Cantonese and that the private lawyer her sister had promised never came through. A few weeks before her first hearing, Catherine met with an attorney and social worker from the legal services organization. After several meetings, the lawyer and social worker began to suspect that Catherine had a story that she was not sharing, and after taking the time and using their training in child interviewing to gain her trust, she told her story. Finally understanding what really brought Catherine to the United States, the lawyer was able to begin a two-year process of coordination between DHS and the local dependency system to move Catherine into foster care. Perhaps the biggest obstacle that the lawyer had to overcome was convincing DHS, the dependency judge, and the immigration officer that Catherine's story was credible, despite the fact that she did not share it during that initial interview at the airport. Catherine and her lawyer relied on child development experts and psychologists who work with people who have suffered trauma to explain why Catherine did not immediately share her story. Having accomplished this challenging task, Catherine was placed in long-term foster care, and she became eligible for a visa that eventually led to legal permanent residence in the United States.⁶² Supported by her

⁶² Catherine obtained a Special Immigrant Juvenile Status (SIJS) visa. SIJS is a form of relief that allows children who have been abused, abandoned, or neglected to obtain lawful

foster family, and legally able to obtain identification, a social security number, and a work permit, Catherine completed a GED while she worked part-time.

The lesson in Catherine's story is that, left to her own devices, she would not have been able to appreciate the importance of her story or to navigate the complex process between DHS and the dependency system that was necessary for her path to permanent residency. It is also true that most lawyers would not have been able to earn Catherine's trust. In her case, several factors came together—the lawyer spoke Cantonese, the lawyer was working with a social worker trained in child development, and both had been trained in how to interview children. Without the proper training and experience a lawyer may never have gotten through to Catherine, and she likely would have been returned to her parents in China.

Catherine's story offers but a brief glimpse into the isolating, frightening, and complex system that unaccompanied minors often face alone. Scholars, practitioners, and human rights organizations have long recognized that unaccompanied children need access to free legal counsel because children are vulnerable; immigration proceedings are unfamiliar, arduous, and complex;⁶³ and children do not understand the nature and consequences of immigration proceedings.⁶⁴ The statistics support these conclusions, as children with attorneys are several times as likely to prevail on their claims as those children without.⁶⁵ The following section shows how developing human rights standards support the provision of lawyers to unaccompanied minors, so that like Catherine, their interests can be served and their rights protected.

III. DEVELOPING HUMAN RIGHTS STANDARDS THAT SUPPORT FREE LEGAL REPRESENTATION FOR UNACCOMPANIED MINORS IN THE UNITED STATES

Human rights standards are embodied in a complex system of overlapping instruments, directives, comments, observations, recommendations, and jurisprudence. On a global scale, the International Covenant on Civil and

permanent residency in the United States. See 8 U.S.C. § 1101(a)(27)(J) (2006); 8 C.F.R. § 204.11 (2012).

⁶³ See Bhabha, *supra* note 5, at 203; Bhabha & Young, *supra* note 2, at 86, 118; Corneal, *supra* note 4, at 649; Finkel, *supra* note 2, at 1106; Hill, *supra* note 5, at 62; Morton & Young, *supra* note 4, at 15, 18 (2002); Olivas, *supra* note 2, at 162; Seugling, *supra* note 5, at 879; BHABHA & SCHMIDT, *supra* note 6, at 102; GARCIA, *supra* note 5, at 5; WOMEN'S REFUGEE COMM'N, *supra* note 4, at 22.

⁶⁴ See Bhabha & Young, *supra* note 2, at 118; Corneal, *supra* note 4, at 649; Finkel, *supra* note 2, at 1114; Morton & Young, *supra* note 4, at 18; Young & McKenna, *supra* note 4, at 256; WOMEN'S REFUGEE COMM'N, *supra* note 4, at 23.

⁶⁵ Bhabha & Young, *supra* note 2, at 118; Hill, *supra* note 5, at 65; Morton & Young, *supra* note 4, at 18; BHABHA & SCHMIDT, *supra* note 6, at 7; see also Bhabha, *supra* note 5, at 207.

Political Rights (“ICCPR”)⁶⁶ and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),⁶⁷ both adopted by the United Nations General Assembly in 1966, set out comprehensive rights and freedoms under a broad range of categories. On a regional scale, the Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”), the American Convention on Human Rights (“the American Convention”), and the African Charter on Human and Peoples’ Rights (“the African Charter”) also offer comprehensive rights and freedoms. Other instruments such as the United Nations Convention on the Rights of the Child (“CRC”),⁶⁸ the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW),⁶⁹ and the African Charter on the Rights and Welfare of the Child (“the African Children’s Charter”),⁷⁰ are specifically targeted to protect certain groups. In addition to being set out in treaties, human rights standards develop in the comments, recommendations, and jurisprudence of the bodies tasked with monitoring State parties’ compliance with the treaties. These bodies include, for example, the United Nations Human Rights Committee (“HRC”)⁷¹ and the United Nations Committee on the Rights of the Child (“CRC Committee”).⁷²

⁶⁶ ICCPR, *supra* note 39.

⁶⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁶⁸ CRC, *supra* note 39. The United States has signed the CRC, but it stands alone with Somalia in failing to ratify it. See United Nations Treaty Collection, Status of Convention on the Rights of the Child, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Mar. 4, 2013).

⁶⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 93 (entered into force July 1, 2003) [hereinafter ICPMW]. See *Statement of the Center for Migration and Refugee Studies (CMRS) on Occasion of the International Migrant’s Day*, DECEMBER 18 (Dec. 19, 2010, 6:47 PM), <http://www.december18.net/article/statement-center-migration-and-refugee-studies-cmrs-occasion-international-migrants-day> (stating that the ICPMW has not been ratified by the major industrialized countries).

⁷⁰ Organization of African Unity [OAU], *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (July 11, 1990) [hereinafter African Children’s Charter].

⁷¹ The HRC consists of independent experts who monitor implementation of the ICCPR. This committee examines reports from States parties, addresses concerns and recommendations in the form of “concluding observations,” and publishes its interpretation of human rights provisions as “general comments.” *Human Rights Committee*, OFF. OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUM. RIGHTS, <http://www2.ohchr.org/english/bodies/hrc> (last visited Mar. 4, 2013).

⁷² The CRC Committee consists of independent experts who monitor implementation of the CRC and its Optional Protocols. Like the HRC, the CRC Committee examines reports from States parties, addresses concerns and recommendations in the form of “concluding observations,” and publishes its interpretation of human rights provisions as “general comments.” *Committee on the Rights of the Child*, OFF. OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUM. RIGHTS, <http://www2.ohchr.org/english/bodies/crc> (last visited Mar. 4, 2013).

The human rights standards that have developed in this complex system support the provision of free legal counsel for unaccompanied minors because the standards include substantive rights in the areas of children's rights and refugee rights that can only be protected—at least in the case of unaccompanied minors—by the guarantee of access to free legal counsel; the standards also provide important procedural rights for children, refugees, and civil litigants to access free legal counsel in certain circumstances.

In the area of children's rights, international and regional human rights standards have firmly established the "best interests of the child" as a guiding principle. This principle supports the provision of free legal representation to unaccompanied minors, namely because unaccompanied minors are more likely to have fair outcomes in immigration proceedings if they have legal representation. And for children like Catherine Wong who are fleeing unsafe situations, or for others who are immigrating for the sake of family unity, their best interests will be served only by an immigration process that gives voice to their expressed interests, needs, and wishes.⁷³

In the area of refugee rights, standards have developed to encompass the right to family unity, limitations on the length and conditions of detention, and limitations on a country's right to return immigrants to their home countries. To protect these human rights, particularly for unaccompanied minors who are especially vulnerable and unable to navigate complex immigration proceedings on their own, countries must provide access to free attorneys who can better ensure that children raise the necessary factual and legal issues to protect their interests.

While these international norms are not binding on the United States, international norms are increasingly relevant to U.S. law. Briefly, it is worth considering that because international human rights law and institutions have become much stronger in the past sixty years, there has been increased interest in incorporating international human rights into U.S. domestic litigation and advocacy.⁷⁴ The growing familiarity of lawyers and judges with international human rights has also increased the volume of international human

⁷³ This Article does not suggest that the best interests of the child are always served by the child remaining in the United States. Some children do not have valid claims, have no fear of persecution or other dangerous situations, and have strong family ties and support in their home countries. For those children, their best interests may be best served by returning home. But for those children who do have valid claims for asylum or special immigrant juvenile status, as examples, their best interests will be served (almost by definition) by remaining in the United States. These children need an attorney to give voice to their claims. Children without valid claims also need attorneys so that they can take advantage of options, including voluntary departure, that do not carry the same legal ramifications for future immigration as deportation, such as bars to lawful readmission in the future. *See* 8 U.S.C. § 1229(c) (2006); *see also* Jennifer L. Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475 (2013).

⁷⁴ *See* BRINGING HUMAN RIGHTS HOME (Cynthia Soohoo et al. eds., 2008); *see also* Cynthia Soohoo & Susanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459 (2008).

rights arguments made and accepted in U.S. courts.⁷⁵ The current vigorous debate regarding the propriety of invoking international law in U.S. courts and U.S. reliance on international norms traces back to the days of the founding fathers.⁷⁶ Nonetheless, respect for international law has long been a part of U.S. law and jurisprudence.⁷⁷ In *Chisholm v. Georgia*, Chief Justice Jay noted that the United States “had, by taking a place among the nations of the earth, become amenable to the laws of nations.”⁷⁸ And, not only did Chief Justice Marshall state the oft-quoted refrain that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”⁷⁹ but many of Justice Marshall’s opinions “expressly promoted the implicit or explicit internalization of international law into U.S. domestic law: through statutory construction, direct invocation, and even constitutional interpretation.”⁸⁰ Similarly, Harold Koh, former Dean of Yale Law School and Legal Advisor to the U.S. Department of State, explained that “[t]he framers and early Justices understood that the global legitimacy of a fledgling nation crucially depended upon the compatibility of its domestic law with the rules of the international system within which it sought acceptance.”⁸¹

While the argument that counsel for minors is customary international law and is thus binding on the United States is beyond the scope of this article, international human rights standards do shape domestic policy in many ways both through Congress and the Courts. For example, Congress

⁷⁵ See Soohoo & Stolz, *supra* note 74, at 466.

⁷⁶ For a good description of the various “sides” of this debate on the Supreme Court, see Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 44 (2004); see also Roper v. Simmons, 543 U.S. 551 (2005).

⁷⁷ See, e.g., Soohoo & Stolz, *supra* note 74, at 461–65; see also Koh, *supra* note 76.

⁷⁸ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).

⁷⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁸⁰ Koh, *supra* note 76, at 44. See e.g., *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (“[T]he Court is bound by the law of nations which is a part of the law of the land.”).

⁸¹ Koh, *supra* note 76, at 44. Early in American jurisprudence, cases involving human rights were relatively rare. The areas in which courts addressed human rights and international law typically involved the slave trade, *The Nereide*, 13 U.S. 388, the laws of war, *The Paquete Habana*, 175 U.S. 677 (1900), and extradition treaties, *United States v. Rauscher*, 119 U.S. 407 (1886). The modern human rights movement began in earnest after World War II, and it was at this time that U.S. lawyers began employing international human rights norms on behalf of their clients. For example, American civil rights leaders turned to the UN Charter and the Universal Declaration of Human Rights to challenge the reality of de jure and de facto discrimination in post-war America—in contrast with the UN Charter’s non-discrimination language. Bert Lockwood, *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984). That being said, early efforts at incorporating human rights norms into domestic litigation strategy met with strong resistance during this time, in part, because of the burgeoning civil rights movement. In fact, Senator John W. Bricker of Ohio introduced the so-called “Bricker Amendment,” which would have amended the Constitution to limit the domestic application of international treaties and other international agreements. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 349 (1995). Thus, it was not until the mid-1990s that the United States earnestly began to ratify human rights treaties.

sometimes incorporates international law into domestic legislation. In particular, the Refugee Act of 1980 was passed to effectuate U.S. obligations under the Refugee Protocol of 1967 and courts often turn to international refugee law in litigation under the Refugee Act, as Congress has signaled its intent to comply with its international obligations in this area.⁸² Similarly, the Genocide Convention Implementation Act, the Torture Convention Implementation Act, the Alien Tort Statute, and the Torture Victim Protection Act may also be viewed as domestic implementation of international law by the United States Congress.⁸³

The U.S. Supreme Court has also explicitly recognized the value in looking to international standards. In *Atkins v. Virginia*, for example, the Court held that executing persons with mental retardation would offend civilized standards of decency, in part because “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”⁸⁴ And in *Lawrence v. Texas*, in which the Supreme Court struck down a Texas law banning consensual sodomy between adults of the same sex, Justice Kennedy cited the decision of the European Court of Human Rights and noted that the right petitioners were seeking “has been accepted as an integral part of human freedom in many other countries.”⁸⁵ In *Grutter v. Bollinger*, Justice Gins-

⁸² See, e.g., *Garcia v. I.N.S.*, 7 F.3d 1320, 1324 (7th Cir. 1993) (“One of [the] main purposes of the Refugee Act of 1980 was to conform United States law to the United Nations Convention Relating to the Status of Refugees”); *N-A-M v. Holder*, 587 F.3d 1052, 1061 (10th Cir. 2009) (“As UNHCR notes, our Refugee Act, which implements the Refugee Convention, and specifically, § 1231, embodies a Congressional commitment to the international legal principle of *nonrefoulement* as it appears in Refugee Convention Article 33. And a wealth of persuasive authority reveals that under both the Convention and the Refugee Act implementing the Convention, the ‘decisive factor is not the seriousness or categorization of the crime that the refugee has committed, but, rather, whether the refugee, in light of the crime and conviction, poses a *future* danger to the community.’ We can also benefit from reference to international law, as it reveals how other tribunals have interpreted the exact same text. Although citing foreign law is at times controversial, the broad consensus, even among opponents of its use in constitutional law cases, supports its use when determining how other signatories on a treaty interpret that treaty.” [The opinion then quotes Justice Scalia’s dissent in *Olympia Airways v. Husain*, 540 U.S. 644 (2004)] (citations omitted); see also *Na Zheng v. Holder*, No. 11-9598, 2013 WL 116811, at *8 (10th Cir. Jan. 10, 2013) (quoting *Dass*, 20 I. & N. Dec. 120, 124–25 (1989)) (“If an intelligent assessment is to be made of an asylum application, there must be sufficient information in the record to judge the plausibility and accuracy of the appellant’s claim. Without background information against which to judge the alien’s testimony, it may well be difficult to evaluate the credibility of the testimony. We note that this problem is addressed in the Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.”).

⁸³ Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified at 18 U.S.C. §§ 1091–1093 (2006)); Torture Convention Implementation Act of 1994, Pub. L. 103-236, 108 Stat. 463 (1994) (codified at 18 U.S.C. § 2340 (2006)); Alien’s Action for Tort, ch. 646, 62 Stat. 934 (1948) (codified at 28 U.S.C. § 1350 (2006)); Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (2006)).

⁸⁴ *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

⁸⁵ *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

burg cited “the international understanding of the office of affirmative action” in her understanding that race-conscious affirmative action programs must have a logical end point, and she cited the International Convention on the Elimination of All Forms of Racial Discrimination, which was ratified by the United States in 1994.⁸⁶ Similarly, the Supreme Court has invoked international standards in an increasingly visible way in the Children’s Rights area. For example, the Court relied upon international norms in *Roper v. Simmons*, a 2005 case in which the Court held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under eighteen when they committed their crimes,⁸⁷ and in *Graham v. Florida*, a 2010 case in which the Court held that the Eighth Amendment Cruel and Unusual Punishments Clause prohibits the imposition of a sentence of life in prison without parole on a defendant who was under eighteen at the time of the non-homicide crime.⁸⁸

While we are currently in the midst of a long-standing societal debate involving constitutional theory, concerns about U.S. sovereignty, and the role of the United States in the world, the point here is that U.S. law and policy have always been, and continue to an increasing degree to be, influenced by international human rights. Of particular relevance to unaccompanied minors arriving on our shores from other countries, in an address to the American Society of International Law, Justice O’Connor has insightfully stated, “international law is no longer confined in relevance to a few treaties and business agreements. Rather, it has taken on the character of transnational law—what Phillip Jessup has defined as law that regulates actions or events that transcend national frontiers.”⁸⁹

A. Children’s Rights

1. International Children’s Rights

Over the course of the last century, a consensus has developed that children have rights of their own and that the “best interests of the child” should determine outcomes for children. With the Declaration of the Rights of the Child in 1959, the UN General Assembly established that children need special safeguards and care because adults and children are different in physical and mental maturity⁹⁰ and that the “best interests of the child” is the “paramount consideration” in enacting laws for the protection and nur-

⁸⁶ *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

⁸⁷ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁸⁸ *Graham v. Florida*, 130 S. Ct. 2011 (2010).

⁸⁹ Sandra Day O’Connor, Keynote Address, 96 ASIL PROC. 348, 350 (2002) *quoted in* Koh, *supra* note 76, at 53.

⁹⁰ G.A. Res. 1386 (XIV), 19 U.N. Doc. A/4354, at pmb1. (Nov. 20, 1959).

turing of children and the “guiding principle” of those responsible for a child’s education and guidance.⁹¹

Although not focused exclusively on children, the ICCPR also supports the idea that children should have greater protection than adults. Article 10(2)(b), for example, provides that “[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication,” and Article 14(1) provides that judgments should be made public, except where the interests of children would require confidentiality.⁹² Like the ICCPR, the ICESCR provides that “[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons” and focuses on the need to protect children from economic or social exploitation.⁹³

In 1989, the CRC set out the first comprehensive definition of children’s rights and the first system for protecting and enforcing those rights.⁹⁴ The CRC, the most authoritative legal instrument involving children’s rights, highlights the fundamental dignity of children, demonstrates the urgency of protecting children, and enshrines children as bearers of human rights. With the CRC, the “best interests of the child” standard was firmly established and specifically referred to as the standard for decision-making in different contexts.⁹⁵ The CRC does not provide a precise definition of the best interests of the child, as this depends upon the child’s individual circumstances, including a child’s age and maturity, the child’s relationship with their parents, and the environment in which the child is living, among other things. The CRC contains guideposts though that are relevant to a best interests analysis. In certain cases, for example, including adoption and separation from their parents, the child’s best interests should be *the determining factor*, whereas in other situations it should be *a* primary consideration, not exclusive of other considerations. This standard is enshrined in many provisions throughout the Convention,⁹⁶ all of which are undergirded by the general principle in Article 3: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁹⁷

⁹¹ *Id.* princs. 2, 7.

⁹² ICCPR, *supra* note 39, art. 10, 14.

⁹³ ICESCR, *supra* note 67, art. 10.

⁹⁴ CRC, *supra* note 39.

⁹⁵ *Id.* art. 3.

⁹⁶ *See e.g., id.*, art. 9 (establishing a child’s right to a relationship with her parents unless it is contrary to the child’s best interests), art. 18 (establishing that the best interests of children should be their parents’ primary concern), art. 20 (establishing that children should not be removed from their family environment unless it is in their best interests to do so), art. 40 (provides for the presence of parents or legal guardians at criminal proceedings unless doing so would be contrary to the child’s best interest).

⁹⁷ *Id.* art. 3.

The best interests standard has been explicitly applied in the international context to unaccompanied minors. In 2009, the HRC observed that Spain was ill-treating unaccompanied minors and that it should ensure that administrative or expulsion proceedings—and the decision as to whether to repatriate the child—take into account the best interests of the child.⁹⁸ The observations include a recommendation that Spain provide free legal assistance to every unaccompanied child.⁹⁹ While the HRC's observations do not explicitly explain how free legal assistance furthers best interests, statistics and anecdotal evidence from the United States provide the link; these statistics show that children are many times more likely to win their cases if they have counsel,¹⁰⁰ thereby suggesting that children who do not have attorneys often lose meritorious immigration cases and are returned to home countries where they will likely be abused, neglected, or even killed.

As the best interests standard has developed over time, so too has the child's procedural right to be heard through a representative and to assistance with legal processes. The CRC expressly identifies children as individuals with their own voices and interests and guarantees children who are capable of forming their own views the right to participate in decision-making processes that affect their interests.¹⁰¹ Furthermore, the CRC directs States parties to give the views of the child "due weight in accordance with the age and maturity of the child," and specifically "the opportunity to be heard in any judicial and administrative proceedings affecting the child"¹⁰² In the context of juvenile justice proceedings, the CRC Committee has concluded that the children have a right to free legal or "other appropriate assistance."¹⁰³

While the term "other appropriate assistance" would leave open a rather wide window for States parties to fail to provide *legal* assistance, international standards, in addition to the HRC's observations on the situation in Spain, have increasingly focused on the legal aspect of the required assistance for unaccompanied minors in immigration proceedings. For children in asylum proceedings, the CRC Committee strongly recommends access to free *legal* representation, particularly in any situation in which the child is detained.¹⁰⁴ In addition, the United Nations Human Rights Council's Special Rapporteur on the Human Rights of Migrants found that children who are unaccompanied or separated from their parents are particularly vulnerable to human rights violations and abuses at all stages of the migration

⁹⁸ U.N. Human Rights Committee, *Concluding Observations: Spain*, ¶ 21, U.N. Doc. CCPR/C/ESP/CO/5 (Jan. 5, 2009).

⁹⁹ *Id.*

¹⁰⁰ See *supra* notes 43–45 and accompanying text.

¹⁰¹ CRC, *supra* note 39, art. 12.

¹⁰² *Id.*

¹⁰³ U.N. Comm. on the Rights of the Child, Gen. Comment 10, U.N. Doc. CRC/GC/2007/10 (Apr. 25, 2007).

¹⁰⁴ U.N. Comm. on the Rights of the Child, Gen. Comment 6, ¶ 63, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

process.¹⁰⁵ In light of this vulnerability, the Special Rapporteur concluded that States should provide “age appropriate” due process of law, including rights to a guardian, a legal representative, free legal aid, effective remedy, and an interpreter; that protection services for migrant children should include access to food, health, and legal advice; and that exceptional migration-related detention of children should take due consideration of the child’s rights to education, health care, recreation, consular assistance, and legal representation.¹⁰⁶ Similarly, the UN High Commissioner for Refugees (“UNHCR”)¹⁰⁷ has encouraged prioritized processing of unaccompanied minors and qualified free legal or other representation for them.¹⁰⁸ The following subsection shows how regional standards have seen similar developments in children’s rights.

2. Regional Children’s Rights

Like the international system, regional bodies in Europe, the Americas, and Africa have recognized children’s best interests as the guiding principle for children’s rights. The regional systems have also established substantive rights for children, and in particular unaccompanied minors, that would be largely hollow without a corresponding right to free legal representation.

European children’s rights include restrictions on a State’s ability to return the minor to his country of origin;¹⁰⁹ the right to access to educational facilities;¹¹⁰ the State’s obligation to endeavor to reunify the minor with his family;¹¹¹ the child’s right to apply for asylum and to suitable placement during the asylum procedure;¹¹² and the right for the child’s best interests to inform immigration proceedings primarily.¹¹³

¹⁰⁵ Special Rapporteur on the Human Rights of Migrants, *Report on the Human Rights of Migrants*, U.N. Human Rights Council, U.N. Doc. A/HRC/11/7 (May 14, 2009) (by Jorge Bustamante).

¹⁰⁶ *Id.* ¶¶ 58, 98, 107.

¹⁰⁷ The UNHCR, established by the United Nations General Assembly in 1950, safeguards the rights of refugees. See *About Us*, OFF. OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/pages/49c3646c2.html> (last visited July 3, 2012).

¹⁰⁸ U.N. Executive Comm. of the High Commissioner’s Programme, Report on its 58th Sess., Oct. 1–5, 2007, U.N. Doc. A/AC.96/1048 (Oct. 10, 2007).

¹⁰⁹ Council Resolution On Unaccompanied Minors Who Are Nationals of Third Countries, 1997 O.J. (C 221) 23 pmb. (EU). EU Member States’ representatives sit on the Council of the European Union. The Council adopts legislative acts (often with the European Parliament), helps coordinate Member States’ policies, develops the EU’s common foreign and security policy, concludes international agreements on behalf of the EU, and adopts the EU’s budget, together with the European Parliament. See *Council of the European Union*, THE COUNCIL OF THE EUROPEAN UNION, <http://www.consilium.europa.eu/council?lang=en> (last visited July 7, 2012).

¹¹⁰ See Council Resolution on Unaccompanied Minors Who Are Nationals of Third Countries, *supra* note 109, art. 3, ¶ 6.

¹¹¹ *Id.* art. 3, ¶ 3.

¹¹² *Id.* art. 4, ¶¶ 1, 4.

¹¹³ Council Directive 2005/85, On Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2005 O.J. (L 326) 13, pmb. ¶ 14, art. 17, ¶ 6 (EU). The European Commission has also been concerned with the rights of unaccompanied

The European Council has acknowledged a connection between substantive and procedural rights, reasoning that unaccompanied minors require “specific procedural guarantees . . . on account of their vulnerability.”¹¹⁴ Also recognizing this connection, the European Convention on the Exercise of Children’s Rights¹¹⁵ states its objective as promoting children’s rights, granting children procedural rights, and facilitating the exercise of these rights by ensuring that children are informed and allowed to participate in proceedings that affect them.¹¹⁶ To ensure that children are able to exercise their rights under the CRC, the convention includes the child’s right to be informed and to express his or her views in proceedings,¹¹⁷ and the right to apply for the appointment of a special representative.¹¹⁸ States are also asked to grant children the right to apply to be assisted by an appropriate person of their choice to help them express their views, the right to apply for the appointment of a separate representative, in certain cases a lawyer, and the right to appoint their own representative.¹¹⁹ Other European instruments similarly include the right to “appropriate representation.”¹²⁰

Despite the right to appropriate representation in certain circumstances, unaccompanied minors do not have a categorical right to *legal* representation in Europe. To address this gap in unaccompanied minors’ procedural rights, the European Commission’s¹²¹ four-year action plan notes that “EU legislation does not provide for the appointment of a representative from the moment an unaccompanied minor is detected by the authorities” and states that the Commission will evaluate whether it is necessary to introduce targeted amendments or a specific instrument setting down common standards on reception and assistance for all unaccompanied minors regarding

minors, adopting in 2010 a four-year Action Plan on Unaccompanied Minors that promotes “the best interests of the child” as “the primary consideration in all action related to children taken by public authorities.” *Communication from the Commission to the European Parliament and the Council: Action Plan for Unaccompanied Minors (2010–2014)*, COM (2010) 213 final (June 5, 2010).

¹¹⁴ Council Directive 2005/85, *supra* note 113, pmb. ¶ 14.

¹¹⁵ The European Convention on the Exercise of Children’s Rights is specifically designed to address procedural matters arising from the enactment of the CRC.

¹¹⁶ European Convention on the Exercise of Children’s Rights, ch. 1, art. 1, opened for signature Jan. 25, 1996, Europ. T.S. No. 160.

¹¹⁷ *Id.* ch. 2 art. 3.

¹¹⁸ *Id.* ch. 2 art. 4.

¹¹⁹ *Id.* ch. 2 art. 5.

¹²⁰ See Council Resolution on Unaccompanied Minors Who Are Nationals of Third Countries, *supra* note 109, art. 3 ¶ 4; see also European Convention on the Exercise of Children’s Rights, *supra* note 116, ch. 2 art. 5; Council Directive 2005/85, *supra* note 113; Juridical Status and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17 (Aug. 28, 2002).

¹²¹ The European Commission promotes the general interest of the European Union by presenting proposals for European law, overseeing the implementation of Treaties and European law, carrying out common policies, and managing funds. Comm’n of the European Cmty., *Governance Statement of the European Commission* (May 30, 2007), available at http://ec.europa.eu/atwork/synthesis/doc/governance_statement_en.pdf.

guardianship, legal representation, access to accommodation and care, initial interviews, education services, and appropriate healthcare.¹²²

Like Europe, the American region has established comprehensive substantive rights for children. These rights derive primarily from Article 19 of the American Convention on Human Rights (“American Convention”)¹²³ and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”).¹²⁴ Both regional instruments provide that every child has the right to be protected as is required by his status as a minor, and the American Convention contains twenty-six articles that apply to the protection of the rights of the child.¹²⁵

In addition to these regional instruments, the CRC and other international instruments strongly influence the concept of children’s rights in the Americas. According to the Inter-American Court on Human Rights (“the Inter-American Court”), the CRC and the American Convention form part of an international corpus juris for children’s rights and “there is a substantive connection between both instruments, demanding their joint application.”¹²⁶ The court has applied this conceptual development of corpus juris “to expand the legal framework governing the human rights of children and to strengthen the protection offered in the regional system.”¹²⁷ Consequently, the CRC and other international instruments help establish the content and scope of Article 19 of the American Convention.¹²⁸ More specifically, the court has adopted a number of the provisions of the CRC, including the “best interests of the child” standard,¹²⁹ the centrality of the family,¹³⁰ the prohibition of official interference with the right to family life,¹³¹ the principle that a child and his or her family cannot be separated except where it is in the best interests of the child,¹³² the right of due process in judicial and

¹²² *Communication from the Commission to the European Parliament and the Council on Action Plan for Unaccompanied Minors*, *supra* note 113, at 9–10.

¹²³ Organization of American States, American Convention on Human Rights, art. 19, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

¹²⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69 (entered into force Nov. 16, 1999).

¹²⁵ The Rights of the Child in the Inter-American Human Rights System, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.133, doc. 34 ¶ 21 (2008).

¹²⁶ Report on Corporal Punishment and Human Rights of Children and Adolescents, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.135, doc. 14, ¶ 17 (2009).

¹²⁷ The Rights of the Child in the Inter-American Human Rights System, *supra* note 125, at ¶ 53.

¹²⁸ *Id.*

¹²⁹ Juridical Status and Human Rights of the Child, *supra* note 120, at ¶ 73.

¹³⁰ *Id.* ¶¶ 66–69.

¹³¹ *Id.* ¶ 71.

¹³² *Id.* ¶ 73.

administrative matters where decisions are made on the rights of children,¹³³ and the right of due process where an individual's liberty is at stake.¹³⁴

Unlike the Americas and Europe, Africa has its own children's rights charter—the African Charter on the Rights and Welfare of the Child (“African Children's Charter”)¹³⁵—which entered into force in November 1999 and as of March 1, 2010, had been ratified by 45 of the African Union's 53 members.¹³⁶ The African Children's Charter reaffirms adherence to the principles contained in the CRC¹³⁷ and adopts the “best interests of the child” standard for all actions concerning the child.¹³⁸

3. *The Significance of Children's Rights to Legal Representation for Unaccompanied Minors in the United States*

Critics may argue that the United States is not bound by the CRC because the United States has not ratified it and it has not taken on the status of customary international law. These critics may similarly dismiss the significance of regional standards that are not binding on the United States. But the question here is not one about legal compliance. Without a policy change to provide free legal representation to unaccompanied children in immigration proceedings, the United States will continue to act, in many cases, contrary to the best interests of children and against well-developed and accepted human rights standards. This position towards children is unusual in the United States, as the best interests of the child permeate (in theory if not always in practice) other areas of the law that directly affect children, including child custody and dependency.¹³⁹ In fact, one of the ironies regarding the United States's failure to ratify the CRC is the fact that the “best interests of the child” standard is taken from U.S. and this principle has been guiding U.S. law in this area for more than 125 years.¹⁴⁰ In 1877, the Code for the territory that preceded South and North Dakota, for example, provided that the best interests of the child standard should be considered when deciding child custody and guardianship cases.¹⁴¹ *Chapsky v. Wood*, an 1881 Kansas Supreme Court decision is generally credited as being the first case to recog-

¹³³ *Id.* ¶ 103.

¹³⁴ *Id.* ¶¶ 115–17.

¹³⁵ African Children's Charter, *supra* note 70.

¹³⁶ African Union, *List of Countries Which Have Signed, Ratified/Accessed to the African Charter on the Rights of the Child* (Jan. 3, 2010), <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> (last visited Aug. 23, 2012).

¹³⁷ African Children's Charter, *supra* note 70, at pmb1.

¹³⁸ *Id.* art. 4(1).

¹³⁹ U.S. Dep't of Health & Human Servs., *Determining the Best Interests of the Child: Summary of State Laws* (Mar. 2010), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf.

¹⁴⁰ See CHILDREN'S RIGHTS IN AMERICA, *supra* note 97, at 123.

¹⁴¹ Rev. Codes of the Territory of Dakota, *supra* note 97, at § 127; see also CHILDREN'S RIGHTS IN AMERICA, *supra* note 97.

nize the principle,¹⁴² and currently “[a]ll states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes requiring that the child’s best interests be considered whenever specified types of decisions are made regarding a child’s custody, placement or other critical life issues.”¹⁴³ This principle has also permeated federal law in the United States. The Adoption and Safe Families Act of 1997, for example has a number of references to the best interests of the child.¹⁴⁴ And, as for case law, a study has found that the term has appeared in nearly 20,000 federal and state court decisions in the United States.¹⁴⁵

The connection between children’s best interests and the right to free legal counsel for unaccompanied minors is not solely theoretical. In Catherine’s case, the dependency court decided that it was in her best interests to be removed from her parents’ legal custody and placed into long-term foster care. Without the assistance of her specially trained attorney, Catherine would not have had a viable defense to her removal, and she would have been returned to her parents in China. In essence, the United States’s immigration laws and system would have acted contrary to her best interests and therefore, contrary to well-established human rights principles that are designed to protect children. The following section demonstrates how international and regional standards relating to migrants and refugees also relate to unaccompanied minors like Catherine.

B. Standards Relating to Migrants and Refugees

1. International Migrant and Refugee Standards

Over time, international standards have increasingly protected human rights in immigration proceedings, even though these protections sometimes conflict with the sovereign’s prerogative to exclude from its borders any non-national of the State. Despite the fact that this trend is growing, the conflict is not a new one. After World War I, the dire situation of Armenian and Russian refugees brought this problem squarely to the attention of the international community, newly organized as the League of Nations.¹⁴⁶ In response, the international community took on the role of protecting those refugees by granting them the right to take refuge in other countries and preventing countries from returning them to places too dangerous for them

¹⁴² *Chapsky v. Wood*, 26 Kan. 650 (1881); see also CHILDREN’S RIGHTS IN AMERICA, *supra* note 97, at 3.

¹⁴³ U.S. Dep’t of Health & Human Servs., *supra* note 139.

¹⁴⁴ Davidson, *supra* note 97, at 191.

¹⁴⁵ Ellis, *supra* note 97, at 12.

¹⁴⁶ James E. Hassell, *Russian Refugees in France and the United States Between the World Wars*, 81 TRANSACTIONS OF THE AM. PHIL. SOC’Y 1, 16 (1991); Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 INT’L J. REFUGEE L. 238, 241–43 (2002).

to live.¹⁴⁷ This response initiated the international system of asylum, which has since addressed the needs of refugees worldwide.

Another challenge on the sovereign right to exclude non-nationals surfaced more recently as, in an increasingly integrated global economy, the international community took on the case of international migrants who arrive in developed countries looking for a better way of life.¹⁴⁸ In these circumstances, the conflict between the State's right to exclude and the rights of the migrant are much murkier, and in some ways the issues are likely to become more pressing. Mobility and communications have dramatically increased the number of migrants (and especially of migrant children). This increase has led to unsettling issues in destination countries, including xenophobia, fear of cultural erosion, fear of job loss (particularly in difficult economic times), and concern about the additional burdens on social services.¹⁴⁹

Since these fears can and do lead to human rights violations, international forums have attempted to balance the sovereign right to exclude non-nationals with the State's obligation to respect the human rights of migrants.¹⁵⁰ For example, the International Convention on the Protection of All Migrant Workers and their Families ("ICPMW") provides certain rights to all migrant workers, including regular (documented) and irregular (undocumented) migrants.¹⁵¹ The premise of the ICPMW, and of other agreements relating to migrant workers, is that States have the right to control entry and departure, but also have human rights obligations.¹⁵² These obligations include honoring the right to due process, limiting the length and conditions of detention, and providing special protections for children and other vulnerable groups.¹⁵³ In particular, Article 18(3) states a strong preference for free

¹⁴⁷ Convention Relating to the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 199.

¹⁴⁸ See, e.g., Ryan Bubb, Michael Kremer & David I. Levine, *The Economics of International Refugee Law*, 40 J. LEGAL STUD. 367 (2011); Myron Weiner, *A Security Perspective on International Migration*, FLETCHER F. WORLD AFF., Summer 1996, at 17.

¹⁴⁹ Marc Lacey, *Arizona Lawmakers Push New Round of Immigration Restrictions*, N.Y. TIMES, Feb. 24, 2011, at A16; *Cutting Immigration: Shutting the Door*, ECONOMIST, Nov. 20, 2010, at 63–64, available at <http://www.economist.com/node/17532717>.

¹⁵⁰ See *Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation*, GLOBAL MIGRATION GROUP (Sept. 30, 2010), <http://www.globalmigrationgroup.org/uploads/news/GMG%20Joint%20Statement%20Adopted%2030%20Sept%202010.pdf>.

Although States have legitimate interests in securing their borders and exercising immigration controls, such concerns cannot, and indeed, as a matter of international law do not, trump the obligations of the State to respect the internationally guaranteed rights of all persons, to protect those rights against abuses, and to fulfill the rights necessary for them to enjoy a life of dignity and security.

Id.

¹⁵¹ ICPMW, *supra* note 69. It is also important to note that the ICPMW has not been ratified by the major industrialized countries. See *Statement of the Center for Migration and Refugee Studies (CMRS) on Occasion of the International Migrant's Day*, *supra* note 69.

¹⁵² See GLOBAL MIGRATION GROUP, *supra* note 150.

¹⁵³ Similarly, since 1975, the Executive Committee of the U.N. High Commissioner for Refugees (UNHCR) has reached over a dozen Conclusions confirming and applying the prin-

legal counsel for migrants who face criminal offenses. Many of these rights and obligations are echoed in regional standards.

2. Regional Migrant and Refugee Standards

For more than twenty-five years, the European Convention on Human Rights¹⁵⁴ (“ECHR”) and its amending protocols have protected refugees and other migrants from detention and summary deportation. For example, Protocol No. 7 guarantees the rights to submit reasons against expulsion, to case review, and to representation.¹⁵⁵ Since its creation in 1993, the European Union has also seen movement towards a common policy for the treatment of asylum-seekers¹⁵⁶ and has adopted prohibitions against collective expulsions and the return of refugees to places where they will face persecution.¹⁵⁷

In recent years, the European Union has continued to develop standards for the treatment of refugees, including resolutions, directives, and recommendations relating to unaccompanied minors,¹⁵⁸ the reception of asylum seekers in member states,¹⁵⁹ measures of detention of asylum seekers,¹⁶⁰ the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection,¹⁶¹ procedures for granting and withdrawing refugee status,¹⁶² and the return of illegally-staying third-country nationals.¹⁶³ These resolutions, directives, and recommendations address the themes of detainee rights, conditions of return, the right to family unity, and the vulnerability of the unaccompanied child.

cial of reunification of the family by invoking Article 16(3) of the UDHR and Article 23(1) of the ICCPR. *See, e.g.*, Executive Committee of the United Nations High Commissioner for Refugees, Conclusion No. 24 (XXXII): Family Reunification (1981) (Dec. 2009), <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf>.

¹⁵⁴ European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

¹⁵⁵ European Convention Protocol No. 7 as amended by Protocol No. 11, Nov. 22, 1984, E.T.S. 117, art. 1. These rights are, however, subject to exceptions relating to public order and national security. *Id.*

¹⁵⁶ Council of the European Union, Presidency Conclusions: Tampere European Council, Oct. 15–16, 1999, *available at* http://www.europarl.europa.eu/summits/tam_en.htm (last visited Aug. 23, 2012).

¹⁵⁷ Charter of Fundamental Rights of the European Union art. 19, 2000 O.J. (C 364/8).

¹⁵⁸ Council Resolution on Unaccompanied Minors Who Are Nationals of Third Countries, *supra* note 109.

¹⁵⁹ Council Directive 2003/9, Laying Down Minimum Standards for the Reception of Asylum Seekers, 2003 O.J. (L 31) 18 (EC).

¹⁶⁰ Council of Europe, Comm. of Ministers, Recommendation Rec(2003)5E of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers (Apr. 16, 2003).

¹⁶¹ Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12.

¹⁶² Council Directive 2005/85, *supra* note 113.

¹⁶³ Council Directive 2008/115/EC of 16 December 2008, On Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, 2008 O.J. (L 348) 98.

Of these themes, the right to family unity is particularly relevant to unaccompanied minors and is well-established in Europe. A Council Directive provides, for instance, that members of the European Union must endeavor to find a minor's family expeditiously¹⁶⁴ and more generally ensure family unity.¹⁶⁵ This right extends beyond unaccompanied minors. In *Berrehab v. the Netherlands*,¹⁶⁶ the European Court of Human Rights ("ECtHR") found that an order of expulsion against a man who divorced his Belgian wife but had a young child living in Belgium breached Article 8 of the ECHR, which protects the right to family life.¹⁶⁷ The Court reasoned that the means employed by the State were disproportionate to its legitimate purpose.¹⁶⁸

Like Europe, the American region has established rights for refugees and migrants that protect family unity and children's best interests. In one case involving the United States,¹⁶⁹ the Inter-American Commission on Human Rights ("IACHR") conceded that member States have the right to control entry, residence, and expulsion of non-citizens,¹⁷⁰ but cautioned that "in exercising this right to expel such aliens, the member States must have regard to certain protections which enshrine fundamental values of democratic societies."¹⁷¹ The case involved two men who were legal permanent residents of the United States, had lived in the United States for many years, and had biological children who were citizens born of citizen mothers. Both men were convicted of drug charges and subsequently deported without an opportunity to present a case for a waiver of deportation. Holding that it was appropriate to consider precedent from other international and regional human rights bodies,¹⁷² the IACHR analyzed this case much the way the ECtHR had handled similar cases—by weighing legitimate state interests against the fundamental right to family life and the citizen children's best

¹⁶⁴ *Id.* art. 14.

¹⁶⁵ *Id.* art. 23.

¹⁶⁶ *Berrehab v. the Netherlands*, 138 Eur. Ct. H.R. (ser. A) (1988).

¹⁶⁷ European Convention, *supra* note 116, art. 8.

¹⁶⁸ See also *Beldjoudi v. France*, 234 Eur. Ct. H.R. (ser. A) at 3 (1992) (ruling that from the point of view of respect for the applicant's family life, deportation decision would not be proportionate to the legitimate aim pursued); *Ciliz v. the Netherlands*, 2000-VIII Eur. Ct. H.R. 265; *Jakupovic v. Austria*, 38 Eur. H.R. Rep. 595 (2003) (deciding that although the young applicant had two prior convictions for burglary, the interference with family life caused by expulsion was disproportionate to the aim pursued); *Moustaquim v. Belgium*, 193 Eur. Ct. H.R. (ser. A) (1991) (stating that, with respect to the applicant's family life, proper balance was not achieved between the interests involved and the means employed); *Staroszczyk v. Poland*, 50 Eur. H.R. Rep. 6 (2007) (finding the means disproportionate to purpose). *But see C. v. Belgium*, 32 Eur. H.R. Rep. 2 ¶ 25 (1996) (finding that given the seriousness of the offenses which gave rise to deportation, the applicant's expulsion cannot be regarded as disproportionate to the legitimate aims pursued).

¹⁶⁹ *Wayne Smith v. United States*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, OEA/Ser.L/V/II.139, doc. 21 (2010).

¹⁷⁰ *Id.* ¶ 49.

¹⁷¹ *Id.* ¶ 50 (internal citations omitted).

¹⁷² *Id.* ¶ 46.

interests.¹⁷³ The IACHR found that the United States breached the American Declaration by violating the men's and their children's right to family.¹⁷⁴

Along with the Americas, the African region has focused on the right to family unity in the context of refugees and migrants, and in particular, with respect to children. The African Children's Charter¹⁷⁵ requires special protection and humanitarian assistance for children who are refugees or are seeking refugee status, as well as special protection and assistance for children who are permanently or temporarily deprived of their family environment.¹⁷⁶ Both Articles require efforts to trace family members so as to facilitate family reunification.

The right to family unity is not alone in its development in regional standards. Like Europe, the American system has established a number of other rights for migrants and refugees. In March 2008, the IACHR approved Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Principles and Best Practices),¹⁷⁷ which generally protects refugees and migrants and contains specific provisions relating to children.¹⁷⁸ With respect to children, the Principles and Best Practices allow detention only as a measure of last resort that must be limited to strictly exceptional cases.¹⁷⁹ Also relating to children, Principle XIX provides that children shall not be separated from their parents in cases of deprivation of liberty of asylum or refugee status seekers.¹⁸⁰

The Principles and Best Practices also address due process, providing that every person deprived of liberty shall have access to competent, independent, and impartial judges and tribunals and shall be informed of their right to consular or diplomatic assistance.¹⁸¹ Other developments in migrant and refugee rights in the American region have also explicitly recognized procedural rights, including access to legal representation. In 2002, the IACHR issued a Report on Terrorism and Human Rights¹⁸² that addresses and analyzes a number of fundamental human rights of non-nationals that may be impacted by States' new focus on anti-terrorism—namely “the right to personal liberty and security, the right to humane treatment, the right to due process and to a fair trial, the right to freedom of expression, and the right to judicial protection, and its correspondent obligation to respect and ensure all human rights without discrimination.”¹⁸³ In particular, the IACHR

¹⁷³ *Id.* ¶¶ 51, 57 (internal citations omitted).

¹⁷⁴ *Id.* ¶¶ 59, 60, 61–65.

¹⁷⁵ African Children's Charter, *supra* note 70, art. 23.

¹⁷⁶ *Id.* art. 25.

¹⁷⁷ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Inter-Am. Comm'n H.R., OEA/Ser/L/V/II.131, doc. 26 (2008).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1, corr. (2002).

¹⁸³ *Id.*

concluded that persons in removal proceedings should be provided with a hearing and given an adequate opportunity to exercise their right of defense, including the right to be assisted by a lawyer or by a representative in whom they have confidence.¹⁸⁴

Also concerned with procedural rights and due process, the Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families discusses Latin American norms for due process for immigrants under the American Convention.¹⁸⁵ The Special Rapporteur found that “in procedures on exclusion or expulsion, the stakes of migrant workers and their families are indeed high” in that they affect a person’s chances of making a living, working under decent conditions, feeding his or her family, providing an education for his or her children, and raising a family. In some cases, personal liberty may be affected for the duration of the proceedings. Consequently, the proceedings should provide, at the least, the minimum threshold of complete due process guarantees.¹⁸⁶ To provide this due process, the Rapporteur recommends that persons facing expulsion have the opportunity to be represented by an attorney or other qualified person and that free legal representation be offered to indigents.¹⁸⁷

3. *The Significance of Migrant and Refugee Standards to Legal Representation for Unaccompanied Minors in the United States*

Human rights limits on the sovereign right to exclude non-nationals—arising from international and regional human rights standards—raise complex factual and legal issues in immigration proceedings. Consequently, standards have developed to protect refugees and migrants while they are in immigration proceedings, such as the rights to submit reasons against expulsion, to case review, and to representation. Since children are especially ill-equipped to navigate legal proceedings alone, they are more likely to forfeit their substantive rights without these procedural protections, and in particular, without the assistance of appointed counsel.

The right to family provides an important example of the complexity of the issues that arise in the context of immigration especially because it must be weighed against the child’s best interests. States must first identify the child’s family and then determine whether reunification will serve the best

¹⁸⁴ The Commission also reiterates the requirements of Article 36 of the Vienna Convention on Consular Relations, concluding that “the Commission considers compliance with the consular notification requirements under the Vienna Convention on Consular Relations to constitute a fundamental aspect of guaranteeing to non-nationals the right to personal liberty and security.” *Id.*

¹⁸⁵ Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.111, doc. 20 rev. (2001).

¹⁸⁶ *Id.* ¶ 98.

¹⁸⁷ *Id.* ¶ 99.

interests of the child, whether the child can be reunited with the family, and whether reunification can occur in a safe place. Some unaccompanied minors may have family in the receiving country, while most have family in their home countries. In which direction does the right to family unity cut?

In Catherine's case, a myopic focus on family unity would have dictated her return to China. But in weighing the right to family unity against Catherine's best interests, one would reach a different conclusion. In addition, the CRC would require States to weigh Catherine's right to autonomy so that her preference and desire to remain in the United States and away from her family home should be heard. The fact that these legal rights may potentially compete and that any conflict will be resolved in immigration proceedings, underscores not only the high stakes of immigration proceedings but the complexity that a child, without legal representation, is unlikely to navigate successfully.

Unaccompanied minors in the United States are also likely to be deprived of liberty.¹⁸⁸ While some children are placed in group homes or foster homes, others are placed in juvenile detention facilities. There are mechanisms for release and lawyers are fundamental to this process. Unaccompanied minors may be released, for example, to a sponsor in the United States who meets certain criteria.¹⁸⁹ Unaccompanied minors may also be released into the custody of local child welfare agencies, as in Catherine's case. Both of these processes are facilitated by attorneys, and some children who do not have dedicated advocates may remain in detention throughout the length of their immigration proceedings.¹⁹⁰

In short, removal proceedings for child refugees and migrants involve high stakes in that they affect the child's right to family, opportunity to live under decent living conditions, obtain an education, and escape abuse, neglect, abandonment, or other types of mistreatment. The duration of the proceedings may also affect a child's personal liberty for an extended period of time. Consequently, the United States should heed the recommendation of the Special Rapporteur on Migrant Workers and their Families that free legal representation be offered to indigents who are facing expulsion.¹⁹¹

¹⁸⁸ See OLGA BYRNE & ELISE MILLER, VERA INST. OF JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS 10 (2012), available at <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

¹⁸⁹ *Id.* at 17.

¹⁹⁰ E-mail from Lisa Frydman, Managing Attorney, Ctr. for Gen. & Refugee Studies, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 30, 2012, 11:43 EDT) (on file with author).

¹⁹¹ Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, *supra* note 185, ¶ 99.

C. *Standards Relating to the Right to Free Counsel in Civil Cases*

1. *International Standards Relating to the Right to Free Counsel in Civil Cases*

Early developments in international rights to free legal counsel took place in the criminal justice arena.¹⁹² The international human rights community also appreciated, however, that in non-criminal cases where important human rights were at issue, standards needed to be set for assuring “in full equality . . . a fair and public hearing”¹⁹³—and that the appointment of free civil counsel is sometimes necessary to assure full equality. Generally, the right to free civil counsel is tied to the importance of the right being protected, the impact of the outcome of the civil proceeding, and the complexity of the case.¹⁹⁴ Ultimately, the question to be answered is whether, where important rights are at stake and the outcome is critical, people who cannot afford counsel can have equal access to justice.

The groundwork for the right to free civil counsel in certain cases was laid as early as 1949, when the UDHR¹⁹⁵ enumerated certain rights and provided remedies for violation of those rights.¹⁹⁶ Later, the ICCPR explicitly extended the right to equality before the courts and tribunals to civil cases.¹⁹⁷ While this right to equality does not explicitly grant a right to free counsel in civil cases, it does invite the question whether trial without counsel can provide an effective remedy for the violation of rights or freedoms granted by the ICCPR. The United Nations Human Rights Committee addresses this issue:

The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3(d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient

¹⁹² See, e.g., UDHR, *supra* note 39, art. 10.

¹⁹³ *Id.*

¹⁹⁴ See, e.g., *Airey v. Ireland*, 2 Eur. Ct. H.R. (ser. A) at 305 (1979); *Benham v. United Kingdom*, 22 Eur. H.R. Rep. 293 (1996); *Steel & Morris v. United Kingdom*, 41 Eur. H.R. Rep. 403 (2005); Annual Report of the Inter-American Commission of Human Rights, Inter-Am. Comm’n H.R., OEA/ser.L/V/II.106, doc. 6 rev. (1999). In the United States, courts have extended this right to certain proceedings involving basic human needs, such as child custody, housing, and health care. See *In re B.*, 285 N.E.2d 288 (N.Y. 1972) (child custody); *Davis v. Mansfield Metro. Hous. Auth.*, 751 F.2d 180 (6th Cir. 1984) (housing); *People v. Medina*, 705 P.2d 961 (Colo. 1985) (en banc) (health care).

¹⁹⁵ UDHR, *supra* note 39.

¹⁹⁶ *Id.* art. 8.

¹⁹⁷ ICCPR, *supra* note 39, art. 14.

means to pay for it. In some cases, they may even be obliged to do so.¹⁹⁸

The right to free civil counsel may be especially implicated in certain circumstances, such as those involving the deprivation of liberty, or where the lack of civil counsel has a disproportionate impact on minorities. In 1988, the UN General Assembly adopted a “Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.”¹⁹⁹ These principles include the entitlement to free legal counsel “in all cases where the interests of justice so require.”²⁰⁰ Relating to disproportionate impact, the Committee for the Convention on the Elimination of All Forms of Racial Discrimination (“CERD Committee”) considered a report submitted by the United States in 2008 and expressed concern about the “disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities.”²⁰¹ In light of this concern, the CERD Committee recommended that the United States “allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs—such as housing, health care, or child custody—are at stake.”²⁰²

Other international guidelines have also been used to promote the right to civil counsel. For example, in 2002, the UN High Commissioner for Human Rights recommended providing legal counsel to enable trafficked persons to access remedies²⁰³ and that children should be provided with appropriate legal assistance.²⁰⁴ In short, international standards have been evolving towards broader guarantees of legal assistance in civil matters, particularly for the indigent, where fundamental rights and basic human needs

¹⁹⁸ U.N. Human Rights Committee, General Comment No. 32: Right to Equality Before Courts and Tribunals and to Fair Trial, art. 14, ¶ 10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007); *see also* U.N. Human Rights Committee, Currie v. Jamaica, Communication No. 377/1989, ¶ 13.4, U.N. Doc. CCPR/C/50/D/377/1989 (1994); U.N. Human Rights Committee, Shaw v. Jamaica, Communication No. 707/1996, ¶ 7.6, U.N. Doc. CCPR/C/62/D/704/1996 (1998); U.N. Human Rights Committee, Taylor v. Jamaica, Communication No. 752/1997, ¶ 8.2, U.N. Doc. CCPR/C/62/D/705/1996 (1998); U.N. Human Rights Committee, Henry v. Trinidad & Tobago, Communication No. 845/1998, ¶ 7.6, U.N. Doc. No. CCPR/C/64/D/752/1997 (1999); U.N. Human Rights Committee, Kennedy v. Trinidad & Tobago, Communication No. 845/1998, ¶ 7.10, U.N. Doc. No. CCPR/C/74/D/845/1998 (2002).

¹⁹⁹ Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, Principles 11, 17, 18, 24, U.N. Doc. A/RES/43/173 (Dec. 9, 1988).

²⁰⁰ *Id.*

²⁰¹ U.N. Committee on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

²⁰² *Id.*

²⁰³ U.N. High Comm’r for Refugees, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, U.N. Doc. E/2002/68/Add1 (May 20, 2002), Guideline 9.

²⁰⁴ *Id.*

are at stake. Similar developments have occurred in European, American, and African regional standards.

2. *Regional Standards Relating to the Right to Free Counsel in Civil Cases*

European jurisprudence on the right to free civil counsel has focused on Article 6(1) of the ECHR, which guarantees access to justice in the determination of one's civil rights. In the seminal case of *Airey v. Ireland*,²⁰⁵ an Irish woman claimed that she was unable to obtain judicial separation from her husband because of the high cost of legal proceedings and sued the Irish government under Articles 6 (access to court), 8 (right to family life), 13 (remedies), and 14 (non-discrimination). The ECtHR found that "the outcome of separation proceedings is 'decisive for private rights and obligations' and hence, a fortiori, for 'civil rights and obligations' within the meaning of Article 6." Consequently, the Court found it improbable that Airey could present her case effectively without a lawyer and that she had been denied the effective right of access guaranteed by Article 6(1). The Court explained, however, that there is no requirement that free legal aid be provided in any case involving a civil right. Rather, providing free legal aid was just one of the ways the State could provide access; another way would be to simplify the procedure involved.²⁰⁶ In other words, Airey was entitled to free civil counsel, in part, because of the complexity of the proceedings.

Since *Airey*, numerous ECtHR cases have dealt with circumstances in which legal representation is required in civil cases. Among these was *Benham v. United Kingdom*,²⁰⁷ involving a litigant who was imprisoned for failure to pay a community tax after a hearing in which there was no automatic right to legal representation. The Court held that in light of the possibility of a severe penalty and the complexity of applicable law, the interests of justice and the right to a fair hearing demanded free legal representation.²⁰⁸ In addition to ECtHR jurisprudence, there has been movement in the European Union towards a policy that provides legal counsel to those who cannot afford it.²⁰⁹ Similar trends in the right to free civil counsel have developed in

²⁰⁵ 2 Eur. Ct. H.R. (ser. A) at 305 (1979).

²⁰⁶ *Id.*

²⁰⁷ 22 Eur. H.R. Rep. 293 (1996).

²⁰⁸ See also *Beet v. United Kingdom*, 41 Eur. H.R. Rep. 23 (2005) (complexity and high stakes required legal representation for fair hearing); *Steel & Morris v. United Kingdom*, 41 Eur. H.R. Rep. 403 (2005) (denial of legal aid deprived litigants of the opportunity to make their case effectively and contributed to an inequality of arms with opponent corporation); *Perks v. United Kingdom*, 30 Eur. H.R. Rep. 33 (1999) (given case complexity and threat to liberty, failure to provide legal aid breached Article 6(1)).

²⁰⁹ Early evidence of this movement can be found in Resolution (63)18, which approved a system of free legal aid for persons submitting an application to the European Commission. Council of Eur., Comm. of Ministers, Resolution 63[18] Grant of Free Legal Aid to Individuals Who Have Submitted an Application to the European Commission of Human Rights (Oct. 25, 1963). Resolution (78)8, prescribed legal aid where necessary in court proceedings defend-

inter-American instruments and jurisprudence. In Article 45 of the Charter of the Organization of American States, for instance, Member States agree to provide adequately “for all persons to have due legal aid in order to secure their rights.”²¹⁰ And the Inter-American Court of Human Rights (“IACHR”) has issued advisory opinions finding that the failure to provide free legal counsel to an indigent person trying to assert his rights in a judicial or administrative forum breached his rights to equal protection, fair trial, and effective judicial protection.²¹¹ The IACHR has also confirmed that the rules and principles embodied in criminal protections are relevant “to other proceedings through which rights and obligations of a civil, labor, fiscal or other nature are determined.”²¹²

Like the European and American regions, the African region has progressively recognized the importance of access to free civil counsel. In 2005, the African Commission on Human and Peoples’ Rights adopted Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.²¹³ These guidelines require a fair and public hearing for any individual whose rights and obligations are determined in a judicial proceeding²¹⁴ and recognize that legal representation is essential to a fair hearing.²¹⁵ While the guidelines do not guarantee access to free legal counsel in all cases, they echo international standards in establishing a right to free civil counsel “where the interest of justice so require” if the party “does not have sufficient means to pay for it.”²¹⁶ Also largely echoing international standards, the interests of

ing civil and other non-criminal rights. Council of Eur., Comm. of Ministers, Resolution 78[8] on Legal Aid and Advice (Mar. 2, 1978). In 1993, the Committee of Ministers adopted Recommendation R(93)1 on effective access to the law and to justice, recommending to Member States that they facilitate effective access to the courts for the very poor, especially by recognizing the right to state-funded appropriate counsel. Council of Eur., Comm. of Ministers, Recommendation R 93[1] of the Committee of Ministers to Member States on Effective Access to the Law and to Justice for the Very Poor (Jan. 8, 1993). While Resolutions and Recommendations of the Council of Ministers of the Council of Europe are not binding, they provide insight into evolving European norms.

²¹⁰ Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3.

²¹¹ Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a), and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am. Ct. H.R. (ser. A) No. 11 (Aug. 10, 1990); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003); see Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.129, doc. 4 (2007) [hereinafter Inter-Am. Comm’n H.R., Access to Justice].

²¹² Report on Terrorism and Human Rights, *supra* note 182.

²¹³ African Comm’n on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, ACHPR Doc. DOC/OS(XXX)(2001).

²¹⁴ *Id.* art. A(1).

²¹⁵ *Id.* art. A(2).

²¹⁶ *Id.* art. H. Similarly, under Article 10(2) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, any party to a case before the African Court is entitled to legal representation which will be free “where the interests of justice so require.” Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III).

justice are determined by reference to: (1) the complexity of the case and the ability of the party to adequately represent herself; (2) the rights that are affected; and (3) the likely impact of the outcome of the case on the wider community.²¹⁷ This right to free civil counsel, as it has developed internationally and regionally, is of particular significance to unaccompanied minors who must navigate complex immigration proceedings that involve high stakes.

3. *The Significance of the Right to Free Counsel in Civil Cases to Legal Representation for Unaccompanied Minors in the United States*

The United Nations Human Rights Committee best stated the significance of the right to free civil counsel in reasoning that the availability of legal assistance often determines an individual's ability to participate in legal proceedings in a meaningful way.²¹⁸ For unaccompanied minors, the inability to participate in a meaningful way in immigration proceedings will most often lead to removal or deportation to their home countries. Unjustified removal or deportation would violate many minors' right to family unity, right to asylum, or right to freedom from persecution, or would jeopardize their best interests. The stakes are unquestionably high for these children in that immigration proceedings implicate some of the most basic human needs, including the needs for food, family, safety, and shelter. The impact of the outcome can include injury or death. Indeed, any outcome prohibiting entry or deporting a child is life-defining.

Proceedings for unaccompanied minors may well present the most compelling scenario for free civil counsel—one that involves fundamental rights to family and life and invariably impacts the child's physical and mental health and well-being. Realistically, an unaccompanied minor is unlikely to be able to argue his or her case without legal counsel, since immigration cases involve intricate international and domestic laws, adversarial proceedings, and direct and cross-examinations of factual witnesses as well as experts. Thus, without the right to free attorneys, children like Catherine will be detained, processed, and removed to their home countries without the opportunity to prove that they have meritorious defenses to removal or deportation. Such an unjust result contradicts well-settled human rights standards that are designed to protect children, refugees and migrants, and civil litigants. Since unaccompanied minors are in a unique position at the intersection of rights for these three groups, receiving countries like the United States should grant these children free counsel so that they may access the most basic procedural protections afforded by immigration proceedings. The

²¹⁷ African Comm'n on Human & Peoples' Rights, *supra* note 213, at art. H(b).

²¹⁸ See *supra* text accompanying note 198.

next section shows how other countries are treating unaccompanied minors, with an eye toward developing a model for the United States.

IV. DIFFERING APPROACHES TO REPRESENTATION FOR UNACCOMPANIED MINORS

Since the developing international and regional human rights standards discussed in Section II are not all necessarily binding, and the immigration processes that unaccompanied minors face differ around the world, countries also vary greatly in providing representation for unaccompanied minors. Unlike the United States, numerous countries around the world provide free representation to unaccompanied minors. Some countries, such as Finland, Norway, Sweden, Switzerland, and the Netherlands, appoint two representatives for unaccompanied minors: attorneys and personal representatives—or guardians—who identify and advocate for the child’s best interests.²¹⁹ In Finland, the personal representative is charged with protecting the child’s best

²¹⁹ Laki maahanmuuttajien kotouttamisesta ja turvapaikanhakijoiden vastaanotosta 493/1999 [Act on the Integration of Immigrants and Reception of Asylum Seekers], § 26, *available* at <http://www.finlex.fi/en/laki/kaannokset/1999/en19990493> (last visited May 6, 2013); WOMEN’S REFUGEE COMM’N, *supra* note 4, at 62–64; e-mail from Martine Goeman, Defence for Children–ECPAT Nederland, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 20, 2012, 06:20 EDT) (on file with author); e-mail from Mark Leijen, Vereniging Asieladvocaten en–Juristen Nederland, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 16, 2012, 13:21 EDT) (on file with author); e-mail from Marq Wijngaarden, Attorney, Bohler Franken Koppe Wijngaarden Advocaten, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 13, 2012, 05:23 EDT) (on file with author); e-mail from Gunhild Bolstad, Senior Adviser, Dep’t of Migration, Nor. Ministry of Justice & the Police, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 14, 2012, 06:35 EDT) (on file with author). In Canada, the designated representative may act as counsel when appropriate. *Commentaries to the Immigration Division Rules*, IMMIGR. & REFUGEE BOARD OF CAN., <http://www.irb-cisr.gc.ca/eng/brdcom/references/aclo/Pages/idcomment.aspx> (last visited Aug. 23, 2012) (providing commentaries to the Immigration Division Rule 19 on designated representatives). In Quebec and British Columbia, an employee with the agency entrusted with the care of the unaccompanied child typically will act as the designated representative. E-mail from Deborah Isaacs, Project Coordinator, Separated Children’s Intervention & Orientation Network (“SCION”), to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 25, 2009, 21:35 EDT) (on file with author); e-mail from Deborah Isaacs, Project Coordinator, Separated Children’s Intervention & Orientation Network (“SCION”), to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 8, 2012, 14:31 EDT) (on file with author). In other provinces, the designated representative is sometimes a lawyer or law student. E-mail from Deborah Isaacs (Oct. 25, 2009, 21:35 EDT), *supra*; e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra*. Opinion differs on the effectiveness of designated representatives in Canada. Some designated representatives are considered effective, while there is dissatisfaction with the representation of others. E-mail from Fay Fuerst, Attorney, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 23, 2009, 16:26 EDT) (on file with author); e-mail from Greg Renault, Covenant House, to Dr. Adnan Türegün, Exec. Dir., Ctr. for Int’l Migration & Settlement Studies (“CIMSS”) (Oct. 26, 2009, 10:42 EDT) (on file with author); e-mail from Greg Renault, Covenant House, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 8, 2012, 15:01 EDT) (on file with author). The dissatisfaction stems from concerns that some designated representatives do not understand their role or are not capable of determining the best interests of the child. E-mail from Deborah Isaacs (Oct. 25, 2009, 21:35 EDT), *supra*; e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra*.

interests and may determine living arrangements and manage the child's assets.²²⁰ Like Finland, Sweden appoints a guardian who assists the unaccompanied minor with financial, educational, and social matters, while also assisting with the asylum application along with the attorney.²²¹ Norway also appoints guardians, but only for children who seek asylum and those who are victims of trafficking.²²² According to new regulations, these guardians will receive necessary training and compensation for safeguarding the child's best interests.²²³ Historically, Norwegian guardians have acted as substitute parents by orienting the children to their neighborhoods and accompanying them to the initial all-day interview with the Directorate of Immigration.²²⁴

In other countries, including Austria, the Netherlands, Finland, Canada, the United Kingdom, France, Denmark, Australia, and New Zealand, children have the right to free representation—whether legal, personal, or both—but not until after preliminary processing takes place, and in some countries, only children seeking asylum have this right. Meanwhile, in the United States and Uganda, children only have the right to counsel at the minor's expense.

Some of these models of representation incorporate features that are consistent with emerging human rights standards, such as the appointment of free personal and legal representatives. Meanwhile, other models include features that fall well short, such as exceptions to the right to free representation; the appointment of non-lawyer legal representatives; and delays in the appointment of a representative which result in crucial interviews occurring without representation. This section analyzes these shortcomings, and the following section recommends a model for the United States that is informed by the strengths and weaknesses of these other approaches and is consistent with developing human rights standards, as well as domestic best practices and ethical standards.

A. *Exceptions to the Right to Free Representation*

In some countries, children have the right to free representation, but it is qualified by a few exceptions. In theory, for example, Sweden provides the right to counsel for unaccompanied minors upon detention and will provide counsel at the expense of the government if the child cannot afford a private lawyer. But that right is qualified in several respects. Sweden created

²²⁰ Laki maahanmuuttajien kotouttamisesta ja turvapaikanhakijoiden vastaanotosta 493/1999 [Act on the Integration of Immigrants and Reception of Asylum Seekers], § 26, available at <http://www.finlex.fi/en/laki/kaannokset/1999/en19990493> (last visited May 6, 2013); FINNISH IMMIGRATION SERVICE ET AL., REPRESENTATION IN THE ASYLUM PROCESS: GUIDE FOR REPRESENTATIVES OF MINOR ASYLUM SEEKERS 7, 11, 12 (2010), available at http://www.pakolaisneuvonta.fi/files/Edustajaopas_2010_eng_v13cov.pdf (last visited May 6, 2013).

²²¹ WOMEN'S REFUGEE COMM'N, *supra* note 4, at 63.

²²² E-mail from Gunhild Bolstad, *supra* note 219.

²²³ *Id.*

²²⁴ *Id.*

an exception for cases where it is determined that there is clearly no need for public counsel, such as “where it is obvious that there are no reasons to grant [a] residence permit or if it is likely that a residence permit will be granted.”²²⁵ Australia has a similar exception. Under the Migration Act, Australian immigration officials are not obligated to inform an unaccompanied child who is an unauthorized arrival of the child’s ability to seek legal advice.²²⁶ If the child does not raise protection concerns, such as issues related to asylum, or ask for legal advice, the child will not be referred to an adviser.²²⁷ Since these children may not know to explain that they are seeking protection from persecution, and immigration officers do not advise them of this requirement, the child may be deported before having the opportunity to seek advice from an adviser.²²⁸

These types of exceptions would create significant hurdles for unaccompanied minors in the United States. Catherine’s situation offers a striking view of the problem with this approach—initially, the immigration officials who questioned her believed it obvious that there was no reason to grant her any relief from removal. It was only the availability of free counsel that eventually opened the path to relief for Catherine. Analogous situations in other contexts also reveal the problems with this approach. Imagine a system in which a criminal suspect cannot access an attorney until after he convinces a police officer—who has no fiduciary obligations to the suspect—that he has a meritorious defense. This system would leave it up to the suspect to sort through all the information that is available to him and to determine not only what information is relevant to his defense but also what information is safe to share with an official who owes him no duty of confidentiality or any other fiduciary obligations. Such a process would be unthinkable for the American criminal justice system and should be unthinkable for unaccompanied minors in the United States who face proceedings as complex as criminal proceedings, and who have stakes as high as any criminal defendant—with potential outcomes that include persecution, abuse, and death.²²⁹

²²⁵ E-mail from Kristina Swiech, Lawyer, Save the Children, Swed., to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 21, 2009, 08:07 EDT) (on file with author).

²²⁶ E-mail from Mary Anne Kenny, Lawyer, SCALES Cmty. Legal Ctr., to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 27, 2009, 18:49 EDT) (on file with author); see MARY CROCK, *SEEKING ASYLUM ALONE: A STUDY OF AUSTRALIAN LAW, POLICY AND PRACTICE REGARDING UNACCOMPANIED AND SEPARATED CHILDREN* 13, 122, 234 (2006).

²²⁷ E-mail from Mary Anne Kenny, *supra* note 226; e-mail from Mary Anne Kenny, Lawyer, SCALES Cmty. Legal Ctr., to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 28, 2012, 08:53 EDT) (on file with author).

²²⁸ See e-mail from Mary Anne Kenny, Lawyer, SCALES Cmty. Legal Ctr., to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 28, 2009, 09:44 EDT) (on file with author); e-mail from Mary Anne Kenny, *supra* note 227.

²²⁹ While the stakes for some unaccompanied minors in immigration proceedings are as high as those in criminal proceedings, the U.S. Supreme Court has held that immigration proceedings are purely civil actions. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

B. The Appointment of Non-Lawyer Legal Representatives

While the Netherlands specifically appoints a lawyer for the child who specializes in immigration and asylum law,²³⁰ other countries appoint non-lawyer legal representatives. For example, Austria provides legal advisors²³¹ who may have a law degree, but may also be non-lawyers who have five years of full-time and continuous experience providing legal advice on asylum matters in an ecclesiastical or private organization.²³² In France, ad hoc administrators are “not required to possess specific skills in the field of immigration law.”²³³ Some of these advisers are considered ineffective because they “lack . . . knowledge about immigration law,”²³⁴ and many do not have the requisite training necessary to represent unaccompanied minors.²³⁵ Denmark also appoints a non-lawyer representative to unaccompanied minors who submit an asylum application.²³⁶ The representative is typically a volunteer who works for the Danish Red Cross and has taken an introductory seminar on human rights and the Danish asylum process.²³⁷ In some coun-

²³⁰ See e-mail from Karen Geertsema, Ph.D. Candidate, VU Univ., Amsterdam, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 23, 2009, 05:33 EDT) (on file with author); e-mail from Karen Geertsema, Ph.D. Candidate, VU Univ., Amsterdam, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 28, 2012, 4:53 EDT) (on file with author); e-mail from Mark Leijen, Vereniging Asieladvocaten en -Juristen Nederland, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 23, 2009, 07:15 EDT) (on file with author).

²³¹ GESAMTE RECHTSVORSCHRIFT FÜR ASYLGESETZ 2005 [2005 ASYLUM ACT] BUNDESGESETZBLATT I [BGBL I] No. 100/2005, as last amended by BGBL I No. 4/2008, § 64 (Austria).

²³² *Id.* § 65, ¶ 1.

²³³ FRANCE TERRE D’ASILE, ALTERNATIVE REPORT TO THE U.N. COMMITTEE ON THE RIGHTS OF THE CHILD ON THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD 3 (2008), available at http://www.crin.org/docs/France_FTA_NGO_Report.pdf.

²³⁴ E-mail from Laurent Delbos, France Terre D’Asile, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 28, 2012, 09:58 EDT) (on file with author); e-mail from Laurent Delbos, France Terre D’Asile, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 21, 2009, 04:40 EDT) (on file with author).

²³⁵ *Id.*

²³⁶ Consolidation of the Act on Integration of Aliens in Denmark, § 56a (2005). There is one exception to this general rule: Denmark provides attorneys to unaccompanied minors only if the Immigration Service submits a case concerning a residence permit for the child to the Danish Refugee Council. This process is the “manifestly unfounded” procedure and occurs when the Immigration Service perceives no ground for granting asylum and submits the case to the Danish Refugee Council for review. E-mail from Signe Sondergaard, Advisor, Danish Refugee Council, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 13, 2012, 07:23 EDT) (on file with author); e-mail from Signe Sondergaard, Advisor, Danish Refugee Council, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 20, 2012, 08:26 EDT) (on file with author); e-mail from Line Bøgsted Olsen, Legal Advisor, Danish Refugee Council, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 29, 2009, 08:10 EDT) (on file with author).

²³⁷ E-mail from Stinne Østergaard Poulsen, Danish Refugee Council, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 15, 2012, 08:45 EDT) (on file with author); e-mail from Stinne Østergaard Poulsen, Danish Refugee Council, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 28, 2009, 06:33 EDT) (on file with author).

tries, lawyers are not necessarily preferred over non-lawyer representatives.²³⁸ As an example, non-solicitor representatives in the UK are considered effective because “they are accredited and must maintain professional standards.”²³⁹ Also, many are “children’s specialists” which is beneficial to their work.²⁴⁰

The appropriateness of non-lawyer representatives for unaccompanied minors depends on each country’s immigration laws and process. It may be, for instance, that the country does not have a complex process, or that the process is not adversarial. Costa Rica provides a case in point. Unaccompanied minors are not detained, and Costa Rican authorities are prohibited from interrogating the children using coercive methods.²⁴¹ Moreover, minors are not subjected to hearings; instead, the investigation focuses on searching for the child’s relatives and on repatriation when it is in the best interest of the child.²⁴² While this type of system does implicate important rights, it may not rise to the level of complexity that would require an attorney under human rights standards that govern the right to free legal counsel. On the other end of the spectrum is the U.S. system, where minors face difficult and complex adversarial proceedings. The appointment of non-lawyer representatives in the U.S. system would again be akin to appointing non-lawyers to criminal defendants.

C. Delays in the Appointment of a Representative

Many countries around the globe—including Canada, Sweden, Norway, and the Netherlands—provide delayed representation, whether by a lawyer or other legal representative, to unaccompanied minors who face immigration proceedings. Canada appoints designated representatives before detention, admissibility, and refugee hearings, but generally after border

²³⁸ E-mail from Geraldine Peterson, Attorney, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 14, 2009, 13:13 EDT) (on file with author).

²³⁹ *Id.*

²⁴⁰ E-mail from Judith Dennis, Policy Officer, Refugee Council, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 22, 2009, 08:56 EDT) (on file with author); e-mail from Judith Dennis, Policy Officer, Refugee Council, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 29, 2012 11:07 EDT) (on file with author).

²⁴¹ E-mail from Rocio Rodriguez Garcia, Exec. Dir., Alianza Por Tus Derechos, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 26, 2009, 17:29 EDT) (on file with author); e-mail from Rocio Rodriguez Garcia, Exec. Dir., Alianza Por Tus Derechos, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 27, 2009, 11:37 EDT) (on file with author); e-mail from Rocio Rodriguez Garcia, Exec. Dir., Alianza Por Tus Derechos, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 27, 2009, 12:27 EDT) (on file with author).

²⁴² E-mail from Rocio Rodriguez Garcia, (Oct. 26, 2009, 17:29 EDT), *supra* note 241.

agents or immigration officials have questioned the unaccompanied minor.²⁴³ In theory, the designated representative also submits a form that documents the refugee's story.²⁴⁴ But in many cases, the designated representative is appointed after the form is submitted.²⁴⁵ Because of late appointments, some designated representatives are unable to fully carry out their responsibilities.²⁴⁶

Sweden has similar delays, in that unaccompanied minors are initially questioned without having representation. While the questions are not designed to relate to the child's reasons for asylum, they do address "travel route, family situation, health and education."²⁴⁷ In Norway, meanwhile, un-

²⁴³ Immigration and Refugee Protection Act, 2001 S.C., c. 27 (Can.); *Commentaries to the Immigration Division Rules*, *supra* note 219; e-mail from Deborah Isaacs (Oct. 25, 2009, 21:35 EDT), *supra* note 219; e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra* note 219.

²⁴⁴ E-mail from Deborah Isaacs (Oct. 25, 2009, 21:35 EDT), *supra* note 219; e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra* note 219; e-mail from Greg Renault, Covenant House, to Dr. Adnan Türegün, Exec. Dir., Ctr. for Int'l Migration & Settlement Studies (CIMSS) (Oct. 26, 2009, 10:42 EDT) (on file with author); e-mail from Greg Renault, Covenant House, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 8, 2012, 15:01 EDT) (on file with author).

²⁴⁵ E-mail from Greg Renault (Oct. 26, 2009, 10:42 EDT), *supra* note 244; e-mail from Greg Renault (Aug. 8, 2012, 15:01 EDT), *supra* note 244; e-mail from Deborah Isaacs (Oct. 25, 2009, 21:35 EDT), *supra* note 219; e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra* note 219.

²⁴⁶ E-mail from Deborah Isaacs (Oct. 25, 2009, 21:35 EDT), *supra* note 219; e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra* note 219. One designated representative lamented that sometimes he "struggle[s] within existing procedures to be effective" when he receives a late appointment. E-mail from Greg Renault (Oct. 26, 2009, 10:42 EDT), *supra* note 244; e-mail from Greg Renault (Aug. 8, 2012, 15:01 EDT), *supra* note 244. Some regions in Canada have proactively worked to address some of these practical problems. In Toronto, for example, local CIC staff met with local non-governmental organizations and IRB staff. E-mail from Greg Renault (Oct. 26, 2009, 10:42 EDT), *supra* note 244; e-mail from Greg Renault (Aug. 8, 2012, 15:01 EDT), *supra* note 244. The group developed a "[r]egional accord . . . to provide consistent, effective [designated representative] service for unaccompanied minor [refugee claimants]" and one result was the use of a law firm to provide designated representatives. E-mail from Greg Renault (Oct. 26, 2009, 10:42 EDT), *supra* note 244; e-mail from Greg Renault (Aug. 8, 2012, 15:01 EDT), *supra* note 244. In Toronto, the CIC has been careful to avoid involving a minor in proceedings that the minor may not understand. *Id.* Consequently, for older minor refugee claimants, a few weeks after the initial CIC interview, CIC has been scheduling a second interview "for the sole purpose of having a [designated representative] present when the Immigration Officer goes over the documents and responsibilities with the claimant." E-mail from Greg Renault (Oct. 26, 2009, 10:42 EDT), *supra* note 244; e-mail from Greg Renault (Aug. 8, 2012, 15:01 EDT), *supra* note 244. In British Columbia, after an influx of unaccompanied minors arrived from China in 1999, "a special team called the migrant services team was formed to handle unaccompanied you[h] up to the age of 19." E-mail from Deborah Isaacs, Project Coordinator, Separated Children's Intervention & Orientation Network (SCION), to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 28, 2009, 13:33 EDT) (on file with author); e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra* note 219. The migrant services team takes responsibility for unaccompanied minors when they arrive. E-mail from Greg Renault (Oct. 26, 2009, 10:42 EDT), *supra* note 244; e-mail from Greg Renault (Aug. 8, 2012, 15:01 EDT), *supra* note 244.

²⁴⁷ E-mail from Michael Williams, Swed. Network of Asylum and Refugee Support Grps. (FARR), to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 21, 2009, 16:03 EDT) (on file with author); e-mail from Mikaela Hagan,

accompanied minors have contact with a lawyer after they register with the police, but before being interviewed by immigration authorities.²⁴⁸ During the registration process when legal representation is not available,²⁴⁹ the police question the children about personal information and travel route.²⁵⁰ The Netherlands also provides free legal aid for unaccompanied minors seeking asylum,²⁵¹ but only after a short interview by the immigration police regarding identity, nationality, journey, and the authenticity of their documents. The attorney is appointed before the interview by the Immigration and Naturalization Service regarding motives for asylum.²⁵²

In France, public prosecutors appoint ad hoc administrators to assist minors who arrive in the country without a legal guardian, lack legal representation, and are seeking asylum and being held in a waiting area.²⁵³ The ad hoc administrators assist unaccompanied minors during their stay in the waiting area and ensure their representation in all administrative and legal procedures relating to their application for recognition of refugee status,²⁵⁴ but immigration authorities first question the child without any representation.²⁵⁵ In practice, many children are deported before being able to meet with an ad hoc administrator.²⁵⁶ And since the number of ad hoc administrators is limited, even when one is appointed to represent a child, he may be unavailable to assist the child.²⁵⁷ In the United Kingdom, as soon as possible after an unaccompanied child applies for asylum, the Secretary of State must “take measures to ensure that a representative represents and/or assists the

Save the Children, Swed., to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 22, 2012, 03:49 EDT) (on file with author); e-mail from Kristina Swiech, Attorney, Save the Children, Swed., to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 21, 2009, 08:07 EDT) (on file with author).

²⁴⁸ E-mail from Gunhild Bolstad, *supra* note 219; e-mail from Stine Münter, Senior Advisor, Dep’t of Migration, Nor. Ministry of Labour & Social Inclusion, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 16, 2009, 06:53 EDT) (on file with author).

²⁴⁹ E-mail from Gunhild Bolstad, *supra* note 219; e-mail from Stine Münter, *supra* note 248.

²⁵⁰ E-mail from Gunhild Bolstad, *supra* note 219; e-mail from Stine Münter, *supra* note 248.

²⁵¹ E-mail from Marq Wijngaarden, *supra* note 219; e-mail from Mark Leijen, *supra* note 230; e-mail from Karen Geertsema (Oct. 23, 2009, 05:33 EDT), *supra* note 230; e-mail from Karen Geertsema (Aug. 28, 2012 4:53 EDT), *supra* note 230.

²⁵² E-mail from Marq Wijngaarden, Attorney, Bohler Franken Koppe Wijngaarden Advocaten, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 23, 2009, 08:10 EDT) (on file with author).

²⁵³ Loi 2002-305 du 4 mars 2008 [Law No. 2002-305 of Mar. 4, 2002], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 5, 2002, p. 4161.

²⁵⁴ *Id.*

²⁵⁵ E-mail from Laurent Delbos (Aug. 28, 2012, 09:58 EDT), *supra* note 234; e-mail from Laurent Delbos (Oct. 20, 2009, 10:48 EDT), *supra* note 234.

²⁵⁶ FRANCE TERRE D’ASILE, *supra* note 233.

²⁵⁷ *Id.*

unaccompanied child.”²⁵⁸ The representative has “the right to be present at the interview and ask questions and make comments in the interview.”²⁵⁹ Still, the only requirement in the UK is that the child is offered the opportunity to seek advice and representation before the interview where the actual substance of the asylum claim is discussed.²⁶⁰ Thus, in theory, UK immigration authorities should not interview an unaccompanied asylum-seeking child without legal representation.²⁶¹ But in practice, they may interview the child if the representative is not present.²⁶² In these circumstances, some officials will postpone interviews, and others will not.²⁶³ Similarly, in appellate courts, an immigration judge can, but will not always, postpone a hearing if a child does not have a legal representative.²⁶⁴

In Uganda, an unaccompanied minor applying for refugee status has the right to be represented or assisted by a lawyer at his own expense during hearings on the consideration of his refugee application.²⁶⁵ The Ugandan Refugees Act also states that the United Nations High Commissioner for Refugees (“UNHCR”) may attend proceedings before the Refugees Appeals Board and that a UNHCR representative may make oral or written representations on behalf of the person whose appeal is being heard.²⁶⁶ Technically, however, the refugee applicant’s right to representation attaches only on appeal after the applicant has been rejected by the government agency that oversees the refugee status determination.²⁶⁷ Because the regulations to the Refugees Act have yet to be operationalized, legal representation during the

²⁵⁸ IMMIGRATION RULES, 2009, PART 11, RULE 352ZA (U.K.), available at <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11> (last visited Aug. 24, 2012).

²⁵⁹ *Id.*

²⁶⁰ E-mail from Judith Dennis, Policy Officer, Refugee Council, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 21, 2009, 10:30 EDT) (on file with author); e-mail from Judith Dennis (Aug. 29, 2012 11:07 EDT), *supra* note 240.

²⁶¹ E-mail from Patrick Jones, Legal Team Manager, Asylum Aid, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 13, 2012, 10:18 EDT) (on file with author); e-mail from Patrick Jones, to Laquesha Sanders, Legal Team Manager, Asylum Aid, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 20, 2009, 09:31 EDT) (on file with author); e-mail from Geraldine Peterson, Attorney, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 14, 2009, 13:13 EDT) (on file with author).

²⁶² E-mail from Judith Dennis (Oct. 22, 2009, 08:56 EDT), *supra* note 240; e-mail from Judith Dennis (Aug. 29, 2012 11:07 EDT), *supra* note 240.

²⁶³ E-mail from Judith Dennis (Oct. 22, 2009, 08:56 EDT), *supra* note 240; e-mail from Judith Dennis (Aug. 29, 2012 11:07 EDT), *supra* note 240.

²⁶⁴ E-mail from Judith Dennis (Oct. 22, 2009, 08:56 EDT), *supra* note 240; e-mail from Judith Dennis (Aug. 29, 2012 11:07 EDT), *supra* note 240.

²⁶⁵ The Refugee Act 2006 § 24 (Uganda).

²⁶⁶ *Id.* § 18.

²⁶⁷ E-mail from Kene Esom, Legal Officer, Refugee Law Project, Faculty of Law, Makerere Univ., to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 28, 2009, 06:05 EDT) (on file with author).

appeals process is limited to written submissions by lawyers or UNHCR representatives.²⁶⁸

There are significant problems with models such as these that delay legal assistance, especially models that permit governments to gather information through interviews or applications before the appointment of counsel. Basic information, such as the whereabouts of family members, could undermine the application for asylum. An exception of this type would not work well in the United States, where immigration officials elicit substantive information from the unaccompanied minor from the point of initial contact, including the minor's reasons for immigrating. Any information provided during the initial contact can be used to undermine the minor's credibility later in the immigration process. This scenario played out in Catherine's case, in that her failure to disclose sensitive personal information during her initial interview undermined her credibility throughout her removal proceedings.

With respect to the timing of the appointment of a representative, Austria, Finland, and Denmark offer models that would work well in the United States. Austria provides legal advisors "in the admission procedure, at every interrogation in the initial reception centre and at every interview in the admission procedure,"²⁶⁹ whether conducted by immigration officers or agents of the public security service.²⁷⁰ Denmark appoints representatives as the first step in the asylum process, and authorities will not interview an unaccompanied child without representation present.²⁷¹ These models assure that unaccompanied minors have as much guidance as possible before sharing any information with immigration officials or police that may affect their claims.

V. A MODEL FOR THE UNITED STATES

This Article now turns to recommendations for Congress—based on developing human rights standards, lessons from other models, and on the

²⁶⁸ *Id.*; e-mail from Kene Esom, Legal Officer, Refugee Law Project, Faculty of Law, Makerere Univ., to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 29, 2009, 09:12 EDT) (on file with author). Despite the Refugees Act's lack of provision for legal representation at the initial application stage, it does not preclude legal assistance; consequently, the Refugee Law Project typically provides free assistance to properly document an asylum seeker's testimony in legal terms for the application. E-mail from Kene Esom, *supra* note 267.

²⁶⁹ 2005 ASYLUM ACT, *supra* note 231, at § 64, ¶ 5.

²⁷⁰ *Id.* at § 19, ¶ 5; letter from Mag. Kerstin Kowald, Austrian Fed. Asylum Office, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla., Oct. 21, 2009 (sent via e-mail Oct. 22, 2009, 02:26 EDT) (on file with author); letter from Mag. Gerald Dreveny, Austrian Federal Asylum Office, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla., Aug. 28, 2012 (sent via e-mail Aug. 30, 2012) (on file with author).

²⁷¹ E-mail from Signe Sondergaard (Aug. 13, 2012, 07:23 EDT), *supra* note 236; e-mail from Signe Sondergaard (Aug. 20, 2012, 08:26 EDT), *supra* note 236; e-mail from Line Bøgsted Olsen, *supra* note 236.

particular characteristics of the American legal system—to create a statutory right to free attorneys for unaccompanied minors in immigration proceedings. The most basic recommendation—that Congress guarantee some type of legal representation to unaccompanied minors—would at least acknowledge international and regional standards that call for legal representation not only for children who find themselves in legal proceedings, but for refugees who face expulsion or deportation, and for individuals who are indigent and face civil proceedings that are likely to impact important rights. To make this guarantee a meaningful one for children who face immigration proceedings in the United States, Congress should provide for the appointment of an attorney, who gives the child a voice, before any interviews by border patrol agents or immigration officials, who is specially trained in immigration law and in representing children. For those children who cannot express their own interests, the government should also appoint a personal representative, or guardian, who can guide the attorneys.

A. *Representation by an Attorney*

Several countries, including Austria and Canada, appoint non-attorney advisors to represent unaccompanied minors. In the United States, any lawyer admitted to practice in any state is authorized to represent individuals in immigration proceedings.²⁷² Law students, law graduates not yet admitted to the bar, and non-attorney representatives are also permitted to represent unaccompanied minors, but only under certain circumstances.²⁷³ Yet, the appointment of an attorney is particularly important in the United States because of the complex system—both in terms of applicable law and procedure—that children face in immigration proceedings. The reality of detention and of an arduous and complex legal process that may end in the child's return to unsafe situations raises the stakes, and creates the need for attorney representation. Given the legal complexity of immigration proceedings, attorneys are best suited to provide effective advocacy, and thereby further the child's best interests.

The American Bar Association (“ABA”) developed standards for the treatment of unaccompanied minors in the United States (“ABA Standards”) and adopted a rule that unaccompanied minors shall be appointed an attorney, at public expense if necessary, to represent them in any formal proceedings or other matter in which a decision will be made which will affect immigration status.²⁷⁴ Specifically with respect to unaccompanied minors in custody, the ABA Standards include a comment that the appointment of non-

²⁷² See 8 C.F.R. § 1292.1 (2011).

²⁷³ *Id.*

²⁷⁴ AM. BAR ASSOC., STANDARDS FOR CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILD, IN THE U.S. (2004), *available* at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf.

attorney representatives is an “inadequate ‘band-aid’” attempt to meet the legal needs of children.²⁷⁵ Having determined that an attorney is best suited to represent children in immigration proceedings, the more difficult questions relate to *how* the attorney will represent the child-client, including challenges with the child’s capacity. The following subsections address these issues.

B. Voicing the Child’s Interests

As set out in Section III(A)(1) above, the CRC guarantees children the right to participate in decision-making processes that affect their interests. For unaccompanied minors in immigration proceedings, the child’s voice is especially important because the information that is available to the child’s attorney and to the tribunal is far from perfect. Unlike the domestic dependency or delinquency contexts where social welfare workers and family members contribute information about the child’s situation, in the case of unaccompanied minors, it is often only the child who has this information. Without the child’s voice, immigration judges would be left to make life-altering decisions for the child in a vacuum.

In virtually every discussion of a child’s right to counsel, the question arises as to whether attorneys who represent children should automatically endorse the child’s position and follow his or her direction.²⁷⁶ In the United States, substantial scholarship exists on differing models of representation for children in the context of dependency and delinquency, where the child is not usually the sole source of information.²⁷⁷ Generally, representation that is driven purely by the attorneys’ determination of the child’s best interest (the best interest model) is on one end of the spectrum, and representation that is driven almost exclusively by the child’s stated wishes (expressed interest model) is on the other end.²⁷⁸

While a full analysis of this spectrum is beyond the scope of this Article, it is important to understand that there is middle ground within the spectrum, where the attorney gives the child a voice, while realistically

²⁷⁵ *Id.* § VII(A)(1).

²⁷⁶ See *Fact Sheet: The Right to Representation*, UNICEF, <http://www.unicef.org/crc/files/Right-to-Participation.pdf> (last visited Aug. 6, 2012).

²⁷⁷ See, e.g., Barbara A. Atwood, *Representing Children Who Can’t or Won’t Direct Counsel: Best Interests Lawyering or No Lawyer At All?*, 53 ARIZ. L. REV. 381, 391 (2011) (stating that most states rely upon a best interest standard); Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999); Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 FAM. L.Q. 441, 442 (2000); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996); Martin Guggenheim, *The AAML’s Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter’s Perspective*, 22 J. AM. ACAD. MATRIM. L. 251, 258–60 (2009); Mark Henaghan, *What Does a Child’s Right to be Heard in Legal Proceedings Really Mean? ABA Custody Standards Do Not Go Far Enough*, 42 FAM. L.Q. 117, 120 (2008).

²⁷⁸ Atwood, *supra* note 277, at 391; Henaghan, *supra* note 277, at 120.

accounting for children's limited cognitive and decision-making abilities. In the context of delinquency, for example, Henning has developed a "collaborative model of advocacy in which attorneys may educate children and adolescents on the short- and long-term consequences of all potential case-related decisions; patiently lead youth through the pros and cons of each option; and enhance the youth's ever evolving decision-making skills and capacity."²⁷⁹ With respect to the rights enumerated within the CRC, UNICEF has also identified a middle ground when representing children:

Respecting children's views means that such views should not be ignored; it does not mean that children's opinions should be automatically endorsed. Expressing an opinion is not the same as taking a decision, but it implies the ability to influence decisions. A process of dialogue and exchange needs to be encouraged in which children assume increasing responsibilities and become active, tolerant, and democratic. In such a process, adults must provide direction and guidance to children while considering their views in a manner consistent with the child's age and maturity²⁸⁰

Relying in part on this guarantee in the CRC, the ABA Standards include a rule that unaccompanied minors have the right to express their own views freely in all matters affecting them.²⁸¹ The ABA Standards further require attorneys to "zealously advocate the Child's legal interests, as directed by the Child's expressed wishes."²⁸² As the comment to this rule explains, the attorney must advocate for the child's expressed wishes, unless the child does not express her wishes or has been found to lack competence.²⁸³

Taking into consideration the guarantees in the CRC, the model for representing unaccompanied minors in the United States must allow for the child's voice to be heard to the extent that the child is able to express his or her opinions and interests. To do so, the model cannot be a purely best interests model in which the child's attorney makes all the decisions for the child. The following section addresses the use of personal representatives, or guardians, to determine children's best interests.

C. Appointment of a Personal Representative/Guardian

As Section III sets out, many countries appoint personal representatives, often known as guardians, for unaccompanied minors. The United

²⁷⁹ Kristin Henning, *Loyalty, Paternalism, and Rights: Clients Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 248-49 (2005). As Professor Henning concludes, this model complies with the Model Rules of Professional Conduct, which direct attorneys to encourage a "normal" attorney-client relationship with child clients. *Id.*

²⁸⁰ See e.g., *Fact Sheet: The Right to Representation*, *supra* note 276.

²⁸¹ AM. BAR ASSOC., *supra* note 274.

²⁸² *Id.* § V(A)(1)(b).

²⁸³ *Id.* § V(A)(1) cmt.

States should also appoint personal representatives for unaccompanied minors, but only on a case-by-case basis so that children who have the developmental capacity to express their interests are not appointed a personal representative. This recommendation differs from the ABA standards, which would require the appointment of an “Advocate for Child Protection” for every unaccompanied minor, for the purpose of identifying, expressing, and advocating for a child’s best interests.²⁸⁴ Guardian-like personal representatives are not a good fit for every case involving an unaccompanied minor in the United States, in part because children’s best interests generally do not factor into U.S. immigration law and in part because the appointment of a guardian, given the structure of U.S. immigration proceedings, will likely silence the child’s voice.

Theoretically, a guardian in immigration proceedings can serve several functions. The government could task the guardian with ensuring the child’s social welfare by monitoring conditions of detention or release, including access to safe housing, food, medicine, and educational services. This function is necessary for unaccompanied minors who face long periods of detention and sometimes difficult conditions, but like attorneys for children in dependency, attorneys for unaccompanied minors should be tasked with monitoring their clients’ well-being. Thus, unless there is another need for a guardian, it seems unnecessary for a personal representative to duplicate a function that can be delegated to the attorney.

As the ABA Standards contemplate, a guardian could also identify, express, and advocate for a child’s best interests, including developing and providing recommendations to the attorney as to whether it is in the child’s best interest to either voluntarily depart from the United States or apply for relief so that he may remain in the United States lawfully.²⁸⁵ It would not be fruitful, however, for the personal representative to advocate in immigration court that a child should remain in the United States because it is in his best interest, since immigration judges cannot grant children relief from removal or deportation on the ground that it would be in the child’s best interests.²⁸⁶ Thus, the guardian’s opinion as to whether it is in the child’s best interests to remain or leave the United States would be relevant only to the attorney.

While at first blush it appears that an attorney would benefit from hearing the guardian’s perspective, this set up could actually place the attorney in a difficult position. Say, for example, that the child wishes to apply for asylum, but the guardian recommends to the attorney that the child depart voluntarily to his home country so that he can be reunited with his parents. Whose voice does the attorney heed? If neither voice is controlling, does the

²⁸⁴ Bhabha and Young also reason that the appointment of a guardian-like professional is essential for children who apply for asylum. Bhabha & Young, *supra* note 2, at 162.

²⁸⁵ AM. BAR ASSOC., *supra* note 274, § VI(C)(8)(e).

²⁸⁶ While the United States is likely acting contrary to human rights standards by removing or deporting children without regard to their best interests, this issue is beyond the scope of this Article and is best left for another day.

attorney engage in her own best interests analysis and determine what is best for her client? This result runs contrary to the traditional attorney-client relationship, which values the client's autonomy and requires attorneys to follow the client's direction. Fortunately, the Model Rules of Professional Conduct, also issued by the ABA, provide a different path—the attorney should determine if the child has the capacity to express her own interests.²⁸⁷ If the child does not have that capacity, the attorney may request the appointment of a guardian.²⁸⁸

In those cases where the appointment of a guardian is appropriate, the attorney's role must be clearly defined: the attorney should heed the wishes of the guardian while maintaining an attorney-client relationship with the child to the extent possible. Otherwise, if the attorney is able to communicate with the child, discern her wishes, and believes that the child has the capacity to express her own interests, the attorney should not seek appointment of a guardian. This recommendation—that guardians be appointed only when the child cannot express and advance her own interests—seeks to protect the child's right to be heard because the appointment of a guardian who directs representation could silence the child's voice. To best ensure that the attorney makes an appropriate determination as to whether the child client needs a guardian to express her wishes, attorneys for unaccompanied minors must have appropriate training in representing child clients, including training in child development as discussed in Subsection E below.

D. *At Every Stage of the Immigration Process*

Having determined that the United States should appoint attorneys for unaccompanied minors, as well as personal representatives in certain cases, the next issue is timing of the attorney appointment. In the United States, a child's statements during the very first interview with border patrol agents can lead to immediate return to her home country, or can undermine her credibility if she is given the opportunity to enter immigration proceedings. Consequently, the failure to provide an attorney from the initial contact with immigration officials could undermine the child's best interest. While the ABA Standards include a rule that would require legal representation throughout formal proceedings, the rule does not require representation during the initial interview with immigration officials, and in fact, would explicitly carve out children who are apprehended at the border and agree to be returned to their home countries without formal legal proceedings.²⁸⁹

These carve-outs for representation, while similar to the practice in other countries, would not serve unaccompanied minors well in the United States. Again, Catherine's case exemplifies the problems with this approach.

²⁸⁷ See MODEL RULES OF PROF'L CONDUCT, R. 1.14(b) (2011).

²⁸⁸ See *id.*

²⁸⁹ See AM. BAR ASSOC., *supra* note 274, §§ III(H), VIII(B)(3).

Catherine's attorney struggled to convince the immigration and local dependency judges that her story was true, given that Catherine did not share her story during her initial interview with immigration officials. While it is possible that even with an attorney, Catherine would not have been ready to share these facts during her initial interview, she certainly would have been more likely to do so if she had been well aware of their legal significance from the beginning.

Given the large numbers of unaccompanied minors who are apprehended at the border, it would admittedly be a challenging task to appoint an attorney to each of these minors before they have substantive interviews with border patrol agents. In addition to large numbers, the challenges include the fact that unaccompanied minors can be detained and come into contact with border officials at all hours of the day and night and at innumerable locations. Perhaps not an ideal solution, but one that realistically responds to concerns about resources, would be to have attorneys assigned to immigration stations who would be able to at least speak with the children before they are interrogated and encouraged to accept voluntary return to their home countries. There are problems with this solution, including the fact that children are often distrustful of adults and unwilling or too afraid to share personal information with strangers.²⁹⁰ Unfortunately, children detained at the border can be repatriated immediately, and thus, this type of legal assistance may be the best we can hope for, barring significant changes to substantive U.S. immigration law that would prohibit immediate repatriation of children.

Another logistical challenge also arises in appointing attorneys to unaccompanied minors detained at the border, in that immigration or border officials may need to speak with the child to determine if he or she is a minor. In cases where it is obvious that an official is dealing with a child, the official should immediately call upon an attorney. Where it is not obvious, the officials will inevitably interview the child without an attorney, but should cease the interview as soon as it becomes apparent, or even possible, that the individual is a child.

²⁹⁰ While interviewing children can be challenging, child advocates do it every day. There are a number of excellent resources on interviewing, some specific to children and unaccompanied minors. *See, e.g.*, U.N. HIGH COMM'R FOR REFUGEES, GUIDELINES FOR INTERVIEWING UNACCOMPANIED MINORS & PREPARING SOCIAL HISTORIES (1985), available at <http://www.unhcr.org/refworld/docid/47fdfae5d.html>; Videotape: Interviewing the Child Client: Approaches and Techniques for a Successful Interview (ABA 2008), available at <http://apps.americanbar.org/litigation/committees/childrights/video/1006-interviewing-child-client.html> (an outstanding ABA video on conducting child interviews); Robert F. Cochran, Jr. et al., *The Counselor-At-Law: A Collaborative Approach to Client Interviewing and Counseling* §§ 9-1 to -5, at 165-87 (2006) (for a sample of general interview strategies); AMER. BAR ASSOC. JUVENILE JUSTICE CTR., UNDERSTANDING ADOLESCENTS: A JUVENILE COURT TRAINING CURRICULUM module 2 (Lourdes M. Rosado, ed., 2000) (Talking to Teens in the Justice System: Strategies for Interviewing Adolescent Defendants, Witnesses, and Victims) (a sampling of interviewing skill sets for juveniles).

E. Special Training in Immigration Law and Representing Children

The United States has no special requirements for representing children in immigration proceedings. Since child-clients present special challenges to representation, and there is currently a visible lack of quality representation in immigration proceedings, Congress should require special training in immigration law and in representing children.²⁹¹ As recently as 2010-2011, a survey revealed that immigration judges assess the level of representation as “inadequate” in thirty-three percent of their cases and “grossly inadequate” in fourteen percent of their cases.²⁹² Some judges also identified lack of training as one of the main problems with the attorneys who appear in their courtrooms. To ameliorate this problem, judges encouraged attorneys to become more familiar with immigration law.²⁹³

Attorneys who represent unaccompanied minors should also be specially trained in representing child-clients and in child development. The need for this type of training is not unique to the immigration context. Scholars have written extensively about training for attorneys who represent children and the unique issues that must be resolved in this type of attorney-client relationship.²⁹⁴ The ABA Standards also explain why special training is necessary:

[T]he Child may find it extremely difficult to talk about what he has experienced. The Child may be afraid of being overwhelmed by emotions if he expresses them to someone else. He may also use particular behaviors to test whether the interviewer will react critically or sympathetically. Because the Child may feel guilty or ashamed about past experiences, such as service as a child soldier or sexual abuse, conveying respect for the Child and not judging his behavior, is important. In particular, if the Child is a female who has suffered sexual abuse in the past and the interviewer is a male, it may be helpful to have a female present during interviews to make the Child feel secure.²⁹⁵

For the most part, attorneys in the United States are not specifically required to receive specialized training before entering a new practice area, but both the ABA’s Model Rules and Standards require this type of training in the context of immigration proceedings for children. To begin with, all attorneys are required to represent their clients competently, and given the complexity

²⁹¹ Just as children in other high stakes proceedings need representation by attorneys who have special qualifications, unaccompanied minors do as well. The point here is to explain the need for extra training for attorneys; not that lay individuals with training can effectively represent these children.

²⁹² Benson & Wheeler, *supra* note 44, at 58.

²⁹³ *Id.* at 87.

²⁹⁴ See Buss, *supra* note 277.

²⁹⁵ AM. BAR ASSOC., *supra* note 274, § IV(C) Comments.

of immigration laws and processes, it would be difficult for many attorneys to do so without proper training. Beyond this generalized competency requirement, the ABA has explicitly concluded that attorneys for unaccompanied minors should be trained in immigration law and policy and EOIR proceedings, including evidentiary rules that differ from state and federal court rules.²⁹⁶ The ABA Standards also require training in child development and a child's needs and abilities, family dynamics and dysfunctional behaviors that impact children, child-sensitive interviewing techniques, and interviewing children in a culturally appropriate manner.²⁹⁷ These training requirements are consistent with developing human rights standards that require governments to act in children's best interests and to give children the right to express their own opinions. Catherine's case provides a real world example of how special training for attorneys furthers unaccompanied minors' best interests, as her lawyer was able to communicate with her and gather crucial information that immigration officials were not able to discern.

VI. CONCLUSION

Without a doubt, the suggestion that unaccompanied minors should be given a right to counsel will come under attack. Some will argue that there is no legitimate basis for such a right. Some will argue that we just do not have the resources to provide counsel to all children, so this is a fool's errand. Others may suggest that the government provide counsel for children only if resources are sufficient—and inevitably the resources will not be. But, as I have suggested, many children face extreme hardship and suffering when not provided with representation. Legal arguments to the side for the moment, how many children must suffer without an attorney to guide them through a process that can be life-defining? A reminder of the stakes for each child comes to me every month in an email from the National Center for Immigrant and Refugee Children, with the subject line "Children in Need of Representation." Here is an excerpt of this month's email:

Case of JM – Jacksonville, FL. This 16-year-old boy from Honduras fled to the United States as a last act of desperation after having endured a lifetime of abandonment, harrowing violence and homelessness. The boy had lived on his own since the age of 10, after his parents kicked him out of their house because they did not have enough money to provide for their entire family. When he did live with his parents, the boy endured daily physical abuse at the hands of his father, once so severe as to require hospitalization. The boy lived on the streets, which made him the target of local

²⁹⁶ *Id.* § IV(B).

²⁹⁷ *Id.*

*gang members, who shot him twice in the leg, believing him to be from a rival gang. Following this incident, the boy fled to the United States, where he now lives with his grandmother. The boy would like to remain in the U.S. and start school in the fall. Possible Relief: Special Immigrant Juvenile Status; Asylum.*²⁹⁸

With this child and many others in mind, my purpose with this Article is to set out a model for Congress to provide basic fairness.

²⁹⁸ E-mail from Stacy Jones, Staff Attorney, Nat'l Ctr. for Refugee & Immigrant Children, U.S. Comm. for Refugees & Immigrants, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 28, 2012, 15:37 EDT) (on file with author).

**AN INTERNATIONAL HUMAN RIGHT TO FREE LEGAL COUNSEL
FOR UNACCOMPANIED AND SEPARATED CHILDREN
IN U.S. IMMIGRATION PROCEEDINGS**

Sanjula S. Weerasinghe and Andrew I. Schoenholtz
Institute for the Study of International Migration
Georgetown University

TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
I. INTRODUCTION	3
<i>A. PURPOSE.....</i>	<i>3</i>
<i>B. STRUCTURE.....</i>	<i>3</i>
<i>C. DEFINITIONS.....</i>	<i>4</i>
II. MAIN SOURCES OF INTERNATIONAL LAW AND COMMENTARY.....	5
<i>A. INTRODUCTION.....</i>	<i>5</i>
<i>B. THE CONVENTION ON THE RIGHTS OF THE CHILD AND THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES.....</i>	<i>5</i>
<i>C. NON-DISCRIMINATION, BEST INTERESTS OF THE CHILD, AND SPECIAL PROTECTION AND ASSISTANCE.....</i>	<i>7</i>
<i>D. FREE LEGAL COUNSEL FOR CHILDREN DEPRIVED OF LIBERTY.....</i>	<i>11</i>
<i>E. FREE LEGAL COUNSEL FOR ASYLUM SEEKING CHILDREN.....</i>	<i>11</i>
III. POTENTIAL ARGUMENTS.....	14
<i>A. THE BEST INTERESTS OF THE CHILD SUPPORT THE RIGHT TO FREE LEGAL COUNSEL.....</i>	<i>14</i>
<i>B. CHILDREN TEMPORARILY OR PERMANENTLY DEPRIVED OF THEIR FAMILY ENVIRONMENT HAVE A RIGHT TO FREE LEGAL COUNSEL.....</i>	<i>15</i>
<i>C. FAIRNESS/ACCESS TO JUSTICE REQUIRES FREE LEGAL COUNSEL FOR UASC.....</i>	<i>16</i>
<i>D. DETAINED UASC HAVE A RIGHT TO FREE COUNSEL.....</i>	<i>18</i>
<i>E. UASC SEEKING ASYLUM HAVE A RIGHT TO FREE COUNSEL.....</i>	<i>18</i>
IV. CONCLUSION	22

I. INTRODUCTION

A. PURPOSE

This memorandum highlights international human rights law and commentary as well as potential arguments based on this law that could be utilized by U.S.-based advocates to promote a right to free legal counsel for unaccompanied and separated children navigating domestic immigration proceedings. Where relevant, the memorandum also references regional human rights law and national policies and identifies further avenues of research for advocates.

The right to counsel for these children matters in two important ways. First, children are not competent to represent themselves in any legal proceeding, and immigration removal law and procedure is complex. Second, research has long demonstrated that respondents in immigration court are several times more likely to gain asylum if they are represented.¹ Under current U.S. law (Immigration and Nationality Act Sec. 292, 8 U.S.C. Sec. 1362), however, unaccompanied and separated children are not provided with counsel at government expense. That means that they must depend on pro bono representation. While there are major efforts underway by advocacy organizations to recruit pro bono counsel for these children,² a significant number of unaccompanied and separated children are not represented in their immigration removal proceedings.³ Accordingly, advocacy organizations continue to campaign for mandated representation for this vulnerable population. International human rights law can helpfully support that campaign.

B. STRUCTURE

Section II of this memorandum introduces excerpts from international law and commentary directly or indirectly applicable to the provision of free legal counsel for unaccompanied and separated children in civil proceedings. This serves as background to the discussion in Section III on how the identified law and commentary could be utilized to support attempts to promote a right to free legal counsel for unaccompanied and separated children navigating immigration proceedings in the United States.

¹ See e.g. Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 742 (2002); Jaya Ramji-Nogales, Andrew I Schoenholtz & Phillip Schrag, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION* (NYU Press, 2009).

² See e.g. the Unaccompanied Children Program at the VERA Institute for Justice, Kids in Need of Defense (KIND), and the National Pro Bono Project for Children at the Catholic Legal Immigration Network Inc. (CLINIC).

³ For example, based on correspondence with the VERA Institute on December 2, 2010, only 19% of the children who were admitted into ORR custody between April 1, 2006 and March 31, 2008 (and whose cases were concluded (while the child was released) at the IJ stage by June 20, 2008) were represented at some point in their removal proceedings.

C. DEFINITIONS

For the purpose of this memorandum, the following definitions apply:

- Child: Every human being below the age of 18 years, unless under the law applicable to the child, majority is attained earlier.⁴
- Unaccompanied children: Children (as defined above) who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.⁵
- Separated children: Children (as defined above) who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. Accordingly separated children may include children accompanied by other adult family members.⁶
- Unaccompanied and separated children/child (“UASC”): This definition encapsulates the two immediately preceding definitions in their plural and singular forms, as relevant.

⁴ Convention on the Rights of the Child (CRC), at Article 1.

⁵ Committee on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin (General Comment No. 6), at paragraph 7.

⁶ *Id.* at paragraph 8.

II. MAIN SOURCES OF INTERNATIONAL LAW AND COMMENTARY

A. INTRODUCTION

The international materials discussed in this section include:

- The Convention on the Rights of the Child (1989);
- The Committee on the Rights of the Child: General Comment No. 6 on Treatment of Unaccompanied and Separated Children Outside Their Country of Origin (2005);
- The United Nations High Commissioner for Refugees' Executive Committee Conclusion No. 107 on Children at Risk (2007);
- The United Nations High Commissioner for Refugees' Guidelines on Child Asylum Claims Under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (2009); and
- The United Nations High Commissioner for Refugees' Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997).

Where relevant, references are also made to regional human rights law.

B. THE CONVENTION ON THE RIGHTS OF THE CHILD AND THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

As a preliminary matter, a brief introduction to the Convention on the Rights of the Child, the Committee on the Rights of the Child, the United Nations High Commissioner for Refugees and the Executive Committee of the United Nations High Commissioner for Refugees is provided. This treaty and bodies speak to the rights of UASC.

1. The Convention on the Rights of the Child

The Convention on the Rights of the Child (“**CRC**” or “**Convention**”) is the paramount international human rights treaty dedicated to the rights of children. Every nation except two has ratified the CRC; the United States and Somalia have, however, signed the treaty,⁷ and as a consequence, are obliged under international law to act in a manner consistent with the treaty’s object and purpose.⁸ In the very least, advocates can use the CRC for its persuasive value before policymakers and judges in the United States. If and when the United States ratifies and implements the CRC, advocates will then be able to argue that its provisions are binding in the United States. That would also be the case if a determination is made that some or all of the CRC’s provisions have become customary international law.

⁷ See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last accessed December 6, 2010)

⁸ Vienna Convention on the Law of Treaties, Article 18.

2. The Committee on the Rights of the Child and General Comment 6

The Committee on the Rights of the Child (the “**Committee**”) is a body of independent experts mandated pursuant to Article 43 of the CRC to measure State Party compliance and progress with obligations under the CRC. Progress and compliance is generally measured through a reporting mechanism intended to engender dialogue between the Committee and State Parties.⁹ In an attempt to improve implementation of the CRC, the Committee publishes interpretative guidance in the form of ‘General Comments’ to enhance State understanding of the CRC’s provisions and to highlight thematic concerns. The Committee’s General Comments are based on the experience gained through examination of State Party reports. While not strictly binding on States Parties, the Committee’s pronouncements are regarded as authoritative.¹⁰

The Committee’s General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin (“**GC6**”) is of particular relevance to the subject of this memorandum. This comment was issued in order to “draw attention to the particularly vulnerable situation of unaccompanied and separated children...”¹¹ and to “provide guidance on the protection, care and proper treatment of unaccompanied and separated children based on the entire legal framework provided by the Convention on the Rights of the Child...”¹²

3. The United Nations High Commissioner for Refugees and its Executive Committee

The United Nations High Commissioner for Refugees (“**UNHCR**”), a body established by the United Nations General Assembly, is mandated to lead and coordinate international action to protect refugees and resolve refugee problems worldwide. To this end, its primary purpose is to safeguard the rights of refugees. Pursuant to its mandate, UNHCR issues guidelines on various facets of international protection of asylum seekers and refugees. The Guidelines on Child Asylum Claims Under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (“**Guidelines on Child Asylum Claims**”) are intended to provide legal interpretative guidance for, *inter alia*, governments, legal practitioners, decision makers and the judiciary on carrying out asylum determinations.¹³ The Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (“**Guidelines on Unaccompanied Children Seeking Asylum**”) are intended to, *inter alia*, promote awareness of

⁹ All States Parties are obliged to submit regular reports to the Committee on how the rights in the CRC are being implemented. States must report initially two years after acceding to the Convention and then every five years. The Committee examines each report and addresses its concerns and recommendations to State Parties in the form of “concluding observations”. For information on the Committee, see <http://www2.ohchr.org/english/bodies/crc/> (last accessed on December 6, 2010). See also Mieke Verheyde and Geert Goedertier, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 43-45: THE UN COMMITTEE ON THE RIGHTS OF THE CHILD, (Martinus Nijhoff Publishers, 2006).

¹⁰ See e.g. Mieke Verheyde and Geert Goedertier, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 43-45: THE UN COMMITTEE ON THE RIGHTS OF THE CHILD, (Martinus Nijhoff Publishers, 2006), at 38-41.

¹¹ Committee on the Rights of the Child, General Comment No. 6, at paragraph 1.

¹² *Id.*

¹³ United Nations High Commissioner for Refugees, Guidelines on Child Asylum Claims Under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (Guidelines on Child Asylum Claims), at cover page.

the special needs of unaccompanied children and the rights reflected in the CRC.¹⁴ UNHCR's guidelines have been regarded to be of persuasive value in U.S. case law.¹⁵

The Executive Committee (“**ExCom**”) of the High Commissioner’s Programme,¹⁶ the governing body of the UNHCR adopts conclusions on international protection, which contribute to the development of international refugee law. ExCom has adopted Conclusion No. 107 on Children at Risk (“**Conclusion on Children at Risk**”) which is aimed at strengthening the protection of children at risk.¹⁷ Factors that put children in situations of heightened risk include individual risk factors such as being unaccompanied or separated,¹⁸ and wider environmental risk factors such as lack of access to child-sensitive asylum procedures.¹⁹ The Conclusion on Children at Risk provides operational guidance to States, UNHCR, and other relevant agencies and partners on the protection of children affected by forced displacement and statelessness and outlines the main aspects of a comprehensive child protection system.²⁰

C. NON-DISCRIMINATION, BEST INTERESTS OF THE CHILD, AND SPECIAL PROTECTION AND ASSISTANCE

This subsection introduces the principles of non-discrimination and best interests of the child. These represent two of four fundamental principles which underlie the Convention.²¹ This subsection also examines Article 20(1) of the CRC, which states that children temporarily or permanently deprived of their family environment are entitled to special protection and assistance provided by the State. The manner in which these principles may prove valuable for attempts to advocate for a right to free legal counsel for all UASC in immigration proceedings are discussed in section III.

1. Non-discrimination

¹⁴ United Nations High Commissioner for Refugees, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (Guidelines on Unaccompanied Children Seeking Asylum), at paragraph 1.3.

¹⁵ See *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (“[T]he Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.”)

¹⁶ The UN Economic and Social Council established this body in 1958 and it formally came into existence on January 1, 1959. The Executive Committee is currently composed of 79 member States, which includes the United States. For information on the Executive Committee, see <http://www.unhcr.org/pages/49c3646c83.html> (last accessed December 6, 2010).

¹⁷ See Executive Committee, Conclusion No. 107 (LVIII) – 2007 on Children at Risk (Conclusion on Children at Risk), at paragraph (a).

¹⁸ *Id.* at paragraph (c)(ii).

¹⁹ *Id.* at paragraph (c)(i).

²⁰ *Id.* at paragraph (a); See also Ron Pouwels, *UNHCR’s Executive Committee Conclusion on Children at Risk*, Refugee Survey Quarterly, 27(4).

²¹ The Committee has identified the following Articles of the CRC as general principles for its implementation: Article 2 (non-discrimination), Article 3(1) (best interests), Article 6 (right to life and survival and development) and Article 12 (right to express views and be heard). See Committee on the Rights of the Child, General Comment No. 5 (2003): General Measures of Implementation for the Convention on the Rights of the Child, at paragraph 12. See also Committee on the Rights of the Child, General Comment No. 6.

Pursuant to Article 2 of the CRC, States Parties to the Convention are required to respect and ensure the rights set forth in the Convention to each child within its jurisdiction and subject to its territory without discrimination of any kind, including on the basis of the child's status.²²

Article 2(1): States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

In its interpretative guidance, the Committee notes that the principle of non-discrimination applies in all dealings with UASC and does not prevent, and may indeed call for, affirmative action and differentiation on the basis of protection needs.

GC6: Paragraph 18: The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant. This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of different protection needs such as those deriving from age and/or gender....²³

A plethora of other international instruments including the Universal Declaration of Human Rights,²⁴ the United Nations Charter²⁵ and the International Covenant on Civil and Political Rights²⁶ also articulate the prohibition against discrimination.²⁷ Similarly, the notion that States may be required to undertake affirmative action in order to protect the rights of various vulnerable populations is also common to other international treaties.²⁸

Many regional treaties also articulate the prohibition against discrimination including, most notably, the American Convention on Human Rights.²⁹ While the United States has signed this treaty, it has yet to proceed with ratification.³⁰

²² This would include for example, the obligation to respect and ensure the rights in the CRC without discrimination on the basis of a child's immigration status.

²³ It is well established in international human rights law that not all differences in treatment constitute discrimination. Generally, the concept of differentiation in human rights law permits differences in treatment if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate.

²⁴ Universal Declaration of Human Rights, at Article 2.

²⁵ Charter of the United Nations, at Articles 1(3), 55 and 56.

²⁶ International Covenant on Civil and Political Rights, at Article 2.

²⁷ The Conclusion on Children at Risk indicates that strategies and actions to strengthen protection of children at heightened risk should be underpinned by fundamental principles. This includes ensuring the non-discriminatory enjoyment of rights and each child's right to life. See Executive Committee, Conclusion on Children at Risk, at paragraph (b).

²⁸ See e.g. Convention on the Elimination of Discrimination Against Women, Article 4.

²⁹ American Convention on Human Rights, at Article 1(1).

³⁰ See <http://www.oas.org/juridico/english/sigs/b-32.html> (last accessed December 6, 2010).

2. Best Interests of the Child

Similar to Article 2 on non-discrimination, Article 3(1) of the Convention, sets out a pivotal standard, which underpins all other rights articulated in the Convention. Article 3(1) provides that in all actions concerning children, the best interests of the child shall be a primary consideration.

Article 3(1): In all actions concerning children, whether undertaken by a public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

According to the Committee, as regards displaced children, the principle of the best interests of the child must be respected throughout the displacement cycle with the ultimate aim that any durable solution addresses the protection needs of UASC.

GC6: Paragraph 19: ...In the case of a displaced child, the principle must be respected during all stages of the displacement cycle....

GC6: Paragraph 79: The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs....

The CRC does not provide a definition of best interests. The Committee states that the concept does require a clear and comprehensive assessment of the child's particular vulnerabilities and protection needs and that in order to conduct this initial assessment a child should be given access to the State's territory.³¹

GC6: Paragraph 20: A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques.

While it is clear that the best interests concept is indeterminate, the Committee also notes that key procedural safeguards must be implemented in order to ensure respect for the best interests of an UASC; this includes the provision of a legal representative in addition to a guardian where a child is referred to asylum, administrative or judicial proceedings.

³¹ UNHCR's Guidelines on Unaccompanied Children Seeking Asylum also confirm that an unaccompanied child seeking asylum should not be refused access to the territory. At paragraph 4.1, it states the following: "Because of his/her vulnerability, an unaccompanied child seeking asylum should not be refused access to the territory and his/her claim should always be considered under the normal refugee determination procedure."

GC6 Paragraph 21: ...[T]he appointment of a competent guardian as expeditiously as possible serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied and separated child. Therefore such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.

Including the reference in Article 3, the best interests standard is invoked eight times in the Convention in seven articles.³² Regional instruments also endorse the best interests principle as a primary consideration in actions concerning children³³ while the Conclusion on Children at Risk recognizes that strategies and actions under it should be underpinned by, *inter alia*, the best interests principle.³⁴ The standard is also a familiar concept in U.S. family law.

3. Special Protection and Assistance

Article 20(1) of the CRC, addresses the situation of children who are temporarily or permanently deprived of their family environment and states that such children are entitled to *special protection and assistance* provided by the State. In this respect, UASC would be entitled to the protection afforded under this article.

Article 20(1): A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

The Committee clearly states that UASC fall within the protection afforded under Article 20(1).

GC6: Paragraph 39: Unaccompanied or separated children are children temporarily or permanently deprived of their family environment and, as such, are beneficiaries of States' obligations under article 20 of the Convention and shall be entitled to special protection and assistance provided by the relevant State.

In interpreting Articles 18(2) and 20(1), the Committee notes that States are required to undertake necessary measures to secure the proper representation of UASC's best interests. According to the Committee, necessary measures include the provision of legal representation where children are involved in asylum, administrative or judicial proceedings.

³² See Articles 3(1), 9(1), 9(3), 18(1), 20(1), 21, 37(c) and 40(2)(b)(iii).

³³ See e.g. Charter of Fundamental Rights of the European Union, Article 24(2) and African Charter on the Rights and Welfare of the Child, at Article 4(1).

³⁴ See Executive Committee, Conclusion on Children at Risk, at paragraph (b)(v):

GC6: Paragraph 33: States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child's best interests....

GC6: Paragraph 36: In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.

D. FREE LEGAL COUNSEL FOR CHILDREN DEPRIVED OF LIBERTY

In Article 37(d), the CRC explicitly addresses the right to counsel for all children, including UASC, who are deprived of liberty.

Article 37(d): Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

The Committee elaborates that the right to “prompt access to legal and other appropriate assistance” is a right to prompt and *free* access, and that children should have the opportunity to make regular contact with, and receive visits from, legal counsel.

GC6: Paragraph 63: ...In order to effectively secure the rights provided by article 37(d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative.

GC6: Paragraph 63: ...Children should have the opportunity to make regular contact and receive visits from... legal counsel and their guardian....

As to the definition of “deprivation of liberty” the Committee notes “that the rights of a child deprived of his/her liberty, as recognized in the Convention, apply with respect to children in conflict with the law, and to children placed in institutions for the purposes of care, protection or treatment, including... child protection or immigration institutions.”³⁵

E. FREE LEGAL COUNSEL FOR ASYLUM SEEKING CHILDREN

The CRC also imposes obligations on States Parties with regards to asylum seeking children. In particular, the CRC requires States to ensure that such children receive *appropriate protection* in

³⁵ Report of the Committee on the Rights of the Child, Sixty-third Session, Supp. 41, at 55, footnote a.

the enjoyment of applicable rights set forth in the Convention and in other international human rights and humanitarian instruments to which the State is a party.

Article 22(1): States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

The Committee elaborates, noting that where UASC are referred to asylum procedures or other administrative or judicial proceedings, appropriate measures include *providing* such children with a legal representative. According to the Committee, refugee status applications of UASC seeking asylum must be given priority and should be determined promptly and *fairly*.

GC6: Paragraph 21: ...In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be *provided with* a legal representative in addition to a guardian. (emphasis added)

GC6: Paragraph 36: In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be *provided with* legal representation. (emphasis added)

GC6: Paragraph 68: Appropriate measures required under article 22(1) of the Convention must take into account the particular vulnerabilities of unaccompanied and separated children. Such measures should be guided by the considerations set out below.

GC6: Paragraph 69: ...The unaccompanied or separated child should also, in all cases, be given access, *free of charge*, to a qualified legal representative, including where the application for refugee status is processed under the normal procedures for adults. (emphasis added)

GC6: Paragraph 70: Refugee status applications filed by unaccompanied and separated children shall be given priority and every effort should be made to render a decision promptly and *fairly*. (emphasis added)

GC6: Paragraph 72: ...The guardian and the legal representative should be present during all interviews.

In its recent Guidelines on Child Asylum Claims, UNHCR notes that due to their young age, dependency and relative immaturity, children should enjoy specific procedural safeguards to ensure that *fair* refugee status determination decisions are reached with respect to their claims.

According to UNHCR, minimum standards include an entitlement, arguably free of charge, to a legal representative where children are principal applicants in asylum procedures.

Paragraph 65: Due to their young age, dependency and relative immaturity, children should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims.³⁶ The general measures outlined below set out minimum standards for the treatment of children during the asylum procedure.

Paragraph 69: An independent, qualified guardian needs to be appointed immediately, free of charge in the case of unaccompanied and separated children. Children who are the principal applicants in an asylum procedure are also entitled to a legal representative.³⁷ Such representatives should be properly trained and should support the child throughout the procedure.

These guidelines also state that a child sensitive application of the refugee definition would be consistent with the CRC and that the principles of non-discrimination and best interests of the child (discussed in subsection C above) “inform both the substantive and the procedural aspects of the determination of a child’s application for refugee status.”³⁸

As part of its operational guidance to States and other entities, the Conclusion on Children at Risk identifies “components that may form part of a comprehensive child protection system, with the aim of strengthening the protection of children at risk”.³⁹ In this regard, the Conclusion states that the best interests of the child shall be a primary consideration in all actions concerning children.⁴⁰ It also recommends that States and other relevant agencies act to prevent children being put at heightened risk by providing qualified free legal representation for UASC.⁴¹

The UNHCR’s Guidelines on Unaccompanied Children Seeking Asylum provides that upon arrival, a child should be provided with a legal representative and states that claims from unaccompanied children should be examined in a fair manner.

Paragraph 4.2: Upon arrival, a child should be provided with a legal representative. The claims of unaccompanied children should be examined in a manner which is both fair and age-appropriate.

³⁶ “The relevant applicable age for children to benefit from the additional procedural safeguards elaborated in this section is the date the child seeks asylum and not the date a decision is reached...” United Nations High Commissioner for Refugees, Guidelines on Child Asylum Claims, at paragraph 65, footnote 129.

³⁷ “...Legal representative” refers to a lawyer or other person qualified to provide legal assistance to, and inform, the child in the asylum proceedings and in relation to contacts with authorities on legal matters...” United Nations High Commissioner for Refugees, Guidelines on Child Asylum Claims, at paragraph 69, footnote 135.

³⁸ United Nations High Commissioner for Refugees, Guidelines on Child Asylum Claims, at paragraph 5.

³⁹ Executive Committee, Conclusion on Children at Risk, at paragraph a.

⁴⁰ *Id.* at paragraph b(v).

⁴¹ *Id.* at paragraph b(viii).

III. POTENTIAL ARGUMENTS

This section identifies potential arguments, which could be utilized by U.S.-based advocates to promote a right to free legal counsel for UASC navigating immigration proceedings in the United States. The arguments are intended to provide a broad framework within which advocacy strategies and campaigns promoting a right to free legal counsel can be designed. Once advocates identify the most compelling and promising arguments, further research on the merits of these arguments will be undertaken.

Within this context, the following potential arguments are discussed:

- Respect for the best interests of the child requires procedural safeguards for UASC, which includes the provision of free legal counsel in immigration proceedings;
- Children who are temporarily or permanently deprived of their family environment have a right to free legal counsel;
- Fairness/access to justice for UASC necessarily requires free legal counsel;
- Detained UASC have a right to free legal counsel; and
- UASC seeking asylum have a right to free legal counsel.

A. THE BEST INTERESTS OF THE CHILD SUPPORT THE RIGHT TO FREE LEGAL COUNSEL

An overarching argument that is open to U.S.-based advocates is one based on respect for the best interests of the child.

As previously discussed, the non-discrimination principle expressed in Article 2 of the CRC imposes an obligation on States Parties to respect and ensure the rights set forth in the Convention to each child within its jurisdiction without discrimination of any kind, including on the basis of the child's status as a foreign national. One such right, as identified in Article 3 of the CRC, requires that the best interests of the child be a primary consideration in all actions concerning children. Accordingly, the combined application of these two articles requires that the best interests of the child be a primary consideration in all actions concerning UASC who are within the jurisdiction of the United States.

According to the Committee, in order to respect the best interests principle, both substantive and procedural safeguards must be implemented.⁴² Notably, the Committee highlights that in circumstances where UASC are referred to administrative, judicial or asylum proceedings, a key procedural safeguard includes the *provision of* a legal representative.⁴³ Arguably, this wording suggests that a mere right or access to legal representation for UASC is inadequate to ensure respect for their best interests when they are navigating civil proceedings; rather, in such circumstances, there is an obligation on States to *provide* children with a legal representative in

⁴² Committee on the Rights of the Child, General Comment No. 6, paragraph 21.

⁴³ *Id.* at 21 and 36.

order to ensure respect for their best interests. This argument can be buttressed by highlighting the heightened vulnerability of UASC as acknowledged by ExCom,⁴⁴ and the Committee.⁴⁵

If advocates decide to campaign for a right to free legal counsel on the basis of respect for the best interests of the child, additional research on its application to procedural safeguards should be undertaken. This should include a review of relevant literature, a review of regional and national jurisprudence (as the best interests concept is used in many domestic settings) as well as an exhaustive review of the Committee's recommendations to State Parties.

B. CHILDREN TEMPORARILY OR PERMANENTLY DEPRIVED OF THEIR FAMILY ENVIRONMENT HAVE A RIGHT TO FREE LEGAL COUNSEL

Another overarching argument open to U.S.-based advocates is one based on Article 20(1) of the CRC. Article 20(1) recognizes the heightened vulnerability of children who do not have the protection of a family environment; it provides that any child who is “temporarily or permanently deprived of his or her family environment... shall be entitled to *special protection* and assistance provided by the State” (emphasis added). As children who are temporarily or permanently deprived of their family environment, UASC fall within the protection afforded by this article.⁴⁶

While special protection and assistance is not defined in the CRC, in paragraph 33 of GC6, the Committee in interpreting Article 20(1)⁴⁷ provides that “States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child’s best interests.” In this context, the Committee subsequently states in paragraph 36 that “[i]n cases where children are involved in asylum procedures or

⁴⁴ See Executive Committee, Conclusion on Children at Risk, at paragraph (c)(ii) (discussing individual risk factors)

⁴⁵ See Committee on the Rights of the Child, General Comment No. 6, at paragraph 3 (stating “The issuing of the general comment is further motivated by the Committee’s identification of a number of protection gaps in the treatment of such children, including the following: unaccompanied and separated children face greater risks of, inter alia, sexual exploitation and abuse, military recruitment, child labour (including for their foster families) and detention. They are often discriminated against and denied access to food, shelter, housing, health services and education. Unaccompanied and separated girls are at particular risk of gender-based violence, including domestic violence. In some situations, such children have no access to proper and appropriate identification, registration, age assessment, documentation, family tracing, guardianship systems or legal advice. In many countries, unaccompanied and separated children are routinely denied entry to or detained by border or immigration officials. In other cases they are admitted but are denied access to asylum procedures or their asylum claims are not handled in an age and gender-sensitive manner. Some countries prohibit separated children who are recognized as refugees from applying for family reunification; others permit reunification but impose conditions so restrictive as to make it virtually impossible to achieve. Many such children are granted only temporary status, which ends when they turn 18, and there are few effective return programmes.”)

⁴⁶ See Committee on the Rights of the Child, General Comment No. 6, at paragraph 39.

⁴⁷ Article 20(1) is interpreted together with Article 18(2). Article 18(2) of the CRC states that “[f]or the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.”

Based on Article 20(1) and the Committee’s interpretation of this article in paragraphs 33 and 36 of GC6, advocates can argue that UASC are entitled to special protection and assistance from the State, and that this concept of special protection and assistance encompasses the provision of free legal representation for UASC during immigration proceedings. If advocates decide to campaign for a right to free legal counsel on this basis, additional research should be undertaken on the interpretation of “special protection and assistance” as well as “protection and assistance”. This should include a review of relevant literature, a review of regional and national jurisprudence as well as an exhaustive review the Committee’s recommendations to State Parties.

C. FAIRNESS/ACCESS TO JUSTICE REQUIRES FREE LEGAL COUNSEL FOR UASC

A complementary argument to those highlighted in the preceding two subsections is one based on fairness/access to justice. As discussed above, the CRC explicitly provides that children temporarily or permanently deprived of their family environment are entitled to “special protection and assistance provided by the State.”⁴⁸ As regards the subset of asylum seeking children, the CRC also requires States to take appropriate measures to ensure that such children “receive appropriate protection” in the enjoyment of rights set forth in the Convention and other international human rights or humanitarian instruments to which they are a party.⁴⁹ Regarding the content of special protection, the Committee in GC6 states that it encompasses the provision of legal representation, in addition to the provision of guardianship for UASC, where they are involved in administrative, judicial or asylum procedures.⁵⁰ Similarly, in elaborating the content of appropriate protection for asylum seeking children, the Committee states that UASC should “in all cases, be given access, free of charge, to a qualified legal representative”.⁵¹ The Committee further states that the refugee status applications of UASC must be given priority and “every effort should be made to render a decision promptly and *fairly*.”⁵² (emphasis added)

Articles 20(1) and 22(1) and the Committee’s interpretation of these articles in GC6 together arguably reflect an attempt to incorporate notions of fairness and access to justice by accommodating the specific protection needs of children temporarily or permanently deprived of their family environment and UASC seeking asylum. The Committee’s interpretation suggests that where such children are navigating asylum, administrative or judicial procedures, mere guardianship is inadequate to comply with the requirement to provide appropriate or special protection. Rather, the provision of legal representation is a necessary component to ensuring that the rights of such children are adequately protected. In this regard, appropriate and special protection seems to reflect an attempt to level the playing field and ensure that UASC who have

⁴⁸ Convention on the Rights of the Child, at Article 20(1).

⁴⁹ *Id.* at Article 22(1).

⁵⁰ Committee on the Rights of the Child, General Comment 6, at paragraph 36.

⁵¹ *Id.* at, paragraph 69.

⁵² *Id.* at, paragraph 72.

specific protection needs and who by nature of their age do not have the capacity to represent themselves have a fair opportunity to defend and enjoy their rights.⁵³

In a similar vein to the Committee's guidance, UNHCR's commentary also correlates the provision of legal representation with notions of fairness. In its Guidelines on Child Asylum Claims, UNHCR notes that due to their young age, dependency and relative immaturity, children should enjoy specific procedural safeguards, including legal representation, to ensure that *fair* refugee status determination decisions are reached with respect to their claims.⁵⁴

In GC6, the Committee also states that “[t]he ultimate aim in addressing the needs of unaccompanied and separated children is to identify a durable solution that addresses all their protection needs and takes into account their view...”⁵⁵ In this regard, a legitimate argument exists to the effect that fair asylum, judicial and administrative proceedings are necessary to identify durable solutions that, address all the protection needs of UASC, are in their best interests and protects their legal rights such as those relating to non-refoulement.

Within this framework, and in light of the acute vulnerability of UASC, advocates can argue that in order to ensure fairness/access to justice for UASC, they should be provided with free legal representation in immigration proceedings. Fairness requires that individuals who do not have the capacity to protect their legal rights be provided with the necessary procedural safeguards, including free legal representation. The Committee's interpretation of special and appropriate protection in GC6 for children temporarily deprived of their family environment and asylum seeking children, respectively, supports this position.

If advocates decide to campaign for a right to free legal counsel on the basis of an argument related to fairness/access to justice, additional research on the content of “special protection” and “appropriate protection” should be undertaken. Beyond the committee's interpretation of those terms in GC6, it may also prove valuable to exhaustively review the Committee's recommendations to State Parties in individual State Party reports, and to review relevant literature as well as regional and national jurisprudence.

⁵³ Despite the primarily implicit nature of this argument, in paragraph 72 of its General Comment No. 6, the Committee explicitly refers to fairness in refugee status determination procedures for UASC. Additionally, the Committee's reasons for issuing General Comment No. 6 were at least partially motivated by gaps in protection experienced by UASC. See Committee on the Rights of the Child, General Comment No. 6, paragraph 3, which states that the “issuing of the general comment is further motivated by the Committee's identification of a number of protection gaps in the treatment of [UASC] children, including the following: unaccompanied and separated children face greater risks of, inter alia, sexual exploitation and abuse, military recruitment, child labour (including for their foster families) and detention.... In some situations, such children have no access to proper and appropriate identification, registration, age assessment, documentation, family tracing, guardianship systems or legal advice. In many countries, unaccompanied and separated children are routinely denied entry to or detained by border or immigration officials....” See *also*, Committee on the Rights of the Child, General Comment No. 6, at paragraph 1.

⁵⁴ United Nations High Commissioner for Refugees, Guidelines on Child Asylum Claims, at paragraphs 65 and 69.

⁵⁵ Committee on the Rights of the Child, General Comment No. 6, at paragraph 79.

D. DETAINED UASC HAVE A RIGHT TO FREE COUNSEL

The three arguments discussed in the preceding sections could assist in providing a right to free legal counsel for all UASC navigating immigration proceedings in the United States. A narrower argument that is also open to advocates concerns the promotion of a right to free counsel for detained UASC.

In this regard, the explicit reference to prompt legal assistance for detained children in Article 37(d) when combined with the Committee's interpretation that Article 37(d) relates to prompt and free legal assistance could be utilized by advocates to campaign for a right to free legal assistance for all UASC in U.S. custody.

Under this argument, advocates should utilize, the Committee's liberal interpretation of deprivation of liberty, which indicates "that the rights of a child deprived of his/her liberty, as recognized in the Convention, apply with respect to children... placed in institutions for the purposes of care, protection or treatment, including... child protection or immigration institutions."⁵⁶ This interpretation arguably includes not only children in DHS and DHS-contracted detention facilities, but also the much larger number of UASC who have been placed in facilities contracted by the Office of Refugee Resettlement/Health and Human Services for the purposes of care and protection.

In light of the near universal ratification of the CRC, a campaign for a right to free legal counsel for detained UASC may benefit from an examination of State practice with regard to Article 37(d). A useful starting point for this analysis will include State Party reports submitted to the Committee, followed by a review of national law and policies. Such an examination may highlight the extent to which there is scope to argue that the requirements under Article 37(d), particularly as interpreted by the Committee, have become customary international law. In this regard, attention should be paid to European countries, which have experienced a pronounced increase in the migration of UASC in recent times.

After determining which States have implemented laws consistent with Article 37(d) of the CRC, it may also be valuable to undertake background research on efforts leading to the implementation of the relevant national laws in those States. This may highlight advocacy and campaign lessons for U.S.-based advocates. In this regard, a useful starting point would be Sweden, which requires public counsel to be appointed for children held in detention if they do not have a custodian in the country.⁵⁷

E. UASC SEEKING ASYLUM HAVE A RIGHT TO FREE COUNSEL

Finally, another more limited argument open to advocates relates to a right to free legal counsel for UASC seeking asylum in the United States.

⁵⁶ Report of the Committee on the Rights of the Child, Sixty-third Session, Supp. 41, at 55, footnote a.

⁵⁷ Aliens Act, Ch. 18, Sec. 1, available at <http://www.sweden.gov.se/content/1/c6/06/61/22/bfb61014.pdf>.

As discussed earlier, in addition to singling out children who are temporarily and permanently deprived of their family environment, the CRC also imposes obligations on States Parties to ensure that asylum-seeking children receive appropriate protection.⁵⁸ Within this context, the Committee has repeatedly elaborated that appropriate protection measures include the provision of free, qualified legal representation where UASC are navigating asylum procedures.⁵⁹ The Committee has also noted that the legal representative should be present at all interviews with the child.⁶⁰

UNHCR's guidance confirms that the principles of non-discrimination and best interests of the child should inform procedural aspects of a determination of a child's refugee status.⁶¹ In this regard, UNHCR's commentary highlights the importance of qualified legal representation for children who are principal applicants in asylum procedures as a minimum procedural safeguard to ensure fairness in refugee status determinations.⁶²

An argument on the right to free legal counsel based on Article 22(1) of the CRC as well as the commentary and guidance of the Committee and UNHCR should highlight the importance of legal representation for UASC in U.S. immigration proceedings. For example, empirical research has highlighted the critical importance of legal representation for success in U.S. asylum proceedings.⁶³ Additionally, an UASC's chance of gaining asylum could be impacted by the risk that he/she may not be able to clearly articulate subjective fear and relevant experiences,⁶⁴ and where adjudicators are unfamiliar with forms and manifestations of persecution experienced by children (i.e. under-age recruitment, trafficking, sexual exploitation, female genital mutilation, forced marriage and persecution of kin) and fail to handle children's claims in an age-sensitive manner.⁶⁵

If attempts are made to advocate for a right to free legal counsel for UASC seeking asylum in the United States, it may be valuable to keep abreast of developments in Europe regarding the proposed recast (a consolidated legislative enactment, which incorporates existing and additional amendments)⁶⁶ of the Council Directive on Minimum Standard on Procedures in Members States

⁵⁸ Convention on the Rights of the Child, at Article 22(1).

⁵⁹ Committee on the Rights of the Child, General Comment No. 6, at paragraphs 21, 36, 68-69.

⁶⁰ *Id.* at paragraph 72.

⁶¹ United Nations High Commissioner for Refugees, Guidelines on Child Asylum Claims, at paragraph 5.

⁶² *Id.* at paragraphs 65 and 69.

⁶³ See e.g. Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 742 (2002); Jaya Ramji-Nogales, Andrew I Schoenholtz & Phillip Schrag, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION* (NYU Press, 2009).

⁶⁴ See generally, Immigration and Refugee Board of Canada, Guideline 3: Child Refugee Claimants Procedural and Evidentiary Issues, available at <http://www.irb.gc.ca/eng/brdcom/references/pol/guidir/pages/ChiEnf.aspx> (last accessed December 8, 2010); The Committee on the Rights of the Child, General Comment No. 6, at paragraph 66; See e.g. United Nations High Commissioner for Refugees, Guidelines on Child Asylum Claims, at paragraph 11; United Nations High Commissioner for Refugees, Guidelines on Unaccompanied Children Seeking Asylum, at paragraph 8.6.

⁶⁵ See generally Executive Committee, Conclusion on Children at Risk; United Nations High Commissioner for Refugees, Guidelines on Child Asylum Claims; The Committee on the Rights of the Child, General Comment No. 6, at paragraphs 3, 59 and 74.

⁶⁶ Recasting is like codification in that it brings together in a single new legislative act all the amendments made to it. The new act passes through the full legislative process and repeals all the acts being recast.

for Granting and Withdrawing Refugee Status.⁶⁷ In its proposed Article 21(4), the recast states that subject to limited exceptions, “unaccompanied minors shall be granted free legal assistance with respect to all procedures provided for in this directive.”⁶⁸ In light of the magnitude of migration of UASC into Europe, if and when this recast becomes operative,⁶⁹ it arguably has the capacity to significantly influence consensus in State practice, which in turn may be of persuasive value in influencing reform in the United States.

At present, it should be noted that some European countries provide legal representation to UASC in asylum proceedings in certain circumstances. For example, in Denmark, there are strict rules for unaccompanied minors in appeals proceedings. In addition to the general right to have counsel appointed by the Refugee Appeals Board, Denmark provides all unaccompanied minors with counsel in cases where the Danish Immigration Service does not deem the case appropriate for a hearing in front of the Refugee Appeals Board.⁷⁰ “If the Danish Immigration Service submits a case concerning a residence permit under section 7 for a child falling within subsection (1) to the Danish Refugee Council... the Danish Immigration Service shall at the same time assign counsel to the child unless the child has itself retained one.”⁷¹ A Section 7 residence permit is essentially the grounds to claim refugee status, subsection 1 outlines the definition of an unaccompanied minor, and the Danish Refugee Council reporting only occurs when immigration officials deem the case unsuitable for the Refugee Appeals Board. So, in addition to being represented in front of the Appeals Board, unaccompanied minors have a right to legal counsel even if their case is denied a hearing in front of that board.⁷²

Other countries also have general requirements regarding free legal counsel or legal aid that often cover UASC in asylum proceedings.⁷³ For example, in the United Kingdom, means-tested,

But unlike codification, recasting involves new substantive changes, as amendments are made to the original act during preparation of the recast text. See

http://ec.europa.eu/dgs/legal_service/recasting_en.htm (last accessed December 8, 2010)

⁶⁷ See Amendment proposed by 52009PC0554 Repeal, at <http://eur-lex.europa.eu/Notice.do?val=418705:cs&lang=en&list=418705:cs,&pos=1&page=1&nbl=1&pgs=10&hwor ds=Granting%20and%20Withdrawing%20Refugee%20Status~> (last accessed December 8, 2010)

⁶⁸ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009PC0554:EN:HTML> (last accessed December 8, 2010).

⁶⁹ As a consequence of the entry into force of the Treaty of Lisbon on 1 December 2009, the European Parliament and the European Council will have to decide on proposals presented by the Commission (such as the recast proposal on granting and withdrawing asylum status discussed above), on the basis of Treaties, before that date and that are at different stages of the legislative process. As of August 2010, the recast proposal is awaiting a parliamentary decisions/first parliamentary reading; See <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=COD/2009/0165>. This link will continue to be updated as the recast moves through the relevant legislative process.

⁷⁰ Aliens (Consolidation Act) §56a, available at http://www.nyidanmark.dk/NR/rdonlyres/C2A9678D-73B3-41B0-A076-67C6660E482B/0/alens_consolidation_act_english.pdf.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Sweden typically provides counsel for the most serious immigration proceedings. Norway has a general right to legal counsel under Immigration Act § 34; Denmark, under §55 of Aliens Consolidation Act (available at http://www.nyidanmark.dk/NR/rdonlyres/C2A9678D-73B3-41B0-A076-67C6660E482B/0/alens_consolidation_act_english.pdf) provides counsel at the Refugee Appeals Board, unless it is not reasonable to do so; Finland, under the Legal Aid Act (available at <http://www.finlex.fi/en/laki/kaannokset/2002/en20020257.pdf>) provides a right to counsel in most administrative proceedings, and Section 9 of Aliens Act (available at

publicly-funded legal aid is available to asylum seekers who qualify.⁷⁴ Outside Europe, both New Zealand and Canada have legal aid schemes which cover UASC. In New Zealand, for example, all refugee status determinations, including all applicable appeals, are eligible for legal aid under part 2, section 7, of the Legal Services Act 2000.⁷⁵ Guideline 3 on Child Refugee Claimants issued by the Canadian Immigration and Refugee Board, provides that the Immigration Act (now the Immigration and Refugee Protection Act) requires the designation of a representative for all child claimants.⁷⁶ One duty imposed on designated representatives relates to the retention of counsel,⁷⁷ and federally-funded legal aid is available to retain counsel.⁷⁸

If advocates decide to campaign for a right to free legal counsel for UASC seeking asylum, given the shared common law heritage between the United Kingdom, Canada, New Zealand and the United States, consideration should be given to undertaking additional research on the provision of legal aid to UASC in asylum proceedings in these countries to determine whether lessons from these countries may lend assistance to advocacy in the United States. Additionally, case law research should be undertaken in applicable countries to determine whether national and regional courts have made persuasive pronouncements regarding the importance of counsel for children and particularly UASC in asylum proceedings.

<http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf>) requires that legal aid be provided under the requirements of the Legal Aid Act.

⁷⁴ See e.g., Community Legal Advice, Asylum seekers and refugees, <http://www.communitylegaladvice.org.uk/gateway/immigration.jsp?rid=5665> (last visited June 15, 2010). Check to see if available on UK Border Agency website, such as Home Office, UK Border Agency, Rights and Responsibilities <http://www.ukba.homeoffice.gov.uk/asylum/rights/>

⁷⁵ See <http://www.legislation.govt.nz/act/public/2000/0042/latest/DLM71807.html> (last visited June 15, 2010).

⁷⁶ See Immigration and Refugee Board of Canada, Guideline 3: Child Refugee Claimants Procedural and Evidentiary Issues, available at <http://www.irb.gc.ca/eng/brdcom/references/pol/guidir/pages/ChiEnf.aspx> (last accessed December 8, 2010).

⁷⁷ *Id.*

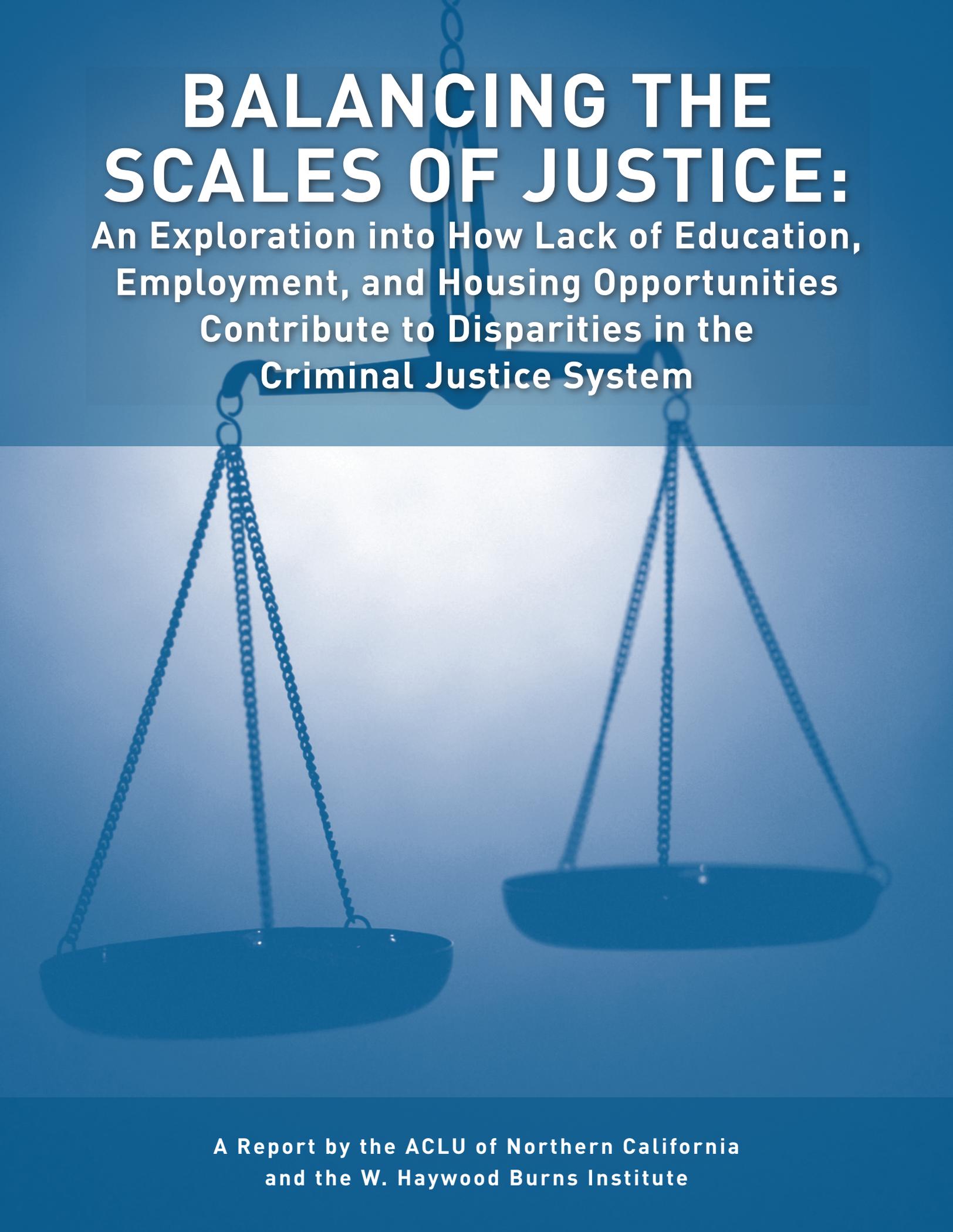
⁷⁸ Correspondence with practitioners acting as designated representatives for UASC in Canada (on file).

IV. CONCLUSION

This memorandum provides an introduction to applicable international human rights law and commentary supporting a right to free legal counsel for UASC navigating U.S. immigration proceedings. The arguments identified in this memorandum are particularly based on the CRC, which is not binding on the United States as a consequence of its non-ratification. Nonetheless, given the CRC's near universal ratification record, advocates can use arguments based on the CRC for its persuasive value before policymakers and judges in the United States. If and when the United States ratifies and implements the CRC, advocates will then be able to argue that its provisions are binding in the United States. That would also be the case if a determination is made that some or all of the CRC's provisions have become customary international law.

This memorandum identifies five potential arguments which could be utilized by U.S.-based advocates to campaign for a right to free legal counsel for UASC in immigration proceedings. Three of these arguments have the potential to provide a right to free legal counsel for all UASC in the United States. The first argument is based on utilizing the best interests of the child and non-discrimination concepts, which are pivotal to the CRC, the paramount international human rights instrument dedicated to the defense of children's rights. This argument essentially provides that respect for the best interests of UASC requires implementation of procedural safeguards, which includes the provision of free legal counsel in immigration proceedings. The second broad argument is based on Article 20(1) of the CRC which singles out children temporarily or permanently deprived of their family environment for special protection and assistance. An argument for the provision of free legal counsel for such children navigating immigration proceedings is founded on Committee guidance. The last all encompassing argument is based on access to justice and fairness and is underpinned by provisions in the CRC as well as guidance by the Committee and UNHCR. Provisions of the CRC and Committee and UNHCR guidance also support arguments for a right to free legal counsel for two narrower categories of UASC, those detained and those seeking asylum.

Once advocates identify the most compelling and promising arguments, further research on the merits of these arguments will be undertaken. To this end, some additional avenues for research have been identified.



BALANCING THE SCALES OF JUSTICE:

**An Exploration into How Lack of Education,
Employment, and Housing Opportunities
Contribute to Disparities in the
Criminal Justice System**

**A Report by the ACLU of Northern California
and the W. Haywood Burns Institute**

TABLE OF CONTENTS

EXECUTIVE SUMMARY.....	i
INTRODUCTION.....	1
Part I	
METHODOLOGY: A THREEFOLD APPROACH.....	2
Part II	
FINDINGS.....	6
CONCLUSION.....	12
ENDNOTES.....	13
APPENDICES	
A. Extra-Judicial Factors Explored.....	15
B. Criminal Justice Decision-Making Terms.....	16
C. Interview Questionnaire.....	19

COUNTY PROFILES

County-level data from Alameda, Fresno, and Los Angeles Counties were analyzed for purposes of this study.

For a discussion of this county-level data, please see *Balancing the Scales of Justice: County Profiles* at: www.aclunc.org/docs/racial_justice/balancing_the_scales_of_justice_county_profiles.pdf.

ACKNOWLEDGMENTS

This report was written by Diana Tate Vermeire and Natalia Merluzzi, Racial Justice Project Director and Fellow, respectively, at the American Civil Liberties Union of Northern California and Laura John Ridolfi, Law and Policy Analyst at the W. Haywood Burns Institute.

Assistance with data analysis was provided by Nathan Woods and Daniel Cooper.

We thank Saneta deVuono-Powell, former Racial Justice Project Fellow, for her extensive work on this study for nearly two years. We also thank Audrey Grace and Evonne Silva for their assistance in administering interviews.

This publication is made possible by the generous support of the Race, Gender and Human Rights Fund of the Women’s Foundation of California, Rosenberg Foundation, and Fund for Nonviolence.

EXECUTIVE SUMMARY

At a time of growing need, California continues to slash basic safety net programs and underfund public education and other critical services. The state's criminal justice system, however, does not turn anyone away. It has evolved into society's catchall institution. As a result, California's criminal justice system has experienced historic growth and a correlating mass incarceration of racial and ethnic minorities over the past 30 years. Consequently, people of color are disproportionately represented in the criminal justice system, and the number of women in the criminal justice system is increasing at a disproportionate rate. Systemic bias within the criminal justice system contributes to this disproportionality, but it is not the sole cause of the expansion of the system and the disparities within the system. Instead, the racial, ethnic, and gender disparities found within our criminal justice system are created—in part—by external socio-economic factors.

External socio-economic factors, including adequate educational, employment, and housing opportunities, protect privileged individuals from contact with the criminal justice system. However, for those living in concentrated areas of poverty, especially racial and ethnic minorities, lack of access to basic necessities such as quality education, employment, and housing, increases the likelihood of criminal justice system contact. Moreover, the interventions meant to address socio-economic inequities are failing and as a result the criminal justice system is assuming the responsibilities of these failed governmental programs and agencies. With significant budget cuts for all social service institutions, the number of individuals served and the scope of available services continues to decrease.

Socio-economic inequities contribute to disparities in the criminal justice system. Yet, due to a lack of data and research, it is impossible to measure the force and impact of these external factors on criminal justice system involvement and the extent to which they exacerbate the systemic and institutional bias and racism within the criminal justice system.

METHODOLOGY

The American Civil Liberties Union of Northern California (ACLU-NC) and the W. Haywood Burns Institute (BI) conducted this exploratory pilot study to examine how interlocked socio-economic factors operating outside the justice system encourage, enforce, and complement patterns of disproportionate criminal justice system involvement for people of color and women. Emphasis was not placed on testing precise hypotheses, but rather on outlining operable research questions, identifying relevant criminal justice and socio-economic statistics related to the research questions, and conducting preliminary analyses of the available statistics. Specifically, this study explored the relationship between extra-judicial factors of education, employment, and housing and the disparities in the criminal justice system in three California counties: Alameda, Fresno, and Los Angeles. The goal was to identify critical variables and to generate possible lines of inquiry about the relationships among these overlapping, unanalyzed factors and their effect on communities of color and women in California.

The study is comprised of three distinct data sources that were analyzed and form the basis for this report. The first data source is relevant social science literature that discusses the problem, prevalence, and contributors to racial, ethnic, and gender disparities found at various points in our criminal justice system, from police stops to filing charges to incarceration. The literature review also explores whether and to what extent communities of color and women experience inequities in access to education, employment, and housing. The second data source is county-level statistics broken down by race, ethnicity, and gender regarding (1) education, employment, and housing status and (2) critical points of contact throughout the juvenile and adult criminal justice systems. This data provides context for the ways in which these extra-judicial factors may contribute to disproportionate system contact. Third, interview data were collected from individuals with previous criminal justice contact to explore the relationship between an individual's criminal justice involvement and extra-judicial factors that may contribute to criminal justice system involvement.

FINDINGS

Society cannot afford to ignore the failings of our broken schools and social service institutions and rely upon the criminal justice system to absorb responsibility. There is an urgent need to remedy our state's ever-expanding criminal justice system and the racial, ethnic, and gender disparities that exist within it. In order to reduce overreliance on the criminal justice system as well as reduce or eliminate racial, ethnic, and gender disparities, the interlocked factors operating outside the criminal justice system must be addressed, while still holding the criminal justice system accountable in its own right.

The overarching finding of this study is that relevant education, employment, and housing data disaggregated by race, ethnicity, gender, and age are not being collected, maintained, or analyzed by county-level agencies and governmental programs in a standard and consistent manner. The lack of data may have a far-reaching and devastating impact on communities of color and women. This study finds that lack of access to education, employment, and housing disparately impacts communities of color and women, which contributes to involvement in the criminal justice system.

ACLU-NC and BI presumed that county-level trending data regarding education, employment, and housing would be available because county officials need this type of information to evaluate how their policies and programs impact people of color and women. Research quickly revealed that county-level agencies often do not collect, maintain, or analyze the necessary education, employment, and housing data disaggregated by race, ethnicity, gender, and age. To the extent that they do collect such information, they do not do so in a consistent manner. The result is local policy makers are funding, staffing, and otherwise implementing services without assessing the impact on people of color and women. If county-level agencies and governmental programs are not maintaining data on how their services positively or negatively impact communities of color and women, these agencies and programs may be unwittingly contributing to criminal justice system involvement down the line or missing opportunities to address such disparities.

While social service agencies face unique and challenging problems, there is no excuse for not collecting and analyzing data annually for the purpose of evaluating how programming impacts people of color and women. The failure to collect these data in a consistent manner is not merely a bureaucratic oversight but has a devastating impact on communities of color. In the current atmosphere of limited resources, public service agencies can no longer afford to be ignorant about who they serve and the affect their policies have on those they serve. The cumulative impact of failed social service interventions has serious consequences for communities, because individuals who are denied services or receive inadequate services have an increased likelihood of contact with the criminal justice system.

California's criminal justice system is overwhelmed and its costs are skyrocketing. People of color are disproportionately subject to criminal justice interventions, and the number of women in the criminal justice system is increasing at a disproportionate rate. State and local policy decisions underlying the swelling criminal justice system and its disproportionality are being made without necessary and relevant data. Communities must decide whether to invest in meaningful interventions and preventions to stem the flood of individuals into the criminal justice system or whether to continue to allow the criminal justice system—and its burgeoning costs—to remain the only social service we are willing to fund.

KEY FINDINGS AND RECOMMENDATIONS

COUNTY-LEVEL EXTRA-JUDICIAL DATA COLLECTION

Research Finding:

- Key extra-judicial education, employment, and housing data disaggregated by race, ethnicity, gender, and age are not being collected, maintained, or analyzed by county-level agencies in a consistent or standard fashion. Given the lack of consistent and standard county-level collection of data disaggregated by race, ethnicity, gender, and age when formulating policy, state and county officials fail to adequately take into account how California law and local policies regarding education, employment, and housing disparately impact communities of color.

Policy Recommendation:

- Improve and standardize county data collection in the domains of education, employment, and housing to enable state and local officials to formulate data-driven decisions, which could improve the efficacy of policy as well as reduce or eliminate racial, ethnic, and gender disparities.

CRIMINAL JUSTICE

Research Findings:

- **Finding One:** While some key decision-making data are tracked throughout the criminal justice system, there is a lack of data regarding other critical criminal and juvenile justice system contacts disaggregated by race, ethnicity, and gender, making it difficult to ascertain whether and to what extent disparities exist or are exacerbated as people of color and women penetrate the system.
- **Finding Two:** Racial and ethnic disparities exist in the criminal justice system in the counties explored in this project, even when controlling for offenses. For example, while research indicates that rates of drug use are not significantly different between Whites and people of color, rates of arrest, conviction, and prison sentences are significantly higher for people of color than for Whites.¹

Policy Recommendations:

- **Recommendation One:** Improve and standardize county data collection regarding critical criminal and juvenile justice system contacts to enable state and local officials to formulate data-driven decisions, which could improve the efficacy of policy as well as reduce or eliminate racial, ethnic, and gender disparities.
- **Recommendation Two:** Examine data sources related to drug delivery arrest rates to determine why people of color are overrepresented.

EDUCATION

Research Findings:

- **Finding One:** Students who have law enforcement presence on campus are more likely to be arrested, arrested at a young age, expelled, and suspended. These negative consequences occur regardless of whether the police presence in school is perceived as positive, neutral, or harassing.

- **Finding Two:** Graduation rates are significantly lower for those who are justice system-involved than for the county as whole. Countywide graduation rates are consistently lower for students of color than for White students.
- **Finding Three:** Students who reported having had a quality education are significantly more likely to graduate from high school and significantly less likely to be suspended. Fifty-two percent of the students who reported a quality education attributed the quality of their education to their own intelligence or motivation to learn, rather than the quality of their teachers or schools.

Research Recommendations:

- **Recommendation One:** Collect and analyze quantitative and qualitative data on the effects of police presence on public school campuses. For example, comparing arrest, suspension, and expulsion rates between schools with police on campus to schools without police presence would show what effect, if any, police presence has on these outcomes. Additionally, the analysis should compare whether police on campus are trained in working with youth and whether this training impacts rates of arrest, suspension, or expulsions. Finally, the analysis should explore the efficacy of alternatives to policing in schools; emerging qualitative data shows that schools that have reduced or eliminated their police presence have not only improved safety but also academic performance.
- **Recommendation Two:** Analyze successful programs aimed at increasing the graduation rate for juvenile justice system-involved youth to determine elements of successful programs for replication in other contexts. Similarly, analyze early intervention programs designed to increase the graduation rates of students of color.
- **Recommendation Three:** Analyze how students' perceptions of their own educational aptitude influence their educational experience. Students who perceive themselves as intelligent and motivated learners may also perceive their education experience to be better than their peers.

EMPLOYMENT

Research Findings:

- **Finding One:** In each of the three counties explored, unemployment rates are significantly higher among people of color than they are among Whites. System-involved interviewees experienced unemployment at significantly higher rates than the county averages. Sixty-three percent of interviewees were unemployed at the time of their interview, and 47% were unemployed at the time of their most recent arrest. Thirty-two percent of interviewees cite unemployment as the reason for their most recent arrest.
- **Finding Two:** Ninety-six percent of interviewees indicated that their criminal records limited employment opportunities, and 37% reported that their record prevented them from applying for a job.
- **Finding Three:** In all counties explored, countywide median incomes are significantly lower for people of color than for Whites. Fifty-nine percent of system-involved interviewees reported earning inadequate income, and 21% of interviewees indicated that they turned to crime to supplement their income.

Research Recommendations:

- **Recommendation One:** Determine why unemployment rates are higher among individuals with system involvement by interviewing employers about their perceptions of people with criminal records and the frequency with which they rely on criminal background checks or self-disclosure of criminal records to screen out potential employees. Additionally, analyze whether employers are more likely to hire an individual who has expunged his or her criminal record.
- **Recommendation Two:** Examine under what circumstances individuals with criminal records self-select out of employment opportunities and whether participating in a re-entry program, obtaining job readiness assistance, or expunging their criminal record increases the likelihood that individuals will apply for jobs.

- **Recommendation Three:** Analyze why individuals turn to crime in order to supplement their income to understand what specific factors, such as lack of employment opportunities or high earning potential, motivate people to engage in criminal activity.

HOUSING

Research Findings:

- **Finding One:** Criminal justice system involvement negatively impacts housing opportunities. Forty-seven percent of interviewees reported that their involvement in the criminal justice system has had a negative impact on their housing opportunities.
- **Finding Two:** In each of the three counties explored, system-involved interviewees experience more housing stability as youth than as adults. Forty-eight percent of all interviewees had a history of homelessness and 18% had been evicted. Home ownership among all system-involved interviewees is significantly lower than among the county average, and White residents were significantly more likely to own their homes than residents of color. Moreover, few interviewees lived in safe neighborhoods. Forty-eight percent of interviewees reported personal safety was a major concern in their community. Thirty-seven percent of interviewees reported living in a high crime area, and 39% reported a heavy police presence in their community.
- **Finding Three:** Seventy-one percent of system-involved interviewees reported experiencing rent burden, defined by spending at least 30% of their monthly income on rent.

Research Recommendations:

- **Recommendation One:** Explore the obstacles to housing faced by system-involved individuals, such as rental background checks, limits on public assistance, or loss of rent control or foreclosure due to incarceration.
- **Recommendation Two:** Examine the factors that prevent system-involved individuals from having stable housing as adults.
- **Recommendation Three:** Analyze the extent to which affordable housing is available and the requirements for obtaining access to affordable housing in specific communities with high rent burden to determine what system barriers may exist.

¹ Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, *Criminology*, 44(1) 105 (2006) (finding that Seattle's disproportionately high drug delivery arrest rate for people of color, especially Blacks, was attributable to law enforcement's focus on crack offenders and outdoor drug use as well as a concentrated police presence in racially diverse areas).

INTRODUCTION

Individuals living in economically marginalized, segregated communities where schools are underperforming, unemployment is high, and homeownership is low are more likely to have contact with the criminal justice system. It is a reality that many racial and ethnic minorities are relegated to areas of extreme and concentrated poverty. In such areas, access to the basic necessities of adequate education, employment, and housing are scarce or nonexistent. It would be difficult for anyone to achieve in the face of these steep obstacles. Popular culture, media reports, and our own experiences tell us that those who face these challenges are most at risk of further alienation from society by being pulled into the criminal justice system.

Education, employment, and housing are three basic necessities that when denied drive individuals into the criminal justice system. For example, a quality education is one of many protective factors often unavailable to individuals in areas of concentrated poverty. Too many schools located in these communities face numerous problems, including extreme resource constraints, overly-harsh discipline practices, and over-reliance on law enforcement—all factors that contribute to pushing youth out of school and into the juvenile justice system. Similarly, lack of access to meaningful employment and quality housing create circumstances in which individuals are more likely to interact with law enforcement or enter the criminal justice system, particularly as the social safety nets created to address the socio-economic inequities created by poverty fail these individuals.

The failure to fund and support adequate interventions or safety nets to prevent or address the circumstances that lead many to criminal justice system involvement has contributed to the overcrowding of our prison system. In contrast to social service institutions that can choose to deny services to individuals, the criminal justice system does not turn anyone away and has evolved into society's catchall institution as a result of other failed governmental policies, programs, and agencies.

The phenomenon of the criminal justice system as the ultimate taxpayer funded social service agency is fraught with both social and fiscal problems, not the least of which is its racial, ethnic, and gender disparities. The well-documented disparities in the criminal justice system are often attributed solely to systemic bias within the criminal justice system, yet the reality is that the failure of other protective factors significantly contributes to the racial, ethnic, and gender disparities in the criminal justice system. However, there has been little to no documentation or research regarding how the decline of traditional social service interventions impacts communities of color and women. Moreover, there has been little to no analysis regarding how the decline of social services has led to an over-reliance on criminal justice intervention and has increased disparities within the criminal justice system. Notwithstanding the critical consequences, lack of data and research make it impossible to measure the force and impact of external inequities on criminal justice system involvement and the extent to which they exacerbate the systemic and institutional bias and racism within the criminal justice system.

The American Civil Liberties Union of Northern California (ACLU-NC) and the W. Haywood Burns Institute (BI) conducted this pilot study in order to examine how three interlocked factors operating outside the justice system encourage, enforce, and complement patterns of disproportionate criminal justice system contact for people of color and women. Specifically, this study explored the relationships among disparities in the extra-judicial factors of education, employment, and housing and the criminal justice system in three California counties: Alameda, Fresno, and Los Angeles. The goal of the study was to identify extra-judicial variables and examine trending data to determine whether and which key variables drive disproportionate criminal justice system contact in California.

"We can continue to pay taxes for the public sector to develop and build bigger juvenile justice facilities to hold more minority youth. Or, we can choose to pay taxes for public and private sector development of quality education, career employment, community development, the revitalization of the inner city, quality child care, and those other support services that represent positive alternatives to construction.

We do not have the option of not choosing: the question is which alternative will we choose?"

– Coalition for Juvenile Justice, *A Delicate Balance* (1988).

Part I

METHODOLOGY: A THREEFOLD APPROACH

There is a substantial body of research regarding the existence of racial and ethnic disparities within the criminal justice system, but there is little research examining the interlocked factors operating *outside* the criminal justice system that encourage, enforce, and complement patterns of criminal justice system involvement. The extra-judicial factors examined in this study were organized into three domains: education, employment, and housing.¹ The goal was to identify critical variables and to generate possible lines of inquiry about the relationships among these overlapping, largely unanalyzed factors and their effect on communities of color in California.

This study is comprised of a literature review, an analysis of county-level statistical data, and interviews. Three distinct data sources were used to evaluate what, if any, impact the extra-judicial factors of education, employment, and housing have on criminal justice system involvement. The literature review consisted of relevant social science literature that discusses the problem, prevalence, and contributors to racial, ethnic, and gender disparities found at various points in our criminal justice system, from police stops to filing charges to incarceration. The literature review also included an exploration of whether and to what extent communities of color and women experience inequities in access to education, employment, and housing. The statistical data consisted of county-level statistics regarding significant points in the juvenile and adult criminal justice systems broken down by race, ethnicity, and gender. County-level statistics specifically related to education, employment, and housing were reviewed. As discussed below, both sets of county-level data revealed significant racial, ethnic, and gender disparities. The interviews consisted of standardized interviews of individuals in three counties with previous criminal justice system contact to explore the relationship between access to adequate education, employment, and housing and criminal justice involvement.

This study was designed to be exploratory rather than inferential.² Emphasis was not placed on testing precise hypotheses, but rather on outlining operable research questions, identifying relevant extra-judicial and criminal justice data related to the research questions, and conducting preliminary analyses of the available statistics.

A. LITERATURE REVIEW

The literature review included publications containing data and/or policy recommendations related to a series of education, employment, or housing variables that potentially drive disproportionate criminal justice contact.³ The relevance and inclusion of publications in the review was determined by the topic of the publication, the scope and source of data included in the study, and the year of publication. The literature review was limited to articles published between 1980 and 2009, and preference was given to California-specific articles.

B. COUNTY STATISTICS

The study examined whether and to what extent disproportionality exists in Alameda, Fresno, and Los Angeles counties, which were selected because, collectively, the racial, ethnic, and gender disparity issues they face are representative of statewide problems.⁴

1. Extra-Judicial Domains

The first step in investigating disparities related to opportunities in education, employment, and housing was to generate a comprehensive list of variables associated with each. The list included factors the ACLU-NC and BI believed to be closely related to more or less opportunity in each domain. Additionally, the ACLU-NC and BI believed counties maintained data on the factors identified, and that such data would be easily accessible disaggregated by race, ethnicity, gender, and age over a ten-year span. (*See Appendix A: Extra-Judicial Factors Explored for a complete list of variables collected for this study.*)

Research quickly revealed that data were not readily available at the county level for the extra-judicial domains for several reasons. First, counties did not consistently maintain data on all factors intended for study. Some county departments and agencies associated with education, employment, and housing services conducted *ad hoc* analyses on certain factors for discrete time periods, but did not maintain regular statistics. Second, county departments and agencies did not consistently collect data in a way that could meaningfully generate

reports disaggregating the data by race, ethnicity, gender, or age. Third, there was no consistency in the methodology for collecting data in similar departments or agencies between counties.

Thus, a decision was made to obtain data from sources that maintained common data disaggregated by race, ethnicity, and gender in a uniform format over a five-to ten-year span for each county being investigated. Sources that collected data within these parameters included the California Department of Education (CDE) and the American Community Survey (ACS) conducted by the U.S. Census Bureau.⁵ Data collected for each county included:

- **Education Data**

Data on graduation rates, high school dropout rates, and University of California and California State University (UC/CSU) eligibility rates were collected from CDE from 1995-2005. These data were disaggregated by race, ethnicity, and gender. These data were analyzed to determine whether and to what extent youth of color and girls were more or less likely to graduate from high school, drop out of high school, and be UC/CSU eligible at graduation. Analyses were also conducted to determine whether there were any notable patterns in these educational factors.

In addition, educational attainment data were collected from ACS from 2000-2007. Analyses were conducted to determine whether and to what extent any disparities in educational attainment existed among people of color and women.

- **Employment Data**

Data on unemployment rates, median incomes, and occupation types were collected from ACS from 2001-2007. These data were disaggregated by race, ethnicity, and gender. Analyses were conducted to determine whether and to what extent communities of color and women were more or less likely to experience unemployment or lower median incomes. Analyses were also conducted to assess whether there were any notable patterns in unemployment rates and median income variability for communities of color and women.

- **Housing Data**

Data on housing tenure and rent burden were collected from ACS from 2001-2007. These data were disaggregated by race, ethnicity, and gender. Analyses were conducted to determine whether and to what extent communities of color and women were more or less likely to own or rent their dwellings. Analyses were also conducted to deduce whether there were any notable patterns in housing tenure for communities of color and women.

2. Criminal Justice System

The original intent of the study was to track all critical juvenile and adult criminal justice system decision-making points, from arrest through disposition, over a ten-year span to analyze where racial, ethnic, and gender disparities existed most significantly and how these disparities changed over time. However, as with research regarding disparities in the extra-judicial domains, the study was limited by the availability of data. (*See Appendix B: Criminal Justice Decision-Making Terms for definition of terms used in this section*).

Data were not reliably available at the county level for two primary reasons. First, although counties collect and maintain publicly-available data on criminal justice system decision-making, some counties did not or were unwilling to provide these data disaggregated by descriptors such as race, ethnicity, gender, and offense. Second, counties varied significantly in their methodology for collecting local criminal justice system data. ACLU-NC and BI decided to use data collected in a standard format in a single repository. Thus, all juvenile and adult criminal justice data were provided by the California Department of Justice (California DOJ). A series of requests were made to California DOJ for all criminal justice system data that are disaggregated by race, ethnicity, and gender. California DOJ provided data regarding the following criminal justice system decision-making points for a ten-year span from 1995-2005.⁶

- **Juvenile and Adult Arrest Data**

For each of the three counties examined, California DOJ provided data on the total number of youth and the total number of adults arrested from 1995-2005 disaggregated by race, ethnicity, gender, classifications of misdemeanor or felony, and the offense charged. Analyses were conducted to determine whether and to what extent the arrest rates⁷ were higher for youth and adults of color in each county and whether particular disparities in arrest rates existed for drug charges. Analyses were also conducted to note whether and to what extent any disparities in arrest rates existed for girls and women.

▪ **Adult Law Enforcement Disposition Data**

California DOJ provided data on adult law enforcement dispositions from 1995-2005 disaggregated by race, ethnicity, and gender. Types of law enforcement dispositions collected include: (1) law enforcement releases, (2) complaints denied, and (3) complaints filed. Analyses were conducted to determine whether and to what extent the rate of law enforcement disposition types differed for people of color and women. Additional analyses were conducted to note whether and to what extent any particular disparities existed in law enforcement disposition types for drug charges.

▪ **Adult Court Disposition Data**

California DOJ provided data on adult court dispositions from 1995-2005 disaggregated by race, ethnicity, and gender. Types of court dispositions collected include: (1) dismissals, (2) diversions, (3) acquittals, and (4) convictions. Analyses were conducted to determine whether and to what extent the rate of court disposition types differed for people of color and women. Additional analyses were conducted to note whether and to what extent any particular disparities existed in court disposition types for drug charges.

▪ **Adult Sentencing Data**

California DOJ provided data on adult sentences from 1995-2005 disaggregated by race, ethnicity, and gender. Types of sentences collected include: (1) death, (2) prison, (3) Youth Authority,⁸ (4) probation, (5) probation with jail, (6) jail, (7) fine, (8) California Rehabilitation Center, and (9) other. Analyses were conducted to note whether and to what extent the rate of sentences differed for people of color and women. Additional analyses were conducted to note whether and to what extent any particular disparities existed in the types of sentences issued for drug charges.

▪ **Juvenile Probation Referral Data**

California DOJ provided data on youth probation referrals from 1995-2005 disaggregated by race, ethnicity, and gender. Included in the data were distinctions of whether it was (1) a new versus subsequent referral, (2) a detained versus non-detained referral, and (3) what type of prosecutorial action was taken (including petitions filed, accepted, and not accepted). Analyses were conducted to note whether and to what extent the rates of probation referrals differed for youth of color and girls. Particular focus was placed on any disparities existing with detained referrals.⁹

C. INTERVIEWS

Since little research to date has examined how extra-judicial factors drive racial, ethnic, and gender disparities in the criminal justice system, the ACLU-NC and BI determined that, in order to contextualize the county-level data collected in a meaningful way, interviews of individuals with criminal justice involvement were necessary to link the data to real experiences. For purposes of designing a meaningful interview, a pilot survey was conducted in Alameda County with a small sampling of individuals with criminal justice involvement to determine the scope and direction of the interview questions. The results of the pilot survey were used to draft the interview questions that comprise the third data set for this study.

The ACLU-NC and BI designed, administered, and analyzed results from interviews administered to 179¹⁰ adults on probation in the target counties to understand whether and how their educational experiences, employment histories, and housing stability affected their involvement with the criminal justice system. The domains explored—education, employment, and housing—are domains to which people of color have historically been denied equitable access and which are ripe for advocacy.

1. Interview Theories

The interview questions were designed to explore theories rooted in research as well as practical knowledge gained from working with individuals with criminal justice expertise. The theories for each domain are summarized below and a copy of the interview questions can be found in Appendix C: Interview Questionnaires.

Education Theory: Inadequate educational opportunities lead to criminal justice system involvement, and youth of color are more likely to experience inadequate educational opportunities in the following ways:

- youth of color are more likely to drop out of high school;
- youth of color are less likely to graduate from high school;
- youth of color are more likely to be arrested for truancy;¹¹

- youth of color are more likely to be suspended and expelled from high school; and
- youth of color are less likely to graduate from high school with UC or CSU required courses.¹²

Employment Theory: Lack of employment opportunities and inequity in employment leads to criminal justice system involvement, and people of color and women are more likely to experience a lack of employment opportunities in the following ways:

- people of color and women are less likely to earn a living wage;
- people of color and women are more likely to experience unemployment; and
- people of color and women are less likely to hold professional/management jobs.¹³

Housing Theory: Lack of affordable housing and neighborhood strife (for purposes of this study, defined as higher crime rates than surrounding neighborhoods) contribute to criminal justice system involvement, and people of color and women are more likely to experience a lack of affordable housing and neighborhood strife in the following ways:

- people of color and women are less likely to own their home;
- people of color and women are more likely to allocate a high percentage of their income to rent/mortgage; and
- people of color are more likely to live in neighborhoods with high crime rates.

2. Interview Administration

Adult interviewees were recruited outside of probation offices.¹⁴ Each participant was approached by an interviewer and asked to participate in exchange for a ten-dollar gift card. Interviewers used racial and gender quotas to ensure that the interviewee sample was reflective of the general population in each county.

Interviews were administered to 60 individuals from Alameda County, 60 from Los Angeles County, and 59 from Fresno County over a three-month period in 2009. All interviewees were asked questions about their involvement in the criminal justice system, as well as information regarding their education, employment, and housing histories. In addition to the questions asked of everyone, an equal number of interviewees from each county were randomly selected to answer in-depth questions about one of the three domains. One third of interviewees answered additional questions about their educational experience, another third about employment, and the other third about housing. The in-depth questioning allowed researchers to explore a variety of issues related to these three domains.

Due to the limited number of interviewees, this study drew heavily on descriptive statistics (i.e. percentages) and correlations. Where appropriate, analyses of variance were conducted to test for differences between race, gender, and geographic group. Although this study was exploratory, it yielded interesting findings that lay a foundation for further research in these domains. Future studies should draw on larger samples of interviewees in order to explore further extra-judicial drivers of criminal justice involvement.

Table 1: Demographic Information

	Alameda	Fresno	Los Angeles	Total
Total Interviewees	60	59	60	179
Men	42	41	39	122
Women	18	18	21	57
Black¹⁵	46	11	34	91
Men	30	7	18	55
Women	16	4	16	36
Latino/a	5	37	25	67
Men	5	28	20	53
Women	0	9	5	14
White	6	8	0	14
Men	4	4	0	8
Women	2	4	0	6
Other ethnicity	3	3	1	7
Men	3	2	1	6
Women	0	1	0	1

One hundred and seventy-nine interviewees were included in the analyses. As discussed above, the interviewees were divided equally among the three counties, one-third from each. The race/ethnicity and gender demographics are representative of each group's regional representation in the criminal justice system. As a result, more men than women and more Blacks and Latinos than Whites were interviewed.

Part II

FINDINGS

A. LITERATURE REVIEW

1. Lack of Research on Extra-Judicial Domains

For many people, especially direct service providers in low-income communities of color, it is intuitive that individuals who lack education, employment, and housing opportunity are more likely to have criminal justice system contact. Surprisingly, however, there is insufficient research analyzing which extra-judicial factors or constellation of factors are most predictive of criminal justice system involvement or what connects these extra-judicial factors to disproportionate criminal justice system involvement. The literature review uncovered some research on extra-judicial domains, but none that examined which factors are most predictive and how they impact disparities within the criminal justice system.

2. Extra-Judicial Factors have been Linked to Criminal Justice System Contact

Social factors, such as poverty and lack of employment contribute to a range of racial, ethnic, and gender disparities in the criminal justice system.¹⁶ Minorities living in concentrated areas of poverty are most vulnerable, because they have the least access to quality education, employment opportunity, and affordable housing. Blacks, for example, tend to live in the most concentrated areas of urban poverty¹⁷ with high crime rates and a heavy police presence,¹⁸ and the cumulative impact of this social segregation leads to an increased risk of contact with the criminal justice system. Women's contact with the criminal justice system is also linked to poverty, because low-income women often are charged with crimes related to providing for their children or because other family members engage in criminal activity in their households.¹⁹ Overall, living in concentrated areas of poverty increases the risk of educational failure, unemployment, and contact with the criminal justice system.²⁰

Youth of color from economically marginalized communities face multiple challenges. They experience not only the disadvantages of widespread unemployment but also bear the brunt of under-resourced, failing public schools. Essentially, they are denied two important protective factors from criminal justice contact: quality education and job opportunity. As a result, these youth are most at risk of having contact with the juvenile justice system and being detained or placed in facilities outside of their homes.²¹

Employment can be a protective factor. Youth, of all races, "mature out" of delinquent behavior as they reach adulthood if they are gainfully employed.²² However, finding any employment is challenging in communities of concentrated poverty. Returning to the workforce after a period of incarceration can be especially difficult, not only because of the stigma associated with incarceration but also because research indicates that formerly incarcerated persons have low literacy rates and job-readiness skills.²³

Schools can be the most critical safeguards for at-risk youth by providing a space for youth to grow and thrive in a structured environment. Yet, a strong body of compelling research indicates "get-tough" disciplinary measures, such as "zero tolerance" policies, that exclude students from school by suspension or expulsion, not only fail to meet sound educational principles but also push Black and Latino youth into the juvenile justice system for minor infractions.²⁴ Moreover, studies indicate that police and school authorities discipline children from wealthier families differently than children from low-income families. For example, school authorities are more likely to call a parent than the police and are less likely to detain and formally charge a child from a relatively affluent family.²⁵ These disparities in discipline combined with inadequate academic instruction create inequitable access to quality education and fast track youth of color into the criminal justice system.

B. COUNTY STATISTICS

The study design presumed the collection of county-level data to establish a correlation between the extra-judicial domains of education, employment, and housing that drive individuals into the criminal justice system and the disproportionate contact experienced by people of color and women within that system.

County-level data did establish that racial and ethnic disparities exist in all three counties studied and at each decision-making point along the criminal justice system.²⁶ For example, the rate of arrest for youth and adults of color is significantly higher than it is for Whites.²⁷ Furthermore, Latino arrest rates are likely higher than reported because they are often mislabeled, and therefore, undercounted in the criminal justice system.²⁸ These disparities are true in overall arrest rates as well as arrests for drug charges. The study examined arrest rates generally and drug arrests in particular, because research shows that drug use is equal among all races but people of color are arrested and incarcerated at disproportionate rates.²⁹

Disappointingly, research revealed that most of the data from the extra-judicial domains of education, employment, and housing necessary to evaluate whether policies and programs within each domain have a disparate impact on people of color and women are not collected, maintained, or analyzed by county-level agencies in a standard and consistent manner. The lack of county-based data disaggregated by race, ethnicity, gender, and age has troubling implications for how policy decisions are currently made. The study's general theory is that a variety of extra-judicial factors impact criminal justice system involvement and that communities of color and women are disparately impacted by these factors. However, as noted above, there was a shocking lack of uniform data available to test this theory as originally intended. Indeed, the breadth of this study had to be significantly narrowed given the limited availability of reliable data sets. The lack of data, generally and in disaggregated form, suggests that these agencies are not utilizing the most efficient, data-driven policies, and they cannot assess how and to what extent ineffective policies disproportionately impact people of color, women, and youth. If, in fact, county officials are not considering such logically relevant socio-economic data when making policy decisions, the question becomes: What is the basis for policy decisions that have such significant and serious social and fiscal impact on these communities?

In order to collect the data necessary to assess the efficacy of programming and services for people of color and women, counties would need to collect disaggregated data on all individuals eligible for social services, those who apply for services, those denied services, and outcomes for those who received services. For example, all counties should know how many homeless individuals live in the county and how many of those eligible for housing services apply for them. Of those who apply, how many are denied those services, and the outcomes for those who receive services. While this type of data collection may seem costly or burdensome, the initial investment would not only provide a backend cost savings but would also improve the quality of a county's social services.

(See *Balancing the Scales of Justice: County Profiles* for a discussion of the county-level data examined as part of this study. This discussion is located at www.aclunc.org/docs/racial_justice/balancing_the_scales_of_justice_county_profiles.pdf.)

C. INTERVIEWS

Interviewees were selected based on their representation in the system, thus most interviewees were male (68%) and most were Black (51%) or Latino (37%). At the time of the interview, the average age of the interviewees was 32 years old. All but one of the interviewees was either a United States citizen, permanent resident, or naturalized citizen.

All interviewees were asked a few preliminary questions about their education, employment, and housing histories. Sixty percent of all interviewees had completed high school.³⁰ Forty-five percent of interviewees were unemployed at the time of their most recent arrest. Most interviewees were renters (52%), many lived with family or friends (33%), a small percentage were homeowners (7%) or homeless (6%).³¹

1. Education

As predicted, there was a connection between inadequate educational opportunities and criminal justice system involvement.³² Being arrested at an early age was correlated with the following three factors: lack of educational opportunities, suspension, and police presence at school. These correlations suggest that failing schools, school push-out, and over-policing in schools funnel youth into the juvenile justice system. In contrast, interviewees who reported receiving a quality education were less likely to have been expelled and more likely

to have graduated from high school. Most interviewees, however, did not perceive a connection between their educational experience and their criminal justice involvement.

Interviewees from Los Angeles County experienced the worst educational challenges. Of the interviewees, they had the lowest graduation rate, which was also much lower than the county graduation rate. They also had the lowest educational quality self-report rating, the highest expulsion rate, and the most police presence on school campuses.

- **School Exclusion Correlated to Arrest at an Early Age:** Those suspended from school were likely to be arrested before age 20 ($r=-.387, p<.01$) and were also typically expelled ($r=.387, p<.01$).
 - *County Difference:* Forty-five percent of Los Angeles interviewees and 32% of Alameda interviewees had been expelled from school, compared with 11% of Fresno interviewees.
- **Police Presence on School Campuses Correlated to Arrest at an Early Age:** Interviewees who reported having a police presence at their middle schools were more likely to be arrested before age 20 ($r=.269, p<.05$). Police presence in high school also related to being arrested before age 20 ($r=.269, p<.05$).³³
 - *County Difference:* One hundred percent of Los Angeles interviewees reported having a police presence in their high schools, compared to 67% of Fresno interviewees and 56% of Alameda interviewees.
 - Of interviewees who had a police presence in their high schools, 38% had a positive experience with officers, 30% had a neutral experience or no interaction, and 10% had a negative or harassing experience.
- **Arrest at School:** Forty percent of interviewees ($n=23$) had been arrested before reaching age 18. Five of the 23 were arrested at school; an additional five were arrested during school hours but outside of school grounds; one was arrested en route to or from school; and three were arrested because of an incident occurring at school.
- **Perceived Connection between Education and Criminal Justice System Involvement:** Sixty-seven percent of interviewees did not perceive a connection between their educational experience and their involvement in the criminal justice system.
- **Education Quality is a Protective Factor:** Interviewees who reported receiving a quality education were more likely to finish school ($r=.503, p<.01$) and less likely to be expelled ($r=-.344, p<.01$). Interviewees who reported having a lack of educational opportunities were arrested before age 20 ($r=-.187, p<.05$).
 - *County Difference:* Seventy percent of Fresno interviewees and 63% of Alameda interviewees rated the quality of their education as “good” or “excellent,” compared to 45% of Los Angeles interviewees.
 - Fifty-two percent of interviewees who rated the quality of their education as “good” or “excellent” attributed the rating to their own intelligence and motivation to learn. Only 13% attributed the positive rating to the quality of their teachers or schools. Another 13% defined their good experience by having graduated.
- **Education Quality in Detention:** Fifty-seven percent of interviewees who were educated in detention rated the quality of that education as “good” or “excellent.”³⁴ Qualitative responses revealed these positive ratings were mainly attributable to interviewees being removed from a negative school environment.
- **Graduation Rates:** Fifty-nine percent of interviewees graduated from high school.
 - Fifty-eight percent of Alameda interviewees, 74% of Fresno interviewees, and 47% of Los Angeles interviewees graduated from high school.
 - Sixty-three percent of White interviewees, 59% of Black interviewees, 50% of Latino interviewees, and 67% of other interviewees graduated from high school.
 - Fifty-three percent of female and 63% of male interviewees graduated from high school.
- **Dropout and Attendance:** Twenty percent of interviewees dropped out of high school.
 - *Racial and Gender Difference:* Approximately 60% of all interviewees attended school frequently, but only 44% of Latino male interviewees attended school frequently.

- Having a higher percentage of friends graduate from high school was correlated with frequent high school attendance ($r=.523, p<.05$).
- Fifty-eight percent of interviewees who dropped out reported having left school in order to work.

2. Employment

Almost all interviewees cited major obstacles to employment, and Blacks had the most difficulties.³⁵ Over half of all interviewees were unemployed at the time of the interview and nearly all interviewees reported that their criminal records have limited their employment opportunities. In fact, interviewees were unemployed at five to eight times their respective county unemployment rates. About 30% of interviewees cited unemployment as a reason for their most recent arrest, and almost half of all interviewees were unemployed at the time of their most recent arrest. Women were more likely to be unemployed at the time of arrest and less likely to report that they earn an adequate income. No women reported turning to crime to supplement their income. In contrast, male interviewees who reported an inability to find a job due to lack of job opportunities were most likely to turn to crime to supplement their income. This was most true for Black males in Alameda County. The majority of employed interviewees reported earning inadequate incomes and needing to travel farther to reach their jobs.

- **Criminal Justice System Involvement Impacts Employment:** Ninety-six percent of interviewees reported that their criminal records have limited their employment opportunities, and 37% reported it prevented them from applying for a job.
 - *Racial Differences:* Latino male interviewees reported that their criminal records prevent them from applying for jobs ($r=.432, p<.01$).
 - In contrast, Black male interviewees were less likely to report that their criminal record has prevented them from applying for new jobs ($r=-.361, p<.05$), which illustrates the unknown barriers to employment for this population.
 - Interviewees sentenced for their first arrest were more likely to report that their criminal record has prevented them from finding employment ($r=.350, p<.05$).

- **Unemployment at Time of Interview:** Sixty-three percent of interviewees were unemployed at the time of the interview.
 - *Racial and Gender Difference:* Black interviewees were most likely to be unemployed ($r=.155, p<.05$). Latino male interviewees were more likely to be employed ($r=-.155, p<.01$).
 - Unemployed interviewees were more likely than employed interviewees to cite their criminal record as a barrier to employment ($r=.476, p<.01$). Almost all interviewees attributed current unemployment or difficulty finding a job to the economy, their criminal record, or both.

- **Unemployment at Time of Arrest:** Forty-seven percent of interviewees were unemployed at the time of their most recent arrest. This rate of unemployment was eight times higher for Alameda residents, five times higher for Los Angeles residents, and almost six times higher for Fresno residents, than respective 2007 county unemployment rates.
 - *Gender Difference:* Sixty-six percent of female interviewees were unemployed at the time of their most recent arrest, compared to 40% of male interviewees.
 - *Racial Difference:* Sixty-five percent of White interviewees and 57% of Black interviewees reported being unemployed at the time of their most recent arrest, compared to 28% of Latino interviewees.

- **Unemployment as the Reason for Arrest:** Thirty-two percent of all interviewees and 46% of Black female interviewees cited unemployment as the reason for their most recent arrest. Latino male interviewees did not report unemployment as a reason for arrest ($r=-.171, p<.05$).

- **Inadequate Income:** Fifty-nine percent of all interviewees reported earning inadequate income.
 - *Gender Difference:* Sixty-three percent of male interviewees reported earning an inadequate income, compared to 50% of female interviewees.
 - *County Difference:* Seventy-five percent of Alameda interviewees reported earning an inadequate income, compared to 56% of Fresno interviewees and 57% of Los Angeles interviewees.

- **Illegal Activity as a Means to Supplement Income:** Twenty-one percent of all interviewees reported supplementing their income with criminal activity. The majority of those who reported supplementing their income with criminal activity did so by selling drugs. Unemployed interviewees who were unable to find a job were more likely to turn to crime to supplement their income than those who cited other explanations for their unemployment ($r=.450, p<.01$).
 - *County, Race, and Gender Difference:* Black male interviewees were most likely to report not being able to find a job ($r=.387, p<.01$) and turning to crime to supplement their income ($r=.349, p<.01$). This experience was most common among Black male interviewees in Alameda County.
 - *County Difference:* Thirty-five percent of Alameda interviewees and 21% of Los Angeles interviewees reported turning to crime to supplement their income, compared to only 5% of Fresno interviewees.
 - *Gender Difference:* No women reported turning to crime to supplement their income.
 - *Race Difference:* Thirty-three percent of White male interviewees and 27% of Black male interviewees reported turning to crime to supplement their income, compared to 10% of Latino male interviewees, which may be explained by the higher employment rate among Latino male interviewees.

- **Unemployment History:** Ninety-two percent of all interviewees and 98% of Black male interviewees had been unemployed in their lifetime. Thirty-seven percent of all interviewees and 53% of Black male interviewees received unemployment benefits at some point in their lifetime.

- **Government Assistance:** Sixty-three percent of all interviewees and 81% of Black female interviewees had received government assistance in their lifetime.
 - *Criminal Justice Correlation:* Those arrested before age 20 tended to receive government assistance ($r=-.171, p<.05$).

- **Economically Marginalized Communities:** Interviewees who reported earning an adequate income typically traveled farther from home for employment ($r=.535, p<.05$) and had longer commutes ($r=.678, p<.01$). Sixty-seven percent of interviewees reported low job opportunities in their communities.

3. Housing

Most interviewees did not have stable housing as adults.³⁶ In fact, almost half of all interviewees had been homeless at some point in their lives. At the time of the interview, the majority of renters were rent burdened, defined by paying at least 30% of their income on rent. Los Angeles interviewees were significantly more rent burdened than the general population in their county. Interviewees were approximately two to five times less likely to be homeowners than the county averages. Nearly half of all interviewees reported that their involvement with the criminal justice system negatively impacted their housing, and most were satisfied with their housing prior to their most recent arrest. Women were least satisfied with their housing but had more stable housing. Blacks fared the worst on almost every housing factor. Generally, Blacks were most likely to be homeless, most likely to be rent burdened, and least likely to report satisfaction with their housing prior to arrest.

- **Criminal Justice System Involvement Negatively Impacts Housing:** Forty-seven percent of interviewees reported that their involvement in the criminal justice system has negatively impacted their housing opportunities.
 - *Gender Difference:* Fifty-five percent of male interviewees reported that their criminal justice involvement had a negative impact on their housing opportunities, compared to 33% of female interviewees.

- **Housing Satisfaction High Prior to Arrest:** Seventy-eight percent of interviewees were satisfied with their neighborhood and 64% were satisfied with their housing prior to their most recent arrest.
 - *Gender Difference:* Seventy-four percent of male interviewees were satisfied with their housing, compared to 33% of female interviewees.
 - *Race and Gender Difference:* Black male interviewees were most satisfied with their housing prior to their most recent arrest, and Black female interviewees were least satisfied.
 - Dissatisfaction with housing was correlated with dissatisfaction with the neighborhood ($r=.435, p<.01$).

- **Housing Stability Low in Adulthood:** Interviewees experienced more housing stability as youth than as adults. Seventy-five percent of interviewees reported living at the same residence for five or more years as a youth and only 57% of interviewees reported the same stability as an adult.
 - *County Difference:* Forty-eight percent of Alameda interviewees reported having had stable housing, compared to 67% of Fresno interviewees.
 - *Gender Difference:* Forty percent of female interviewees reported having had stable housing, compared to 66% of male interviewees.

- **Homelessness:** Forty-eight percent of interviewees and 63% of Black interviewees had been homeless in their lifetime. Six percent of interviewees were homeless at the time of the interview.
 - *Racial Difference:* Ten percent of Black interviewees, 7% of White interviewees, and no Latino interviewees were homeless at the time of the interview.
 - *County Difference:* Seven percent of Alameda interviewees, 7% of Los Angeles interviewees, and 3% of Fresno interviewees were homeless at the time of the interview.

- **Rent Burden is High:** Seventy-one percent of interviewees were rent burdened at the time of the interview, defined as spending at least 30% of their monthly income on their rental payment.
 - *Gender Difference:* Women, regardless of geographic location, experience rent burden at an extremely high rate.
 - *County Difference:* Los Angeles interviewees reported the highest rate of rent burden.

- **Homeownership is Low:** Twenty percent of interviewees were homeowners at the time of the interview.
 - *Gender Difference:* Twenty-eight percent of female interviewees and 16% of male interviewees were homeowners.
 - *County and Race Difference:* Black interviewees living in Alameda County had the lowest rate of homeownership (10%, n=10) and Latinos living in Fresno had the highest (25%, n=12).
 - Homeownership was strongly correlated with proximity to job opportunities ($r=.466, p<.01$).

- **Subsidized Housing:** Thirteen percent of interviewees were living in subsidized housing at the time of the interview.
 - *Gender Difference:* Nineteen percent of female interviewees and 10% of male interviewees were living in subsidized housing at the time of the interview.
 - *County Difference:* Fifteen percent of Alameda interviewees, 8% of Los Angeles interviewees, and 15% of Fresno interviewees were living in subsidized housing at the time of the interview.
 - *Racial Difference:* Fifteen percent of Black interviewees, 10% of Latino interviewees, and 7% of White interviewees were living in subsidized housing at the time of the interview.

- **Eviction:** Eighteen percent of interviewees had been evicted in their lifetime.
 - *Race and Gender Difference:* Black female interviewees had the highest rate of eviction, almost double the rate of all interviewees, and Latino male interviewees had the lowest rate.

- **Neighborhood Characteristics:**
 - *Crime:* A significant number of interviewees reported factors related to crime as a concern in their neighborhood.
 - Forty-eight percent of interviewees reported personal safety was a major concern in their community. Interviewees with a recent drug arrest reported having bad neighbors ($r=.329, p<.05$).
 - Thirty-seven percent of all interviewees and 57% of Black interviewees reported living in high crime areas.
 - Thirty-nine percent lived in areas with heavy police presence. Black male interviewees were highly likely to report having a negative experience with the police presence in their neighborhoods ($r=.474, p<.01$). Respondents stopped by police prior to their first arrest were more likely to report racial profiling as a factor in their first arrest ($r=.162, p<.05$).
 - *Transportation:* Fifty-four percent reported they had good access to public transportation.
 - *Gentrification:* Twenty-nine percent reported living in gentrifying neighborhoods.

CONCLUSION

Society cannot afford to ignore the failings of social service institutions and rely on the criminal justice system to absorb responsibility. There is an urgent need to remedy our state's swelling jail and prison population and the racial, ethnic, and gender disparities that exist in California's criminal justice system. In order to reduce overreliance on the system generally as well as reduce or eliminate racial, ethnic, and gender disparities, the interlocked factors operating outside the criminal justice system must be addressed, while still holding the criminal justice system accountable in its own right. To help accomplish this, the study identified two necessary courses of action: (1) require state and local social service agencies and government programs responsible for providing basic safety net services to collect, maintain, and analyze disaggregated data for the purposes of policymaking and accountability, and (2) conduct extensive, additional research, including regression analyses, to determine which extra-judicial factors or constellation of factors are most predictive of criminal justice system involvement.

State and local agencies providing social services and other socio-economic interventions must be required to collect, maintain, and analyze comprehensive data disaggregated by race, gender, ethnicity, and age in order to measure the impact those agencies' programs have on people of color and women. Specifically, state and local agencies should measure the number of individuals served, the effectiveness of those services, the outcomes of the individuals receiving services, and who is not being served. It is likely that these extra-judicial institutions suffer from the same systemic and institutional bias as does the criminal justice system. Moreover, disaggregated criminal justice system data must also be collected, maintained, and analyzed to determine the extra-judicial factors driving individuals into the criminal justice system and to monitor and reduce the extent to which disproportionality exists within the system. Such data collection and analysis is essential for policy makers to design and implement effective, socially responsible policy and to measure outcomes of any policy changes.

In addition to requiring meaningful data collection and analysis, there must be further research to determine which extra-judicial factors or constellation of factors are most predictive of criminal justice system involvement. The dearth of research and data examining which extra-judicial factors drive criminal justice system contact is surprising considering the widely held belief that lack of access to various life necessities, including quality education, meaningful employment, and quality housing, closely correlates to criminal justice system involvement. There is a need for research and analysis of the disparities within and created by these external systems in order to determine the factors most predictive of criminal justice system involvement and to create effective and meaningful policy solutions to the complex problem of racial, ethnic, and gender disparities in the system. While addressing systemic bias in the criminal justice system is essential, fixing the criminal justice system alone will not solve the problem.

California's criminal justice system is overwhelmed and its costs are skyrocketing. People of color are disproportionately subject to criminal justice interventions, and the number of women in the criminal justice system is increasing at a disproportionate rate. Both realities are both costly and ineffective. The state and local policy decisions underlying the swelling criminal justice system and its disproportionality are being made without necessary and relevant data. Communities must decide whether to invest in meaningful interventions and preventions to stem the flood of individuals into the criminal justice system or whether to continue to allow the criminal justice system—and its burgeoning costs—to remain the only social service we are willing to fund.

END NOTES

¹ In order to narrow the focus of this study as well as draw on organizational expertise, other domains that likely drive system contact were initially considered at the outset of the study but were not pursued. Examples of these unexplored domains include the following: health, mental health, voting rights, and involvement in the child welfare system.

² An exploratory study is generally initiated when very little is known about a given phenomena or, alternatively, when some facts are known but more data would be required to develop a viable theoretical framework for explanation.

³ See Appendix A: Extra-Judicial Factors Explored for a list of the variables researched because of their impact on communities of color and relationship to justice system involvement.

⁴ Data was originally collected for six counties, but information for Santa Clara, San Bernardino, and Orange Counties were not included in this report.

⁵ U.S. Census Community survey data were typically available from 2002-2007.

⁶ Data have been collected for all available years at the time of inquiry, and trend analyses are available.

⁷ Charles Puzanzhera et al., *Easy Access to Juvenile Populations: 1990-2008*, (2009), <http://www.ojjdp.ncjrs.gov/ojstatbb/ezapop/>. Arrest rates are defined as the number of occurrences of arrest within a given population. Arrest rates were calculated by dividing California Department of Justice arrest data by available county population data for each year. For example, in Alameda County in 2005, 18,679 Black adults were arrested. In 2005 in Alameda County, there were 148,078 Black adults. Thus, for every 1,000 Black adults in Alameda County, 126 were arrested in 2005; the arrest rate per 1,000 Black adults is 126.

⁸ According to the California Welfare and Institution Code, Section 1731.5, an offender: (1) who is under the age of 21 at the time of apprehension may be sentenced in adult court to the Division of Juvenile Facilities (formerly California Youth Authority); (2) who is under the age of 18, tried as an adult, and sentenced to state prison may be either transferred to the Division of Juvenile Facilities by the Secretary of the Department of Corrections and Rehabilitation with the approval of the Chief Deputy Secretary for the Division of Juvenile Justice or the court may order the inmate transferred to the Division of Juvenile Facilities; and (3) whose period of incarceration would be completed on or before the inmate's 21st birthday, may be housed at the Division of Juvenile Facilities until the period of incarceration is completed.

⁹ Particular focus was placed on whether disparities exist in the decision to detain youth because a substantial body of research indicating that secure confinement is, on the whole, harmful to youth. First, research indicates that detention has a "profoundly negative impact on young people's mental and physical well being, their education, and their employment." Second, research indicates that a youth securely detained prior to adjudication is more likely to be subsequently incarcerated. Indeed, pre-adjudication detention is one of the best predictors of commitment to a State juvenile corrections facility. Barry Holman and Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Nov. 28, 2006, http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf.

¹⁰ One hundred eighty individuals were interviewed for the study, but data from 179 interviewees were used in the analyses. One interviewee was dropped from the analyses because he was under eighteen years old at the time of the interview, and parental consent could not be obtained.

¹¹ Findings for this factor were not included in the analyses because the results were not significant.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Due to the need for parental consent, no youth were interviewed.

¹⁵ Although the interviewee questionnaire used the term African American, rather than Black, this report uses the term Black to be consistent with U.S. Census and Department of Justice data terminology.

¹⁶ See Suman Kakar, *Understanding the Causes of Disproportionate Minority Contact: Results of Focus Group Discussions*, *Journal of Criminal Justice*, 34(4), 380 (2006); Jessica Short and Christy Sharp, *Disproportionate Minority Contact in the Juvenile Justice System*, 13 (2005), <http://www.cwla.org/programs/juvenilejustice/disproportionate.pdf>.

¹⁷ See Short & Sharp, note 16, at 14.

¹⁸ See Short & Sharp, note 16, at 16.

¹⁹ Annette Kuhlmann, *The View From the Other Side of the Fence: Incarcerated Women Talk about Themselves*, Justice Policy Journal, 2(1), 5-8 (2005), http://www.cjcj.org/files/the_view.pdf. See also, Barbara Owen and Barbara Bloom, *Profiling Women Prisoners: Findings from National Surveys and a California Sample*, The Prison Journal, 75(2), 165-185 (1995) (finding that substance abuse and poverty are related to incarceration for women in California).

²⁰ See Short & Sharp, note 16, at 14.

²¹ See Short & Sharp, note 16, at 14,15.

²² Eleanor Hinton Hoytt et al., *Pathways to Juvenile Detention Reform: Reducing Racial Disparities in Juvenile Detention*, 19, (2001), http://www.aecf.org/upload/publicationfiles/reducing_racial_disparities.pdf (finding that gainful employment plus establishing a relationship with a significant other contributing to “maturing out” of engaging in criminal activity).

²³ Joan Petersilia, *Prisoner Reentry: Public Safety and Reintegration Challenges*, The Prison Journal, 81(3), 360-375 (2001).

²⁴ The Civil Rights Project and The Advancement Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies*, June 2000, <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/>.

²⁵ See Short & Sharp, note 16, at 15.

²⁶ The following criminal justice decision-making points were used for this study: law enforcement disposition, court complaint filing, conviction, and sentencing.

²⁷ California Department of Justice, Criminal Justice Statistics Center, Monthly Arrest and Citation Register, 2005; See also *Balancing the Scales of Justice: County Profiles*, www.aclunc.org/docs/racial_justice/balancing_the_scales_of_justice_county_profiles.pdf.

²⁸ Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, Ohio State Journal of Criminal Law, 5(19), 39 (2007), http://moritzlaw.osu.edu/osjcl/Articles/Volume5_1/Mauer-PDF.pdf (citing Paige M. Harrison and Allen J. Beck, Bureau of Justice Statistics, U.S. Department of Justice, *Prisoners in 2005*, 9 (2006), (documenting some states significantly undercount Latinos.)).

²⁹ Human Rights Watch, *Decades of Disparity: Drug Arrests and Race in the United States*, March 2, 2009, <http://www.hrw.org/en/reports/2009/03/02/decades-disparity-0>; see also, Katherine Beckett, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, Criminology, 44(1) 105-137 (2006).

³⁰ Interviewees were asked, “What is the highest level of education you completed?” The following answer choices were provided: “college”; “some college”; “high school”; “GED”; “middle school”; and “other”.

³¹ The other 2% of interviewees declined to answer this question.

³² The findings in this section are based on analyses of the 60 interviewees who were asked in-depth questions about their educational experience.

³³ All Los Angeles respondents reported having a police presence in high school, and 82% reported having police presence in middle school. In order to ensure the Los Angeles respondents did not skew the data, the analysis was rerun without them. After removing the Los Angeles respondents, police presence in middle school was still strongly related to suspension, but neither police presence at the middle nor high school level was significantly related to arrest before age 20.

³⁴ Only eight interviewees were detained as youth and five of those interviewees eventually returned to comprehensive schools.

³⁵ The findings in this section are based on analyses of the 60 interviewees who were asked in-depth questions about their employment history.

³⁶ The findings in this section are based on analyses of the 59 interviewees who were asked in-depth questions about their housing history.



APPENDIX A

EXTRA-JUDICIAL FACTORS EXPLORED

EDUCATION FACTORS

1. Highly Segregated Schools
2. School Attendance
3. Enrollment in Alternative Schools
4. Enrollment in Private Schools
5. Graduation Rates
6. Drop Out Rates
7. Suspensions/Expulsions
8. UC/CSU Eligibility
9. SAT/ Standardized Test Performance
10. English Language Learners
11. School Resource Officers (SROs) on Campus
12. Free or Reduced Lunch
13. Special Education

SOCIO-ECONOMIC AND EMPLOYMENT FACTORS

1. Median Income
2. Unemployment Rate
3. Job/Population Growth
4. Living in Poverty
5. Government Assistance
6. Industry (blue/white collar)
7. Multiple Jobs
8. Foster Youth
9. Homelessness

HOUSING FACTORS

1. Percent of Income Paid for Housing
2. Average Household Size
3. Abandoned Housing
4. Section 8/Rental Assistance
5. Housing Tenure (Home Ownership vs. Renting)
6. Foreclosures
7. Highly Segregated Housing
8. Evictions

APPENDIX B

CRIMINAL JUSTICE DECISION-MAKING TERMS

- I. Arrest:** Taking a person into custody in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person.¹ California law enforcement agencies report arrest and citation information to the California Department of Justice on the Monthly Arrest and Citation Register, which lists each arrestee; includes information on age, gender, and race/ethnicity; and specifies the "most serious" arrest offense and law enforcement disposition.²
- II. Adult Felony Arrest Dispositions:** Final dispositions can occur at the law enforcement, prosecutor, or adult court level. Disposition data are collected in the Offender-Based Transaction Statistics (OBTS) system. The OBTS system includes the processing of adults (and in some cases, juveniles) arrested in California for felony offenses from arrest through final disposition at the adult level.³
- A. Law Enforcement Dispositions:** An action taken as the result of an arrest. Examples of police dispositions are: adults who are released by law enforcement, referred to another jurisdiction, or receive a misdemeanor or felony complaint; juveniles who are handled within the department, referred to another agency, or referred to the probation department or juvenile court.⁴ Law Enforcement Disposition types include:
- **Complaint Filed:** A verified written accusation, filed by a prosecuting attorney with a local criminal court, which charges one or more persons with the commission of one or more offenses.
 - **Complaint Denied**
 - **Combined Case:** Cases deferred or rejected by the prosecutor and combined with other counts or cases.
 - **Petition to Revoke Probation:** Action taken by a prosecutor to revoke the probation status of an offender.
 - **Law Enforcement Release:** If an arrestee is released by a law enforcement agency, or the complaint is denied by a prosecutor who has determined that there is not enough evidence to justify the filing of a complaint, the release is recorded as a final disposition.
- B. Court Dispositions:** An action taken as the result of an appearance in court by a defendant. Examples are: adults who are dismissed, acquitted, or convicted and sentenced; juveniles who are dismissed, transferred, remanded to adult court, or receive out of home placement (for example, group home, ranch camp, or residential placement)⁵. Court Disposition data are collected in the Offender-Based Transaction Statistics (OBTS) system. Court Disposition types include:
- **Convicted:** A judgment, based either on the verdict of a jury or a judicial officer or on the guilty plea of the defendant, that the defendant is guilty.
 - **Not Convicted**
 - **Acquittal:** a judgment of a court, based either on the verdict of a jury or a judicial officer, that the defendant is not guilty of the offense(s) for which he or she was tried.
 - **Dismissal:** a decision by a judicial officer to terminate a case without a determination of guilt or innocence.
 - **Diversion Dismissed:** criminal charges dismissed after the successful completion of a diversion program.
- C. Sentences:** penalty imposed by a court upon a convicted person.⁶
- **Prison:** state correctional facility where persons are confined following conviction for a felony offense.
 - **Probation/Jail:** a type of disposition given upon conviction that imposes a jail term as a condition of probation.
 - **Jail:** a county or city facility for incarceration of sentenced and unsentenced persons.
 - **Probation with no Jail:** probation granted to adults without condition or stipulation that the defendant serve time in jail as a condition of probation.
 - **Other:**
 - **Death**
 - **Division of Juvenile Justice (formerly Youth Authority):** youth
 - **Fine:** the penalty imposed upon a convicted person by a court requiring the payment of a specified sum of money.

- **California Rehabilitation Center:** an institution operated by the California Department of Corrections and Rehabilitation that is designated for the treatment of persons addicted to narcotics or in imminent danger of addiction. Commitment to the facility is by civil procedure only.

III. Juvenile Probation Referrals: A juvenile who is brought to the attention of the probation department for alleged behavior under Welfare and Institutions Code sections 601 and 602. Juvenile referrals occur when a juvenile is brought to the attention of the probation department for a case review. Juveniles can be referred by a number of sources, with the largest percentage of referrals coming from law enforcement. Referrals may also be generated by schools, parents, public or private agencies, individuals, or by transfers from another county or state.⁷ Referrals may be either “new” or “subsequent” and may be either “detained” or “not detained” pending court action.

- **New Referral:** juvenile who is not currently supervised by the probation department and is typically a first-time offender.
- **Subsequent Referral:** juvenile who is currently supervised by the probation department. A subsequent referral generally results from a new arrest or probation violation.
- **Detained:** juvenile who is detained immediately after arrest and prior to any court action. The vast majority of youth detained are detained in a secure facility.
- **Not Detained:** juvenile who is not detained immediately after arrest and prior to any court action.

IV. Relative Rate Index Data:⁸ The Juvenile Justice and Delinquency Prevention Act (JJDP) requires that juvenile justice systems continually measure and monitor the disproportionate minority contact (DMC) of their juvenile case processing. The current system of measuring DMC involves determining the proportion of minority juveniles in a justice system in relation to their proportion in the general population. The measurement method called is called "Relative Rate Index" (RRI), and the case processing data include:

- **Youth Population:** youth “at risk” which includes youth under juvenile jurisdiction. In California, this includes youth aged 10-17.
- **Arrest:** youth are considered to be arrested when law enforcement agencies apprehend, stop, or otherwise contact them and suspect them of having committed a delinquent act. Delinquent acts are those that, if an adult commits them, would be criminal, including crimes against persons, crimes against property, drug offenses, and crimes against the public order.
- **Refer to Court:** when a potentially delinquent youth is sent forward for legal processing and received by a juvenile or family court or juvenile intake agency, either as a result of law enforcement action or upon a complaint by a citizen or school.
- **Divert:** diversion population includes all youth referred for legal processing but handled without the filing of formal charges. Youth referred to juvenile court for delinquent acts are often screened by an intake department (either within or outside the court). The intake department may decide to dismiss the case for lack of legal sufficiency, resolve the matter informally (without the filing of charges), or resolve it formally (with the filing of charges).
- **Cases Involving Secure Detention:** Detention refers to youth held in secure detention facilities at some point during court processing of delinquency cases (i.e., prior to disposition). In some jurisdictions, the detention population may also include youth held in secure detention to await placement following a court disposition. For the purposes of DMC, detention may also include youth held in jails and lockups. Detention should not include youth held in shelters, group homes, or other non-secure facilities.
- **Cases Petitioned:** Formally charged (petitioned) delinquency cases are those that appear on a court calendar in response to the filing of a petition, complaint, or other legal instrument requesting the court to adjudicate a youth as a delinquent or status offender or to waive jurisdiction and transfer a youth to criminal court. Petitioning occurs when a juvenile court intake officer, prosecutor, or other official determines that a case should be handled formally. In contrast, informal handling is voluntary and does not include the filing of charges.
- **Cases Resulting in Delinquent Findings:** Youth are judged or found to be delinquent during adjudicatory hearings in juvenile court. Being found (or adjudicated) delinquent is roughly equivalent to being convicted in criminal court. It is a formal legal finding of responsibility. If found to be delinquent, youth normally proceed to disposition hearings where they may be placed on probation, committed to residential facilities, ordered to perform community service, or receive various other sanctions.
- **Cases Resulting in Probation Placement:** Probation cases are those in which a youth is placed on formal or court-ordered supervision following a juvenile court disposition.
- **Cases Resulting in Confinement in Secure Juvenile Correctional Facility:** Confined cases are those in which, following a court disposition, youth are placed in secure residential or correctional facilities for delinquent offenders. The confinement population should not include all youth placed in any form of out-of-home placement. Group homes, shelter homes, and

mental health treatment facilities, for example, would usually not be considered confinement. Every jurisdiction collecting DMC data must specify which forms of placement do and do not qualify as confinement.

- **Transfer to Adult Court:** Waived cases are those in which a youth is transferred to criminal court as a result of a judicial finding in juvenile court. During a waiver hearing, the prosecutor usually files a petition asking the juvenile court judge to waive jurisdiction over the case. The juvenile court judge decides whether the case merits criminal prosecution. When a waiver request is denied, the matter is usually scheduled for an adjudicatory hearing in the juvenile court. If the request is granted, the juvenile is judicially waived to criminal court for further action. Juveniles may be transferred to criminal court through a variety of other methods, but most of these methods are difficult or impossible to track from within the juvenile justice system, including prosecutor discretion or concurrent jurisdiction, legislative exclusion, and the various blended sentencing laws.

¹ California Penal Code Section 834.

² California Department of Justice Division of California Justice Information Services Bureau of Criminal Information and Analysis Criminal Justice Statistic Center, *Crime in California 2008*, <http://ag.ca.gov/cjsc/publications/candd/cd08/preface.pdf>.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

APPENDIX C

INTERVIEW QUESTIONNAIRES

The interview questionnaires administered for this study are reprinted in this appendix. All 179 participants were asked the questions in the section titled “Preliminary Questions” which provided demographic information as well as information about participants’ involvement in the criminal justice system and general information about their education, employment, and housing histories. In addition to the questions asked of everyone, an equal number of interviewees from each county were randomly selected to answer in-depth questions about one of the three domains. One third of interviewees answered the “Educational Quantity/Quality” questions; another third answered the “Employment Quality/Quantity” questions; and the other third answered the “Satisfaction with Current Housing” questions. To read the theories underlying the questions, please see page 4 of the report.

PRELIMINARY QUESTIONS

I. Background

1. How old are you? _____
2. What is your Race/Ethnicity?
Black___ White___ Hispanic___ Asian___ Pacific Islander___ American Indian___ Other_____
3. What is your gender? Male___ Female___
4. What is your immigration status?
US Citizen___ Naturalized Citizen___ Permanent Resident___ Visa___ Undocumented___ Other_____
5. What zip code did you grow up in? _____
6. What is your current zip code? _____
7. Have you or your family ever received disability or government assistance? Yes___ No___ (skip to 8)
If yes, in what form?
Food Stamps___ TANF___ Medicaid___ MediCal___ CalWorks___ Disability___ General Assistance___
Other_____
8. Were you ever in foster care? Yes___ No___ (skip to next section II)
If yes, for how long?_____ at what age(s)? _____ how many foster care homes were you in? _____

II. Criminal Justice

9. How old were you when you were first arrested? _____
10. What were you arrested for? _____
11. Did any of the following occur as a result of your arrest?
Detained___ Charged___ Sentenced___ Convicted___ Diverted___ Plea Bargain___ Other_____

- 12. Prior to this arrest were you ever stopped by the police? Yes___ No___
- 13. When were you most recently arrested? (month/year) _____
- 14. What offense(s) were you charged with? _____
- 15. What offense(s) were you convicted of? _____
- 16. Which of the following factors would you say influenced your involvement in the criminal justice system?
Gangs___ Lack of personal motivation___ Unemployment___ Racial Profiling by the police___ Personal addiction___
Lack of educational opportunities___ Poverty___ Exposure to family violence___
Family involvement in criminal justice system___
Other_____
- 17. How has your involvement in the criminal justice system impacted other aspects of your life?

III. Education

- 18. What is the highest level of education you completed?
College___ (at _____) Some college___ (at _____) High School___
GED___ Middle School___ Other_____
- 19. Where did you attend high school? (if no high school, name of last school attended)_____
- (19a.) What was the zip code of this school?_____

IV. Employment

- 20. Have you ever had a job? Yes___ No___ (if no, skip to 23)
- 21. How many jobs have you had? _____
- 22. At the time of your most recent arrest, what was your employment status?
Employed full time___ Employed Part time___ Unemployed___ (skip 25)
- 23. Have you ever been unemployed? Yes___ No___ (if no, skip to 25)
- 24. Have you ever received Unemployment? Yes___ No___
(24a.) Why/Why Not?_____
- (24b.) How long did you receive unemployment?_____
- (24c.) Did you face any obstacles in getting unemployment? Yes___ No___
- 25. Did your last full time employment offer benefits? Yes___ No___

V. Housing

- 26. At the time of your most recent arrest, what was your housing status?

Rent subsidized___ Rent unsubsidized___ Owned home___ Homeless in shelter___ Homeless in car___
Homeless on streets___ Living with family or friends___
Other_____

27. (If Different) When you first became involved in the criminal justice system, what was your housing status?

Rent subsidized___ Rent unsubsidized___ Owned home___ Homeless in shelter___ Homeless in car___
Homeless on streets___ Living with family or friends___
Other_____

28. Have you ever been evicted? Yes___ No___ (skip 28a)

(28a.) If Yes, when were you last evicted (month/year) _____

EDUCATIONAL QUANTITY/QUALITY

29. How would you rate the quality of your education overall on a scale of poor, fair, good or excellent?

Excellent___ Good___ Fair___ Poor___

(29a.) What makes you give this rating? _____

30. Did you graduate from High School? Yes___ (skip to 31) No___

If No:

(30a.) Did you complete a GED program? Yes___ No___

(30b.) Why didn't you complete High School?

Did not pass exam___ Failed to complete necessary credits to graduate___

Dropped out of School___ Why _____

Was kicked out of school___ Why? _____

Other _____

(30c.) What did you do instead of attending high school? _____

31. How many of your friends graduated from high school?

Nearly All (90-100%)___ Most (70-89%)___ About half (40-69%)___ Very Few (0-39%)___

32. Did you attend school on a regular basis?

- ___Yes, my absences from school were infrequent and all absences were excused
- ___Yes, I missed school from time to time, but most of my absences were excused
- ___No, I frequently skipped school but was not kicked out
- ___No, I skipped school so often that I was kicked out of school

Other _____



If did not attend on a regular basis:

(32a.) What caused you to miss school? _____

(32b.) What were the consequences of missing school, if any? _____

(32c.) Have any of the following happened as a result of missing school?

Arrest___ Suspension___ Expulsion___ Involuntary transfer___

33. Were you ever suspended from school? Yes___ No___

34. Were you ever expelled from school? Yes___ No___ (skip 34a)

(34a.) If yes, explain the expulsion process and outcome (i.e. transferred to another school)

35. Was there a police presence at your High School? Yes___ No___ (skip to next section)

36. Was there a police presence at your Middle School? Yes___ No___

37. How did you see the **police interacting with students** in High School, Middle School, or both?

38. What were **your interactions with police** in High School, Middle School, or both? _____

39. What were your interactions with police in High School, Middle School, or both? _____

40. What did you think the police at your school were supposed to be doing? _____

SYSTEM INVOLVEMENT AND EDUCATION

41. Were you ever arrested as a juvenile? Yes___ No___ (end)

(41a.) If so, at what age? ____

42. Were any of your juvenile arrests related to school in any of the following ways (check all that apply)

___Arrested at school

___Arrested during school hours (away from school)

___Arrested on the way to/from school

___Arrested as the result of an incident that started at school

43. Were you ever taken out of school as the result of juvenile justice system involvement (e.g., detained in a youth detention facility pending adjudication) Yes___ No___

(43a.) If yes, when you were released from detention, did you return to the same school you attended prior to juvenile justice system involvement? Yes___ No___



44. What impact did your involvement in the juvenile justice system have on your educational experience?

45. Did you go to school while you were in juvenile detention? Yes___ No___

46. Did you complete any education programs while in juvenile detention (GED) Yes___ No___

47. How would you rate the quality of your education overall in juvenile detention?

Excellent___ Good___ Fair___ Poor___

(47a.) What caused you to give this rating? _____

48. Do you see any connection between your educational experience and your involvement with the criminal justice system?

Yes___ No___

(48a.) Please explain. _____



W. Hayward Burns Institute
180 Howard Street Suite 320 San Francisco, CA 94105
415.321.4100 ♦ www.burnsinstitute.org



ACLU of Northern California
39 Drumm Street, San Francisco, CA 94111
415.321.4100 ♦ www.aclunc.org

1 (2) 75 in fiscal year 2015; and

2 (3) 75 in fiscal year 2016.

3 (b) NECESSARY SUPPORT STAFF FOR IMMIGRATION
4 COURT JUDGES.—The Attorney General shall address the
5 shortage of support staff for immigration judges by ensur-
6 ing that each immigration judge has the assistance of the
7 necessary support staff, including the equivalent of 1 staff
8 attorney or law clerk and 1 legal assistant.

9 (c) ANNUAL INCREASES IN BOARD OF IMMIGRATION
10 APPEALS PERSONNEL.—The Attorney General shall in-
11 crease the number of Board of Immigration Appeals staff
12 attorneys (including the necessary additional support
13 staff) to efficiently process cases by at least—

14 (1) 30 in fiscal year 2014;

15 (2) 30 in fiscal year 2015; and

16 (3) 30 in fiscal year 2016.

17 (d) FUNDING.—There shall be appropriated, from
18 the Comprehensive Immigration Reform Trust Fund es-
19 tablished under section 6(a)(1), such sums as may be nec-
20 essary to carry out this section.

21 **SEC. 3502. IMPROVING IMMIGRATION COURT EFFICIENCY**
22 **AND REDUCING COSTS BY INCREASING AC-**
23 **CESS TO LEGAL INFORMATION.**

24 (a) CLARIFICATION REGARDING THE AUTHORITY OF
25 THE ATTORNEY GENERAL TO APPOINT COUNSEL TO

1 ALIENS IN IMMIGRATION PROCEEDINGS.—Section 292 (8
2 U.S.C. 1362) is amended—

3 (1) by inserting “(a)” before “In any”;

4 (2) by striking “(at no expense to the Govern-
5 ment)”;

6 (3) by striking “he shall” and inserting “the
7 person shall”; and

8 (4) by adding at the end the following:

9 “(b) The Government is not required to provide coun-
10 sel to aliens under subsection (a). However, the Attorney
11 General may, in the Attorney General’s sole and
12 unreviewable discretion, appoint or provide counsel to
13 aliens in immigration proceedings conducted under section
14 240 of this Act.”.

15 (b) APPOINTMENT OF COUNSEL IN CERTAIN
16 CASES.—Section 240(b)(4) (8 U.S.C. 1229a(b)(4)) is
17 amended—

18 (1) in subparagraph (A), by striking “, at no
19 expense to the Government,”; and

20 (2) by adding at the end the following: “The
21 Government is not required to provide counsel to
22 aliens under this paragraph. However, the Attorney
23 General may, in the Attorney General’s sole and
24 unreviewable discretion, appoint or provide counsel

1 at government expense to aliens in immigration pro-
2 ceedings.”.

3 (c) APPOINTMENT OF COUNSEL FOR UNACCOM-
4 PANIED ALIEN CHILDREN AND ALIENS WITH A SERIOUS
5 MENTAL DISABILITY.—Section 292 (8 U.S.C. 1362), as
6 amended by subsection (a), is further amended by adding
7 at the end the following:

8 “(e) Notwithstanding subsection (b), the Attorney
9 General shall appoint counsel, at the expense of the Gov-
10 ernment, if necessary, to represent an alien in a removal
11 proceeding who has been determined by the Secretary to
12 be an unaccompanied alien child, is incompetent to rep-
13 resent himself or herself due to a serious mental disability
14 that would be included in section 3(2) of the Americans
15 with Disabilities Act of 1990 (42 U.S.C. 12102(2)), or is
16 considered particularly vulnerable when compared to other
17 aliens in removal proceedings, such that the appointment
18 of counsel is necessary to help ensure fair resolution and
19 efficient adjudication of the proceedings.”.

20 (d) FUNDING.—There shall be appropriated, from
21 the Comprehensive Immigration Reform Trust Fund es-
22 tablished under section 6(a)(1), such sums as may be nec-
23 essary to carry out this section and the amendments made
24 by this section.



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF PANOVITS v. CYPRUS

(Application no. 4268/04)

JUDGMENT

STRASBOURG

11 December 2008

FINAL

11/03/2009

This judgment may be subject to editorial revision.

In the case of Panovits v. Cyprus,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President*,

Nina Vajić,

Khanlar Hajiyev,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni, *judges*,

George Erotocritou, *ad hoc judge*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 6 November 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 4268/04) against the Republic of Cyprus lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Cypriot national, Mr Andreas Kyriakou Panovits (“the applicant”), on 31 December 2003.

2. The applicant was represented by Mr E. Efstathiou, a lawyer practising in Nicosia. The Cypriot Government (“the Government”) were represented by their Agent, Mr P. Clerides, Attorney-General of the Republic of Cyprus.

3. The applicant complained, in particular, about the fairness of criminal proceedings at the pre-trial stage and before the domestic courts.

4. On 16 January 2006 the Court decided to give notice of the application and communicate the complaints under 6 § 1 concerning the pre-trial stage of the proceedings together with the fairness of the trial before the Assize Court and the Supreme Court to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility. On 31 January 2008 the Court decided to invite the parties to submit supplementary observations under Rule 54 § 2 (c) of the Rules of Court.

5. Mr G. Nicolaou, the judge elected in respect of Cyprus, withdrew from sitting in the case (Rule 28 of the Rules of Court). The Government accordingly appointed Mr G. Erotocritou to sit as an *ad hoc* judge (Rule 29).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born on 14 August 1982 and is currently serving concurrent sentences of imprisonment at the Nicosia Central Prison.

A. The applicant's arrest

7. In the context of a police investigation concerning a murder and robbery which took place on 19 April 2000, the police contacted the applicant's father and invited him and the applicant to visit the Limassol police station. At the time the applicant was just over 17 years old. The applicant went to the police station accompanied by his father. The Limassol District Police Director (hereinafter "the Police Director") informed the applicant's father, in the presence of the applicant, about the crime that had been committed, the seriousness of the case, and the fact that there was evidence involving the applicant and that an arrest warrant had been issued against him.

8. According to the applicant, he immediately stated that he was innocent. Another police officer told him that his friend had already confessed to murdering the victim together with the applicant. The police officer added that the applicant's friend was crying and hitting his head against a wall while he (the applicant) was merely lying to them. Then, another police officer came into the Police Director's room holding an arrest warrant and informed the applicant that he was under arrest for murder. The applicant replied that he had nothing to add to his statement that he was innocent. The police officer then told the applicant to follow him into a different office. There there were 5 or 6 officers who started asking him questions and inducing him to confess, promising that if he did so they would assist him. They questioned him for approximately 30-40 minutes but he kept saying that he could not remember anything as he had been very drunk the night before. At some stage during the interrogation a police officer put his gun on the desk and told the applicant that he should hurry up as they had other things to do. The police officers told him that if he wanted to go he should confess. Subsequently a police officer suggested that they take a written statement from the applicant and that the police officers would remind him of anything he could not remember. The applicant then agreed to make a written statement. He denied having made any prior oral admission.

9. According to the Government, relying on the testimonies of the police officers participating in the interrogation, the applicant was shown the arrest warrant and informed of the reasons for his arrest, and had his attention drawn to the law. The applicant replied that he had nothing to say other than

that he was innocent. He was then taken to a different room for questioning. Before the applicant was questioned the arresting officer explained again the reasons for his arrest, repeated that there was evidence involving the applicant in the circumstances under investigation and cautioned him that anything he said could be used against him in subsequent proceedings. There were four police officers present in the room. The applicant replied that he had not intended to kill anyone and started to give an explanation of the events. According to the arresting officer, the applicant was interrupted and his attention was drawn to the law. During the questioning the applicant confessed his guilt.

10. The parties agreed that when the applicant was taken away for questioning, his father remained in the Police Director's office. He was shocked and after a couple of minutes told the Police Director that they should not use violence against his son. The Police Director replied that the police did not use such practices and added that the case was serious, that there was evidence linking the applicant with the crime and that it was important to seek the advice of a lawyer. He asked the applicant's father whether he wanted to be present while his son was questioned. The father declined the offer. A few minutes afterwards, a police officer entered the room and informed the Police Director and the applicant's father that the applicant had confessed. The Police Director invited the applicant's father to join his son in the interview room so that he could hear what his son had admitted. The applicant's father preferred to wait outside.

11. The applicant was charged with manslaughter and robbery under the Criminal Code (Cap. 154). On 9 May 2000 the applicant noted in an additional written statement: "I did not hit him (the victim) with the stone but only kicked him a couple of times."

B. Proceedings before the Limassol Assize Court

12. The applicant and his co-accused were brought for trial before the Limassol Assize Court.

13. During the trial the applicant maintained that his confession to the police had not been voluntary but the product of deception, psychological pressure, promises, threats and other tactics aimed at creating fear. He also argued that at the time he had made his statement to the police he had been drunk and, therefore, he had not been in a position to remember accurately the facts described in that statement. Furthermore, the applicant argued that he had not had legal advice immediately after his arrest and before being questioned and induced to sign the written statement.

14. On 11 and 12 January 2001 the court heard the evidence of the Police Director concerning the applicant's arrest and questioning. The Director confirmed that he had invited the applicant and his father to his office, where he had told the father, without addressing the applicant, that

an arrest warrant had been issued against the applicant in connection with a murder and that there was evidence linking the applicant to the crime. The applicant had then been cautioned, arrested and taken into a separate room for questioning. Shortly after the applicant left the room the Director had explained to the applicant's father the seriousness of the case and suggested that they find a lawyer.

15. On 7 February 2001 the Assize Court, having considered all the evidence put before it, found that the applicant's confession had been voluntary and that he had not been subjected to any undue or improper pressure by the police to secure it. The evidence of the prosecution gave a clear picture of the events that had taken place and the court dismissed the applicant's allegations that, at the time of his confession, he had suffered loss of memory due to drunkenness. The confession was, therefore, admissible as evidence.

16. As regards the applicant's claims concerning the lack of legal representation before his questioning, the court noted that the defence had not relied on any provision or authority recognising a right to have legal advice as a condition for receipt of an accused's statement. Nor had the applicant or his father requested a lawyer and been refused one by the police. Moreover, the Director of Police had advised the applicant's father that he and his son should seek legal representation. Overall, there had been no inappropriate action on the part of the police in this respect.

17. Subsequently, on 14 February 2001, during the main trial, the following exchange took place between the applicant's lawyer, Mr Kyprianou, and the bench (translation of verbatim record of the proceedings):

“Mr Kyprianou: I will ask the prosecution to give me all the statements of suspects who made a statement about this case so that I can continue my cross-examination of this witness. The prosecution is obliged to supply me with all the statements taken from other suspects and it is not permissible in our view for the prosecution to hide behind this.

Court: First we want you to lower the tone of your voice. You do not let slip an opportunity to attack the prosecution who we believe is trying to present its case in a fair way, at least as the facts so far show. If you asked at some stage for the statements to be given to you and the prosecution refused, that is another matter.

Mr Kyprianou: I believed that I would get this from the case file, now I am deprived of this right. I want the complete case file. I cannot continue my cross-examination of this witness if I do not have the complete case file.

Ms Kyriakidou (prosecutor): The position of the prosecution on the basis of Article 7 of the Law on Criminal Procedure (is that) to make any complaint the Defence must apply in writing to the prosecution to ask for any statement in the file and if the Prosecution refuses, then the defence is entitled to complain.

Here, the defence did not apply in writing; certain particulars, photographs, plans were asked for verbally and whatever was asked for was given and the prosecution

never refused to give anything to the defence. This process did not happen and it is my position that this attitude of the defence is not justified.

Court: We have considered the request of the learned counsel of accused no. 2 for the Court to interrupt the proceedings so that he can get statements of persons who gave statements during the investigation of the case from his opponents. As stated earlier today, the defence had a right, on the basis of Article 7 of the Law on Criminal Procedure, Cap.155, to request to be supplied with the said copies from the day when the accused pleaded not guilty, but failed to do so.

We do not consider it expedient to break after so much delay and to create a fresh delay for this purpose. In any case, the Court in the present case is occupied with whether the prosecution will succeed in proving the guilt of the accused, who we note are presumed innocent until the prosecution, with their evidence, prove their guilt beyond all reasonable doubt.

Whether the examination was unsatisfactory or not is a matter which will be decided at the end of the case. The request is therefore refused.

Mr Kyprianou: I would ask for a break of five minutes in view of your ruling to gather my thoughts and see how I shall proceed because I believed that there would be disclosure of all the documents, for this reason I want five minutes to think about what I shall do in view of your ruling, that is to say how I shall proceed with the cross-examination. The cross-examination will take another sitting of the court. So the five minutes I am asking for are not unjustifiable.

Court: We will approve a break of ten minutes but we will remind (the defence) that it is the second time that an interruption of the proceedings has been requested for inspecting the case file. We had a break in a previous session and gave a sufficient interval for them to see the file.”

18. Following the break, the proceedings were resumed. At one point a confrontation occurred between the applicant’s lawyer, Mr Kyprianou, and the court. Mr Kyprianou was at the time cross-examining a police officer who had taken the applicant’s written statement and was asking him about the manner in which an indication by another police-officer to insert the time of taking the statement was made. The court interrupted Mr Kyprianou and noted that they found his questions unnecessary. Mr Kyprianou then sought leave to withdraw from the case which was refused. The verbatim record of the proceedings reports the following exchange (translation):

“Court: We consider that your cross-examination goes beyond the detailed cross-examination that can take place at the present stage of the main trial in issues...

Mr Kyprianou: I will stop my cross-examination...

Court: Mr Kyprianou...

Mr Kyprianou: Since the Court considers that I am not doing my job properly in defending this man, I ask for your leave to withdraw from this case.

Court: Whether an advocate is to be granted leave to withdraw or not, is a matter within the discretionary power of the court and, in the light of what we have heard, no such leave is granted. We rely on the case of *Kafkaros and Others v. the Republic* and do not grant leave.

Mr Kyprianou: Since you are preventing me from continuing my cross-examination on significant points of the case, then my role here does not serve any purpose.”

Court: We consider your persistence...

Mr Kyprianou: And I am sorry that when I was cross-examining, the members of the court were talking to each other, passing ‘*ravasakia*’ among themselves, which is not compatible with allowing me to continue the cross-examination with the required vigour, if it is under the secret scrutiny of the court.

Court: We consider that what has just been said by Mr Kyprianou, and in particular the manner in which he addresses the court, constitutes a contempt of court and Mr Kyprianou has two choices: either to maintain what he said and to give reasons why no sentence should be imposed on him, or to decide whether he should retract. We give him this opportunity exceptionally. Section 44 (1) (a) of the Courts of Justice Law applies to its full extent.

Mr Kyprianou: You can try me.

Court: Would you like to say anything?

Mr Kyprianou: I saw with my own eyes the small pieces of paper going from one judge to another when I was cross-examining, in a way not very flattering to the defence. How can I find the stamina to defend a man who is accused of murder?

Court (Mr Photiou): It so happens that the piece of paper to which Mr Kyprianou refers is still in the hands of brother Judge Mr Economou and Mr Kyprianou may inspect it.

Court (Ms Michaelidou): The exchange of written views between the members of the bench as to the manner in which Mr Kyprianou is conducting the case does not give him any rights, and I consider Mr Kyprianou’s behaviour utterly unacceptable.

Court (Mr Photiou): We shall have a break in order to consider the matter. The defendant (in the main trial) should in the meantime remain in custody.

...

Court: We considered the matter during the adjournment and continue to believe that what Mr Kyprianou said, the content, the manner and the tone of his voice, constitute a contempt of court as provided for in section 44 (1) (a) of the Courts of Justice Law 14/60 ... that is, showing disrespect to the court by way of words and conduct. We already asked Mr Kyprianou before the break if he had anything to add before we pass sentence on him. If he has something to add, let us hear him. Otherwise, the court should proceed.

Mr Kyprianou: Mr President, certainly during the break, I wondered what the offence was which I had committed. The events took place in a very tense atmosphere. I am defending a very serious case; I felt that I was interrupted in my cross-examination and said what I said. I have been a lawyer for forty years, my record is unblemished and it is the first time that I face such an accusation. That is all I have to say.

Court: We shall adjourn for ten minutes and shall then proceed with sentencing.”

19. After a short break the Assize Court, by a majority, sentenced Mr Kyprianou to five days’ imprisonment. The court referred to the above exchange between Mr Kyprianou and its members and held as follows:

“...It is not easy, through words, to convey the atmosphere which Mr Kyprianou created since, quite apart from the unacceptable content of his statements, the tone of his voice as well as his demeanour and gestures to the court not only gave an unacceptable impression of any civilised place, and a courtroom in particular, but were apparently aimed at creating a climate of intimidation and terror within the court. We are not exaggerating at all in saying that Mr Kyprianou was shouting and gesticulating at the court.

It was pointed out to him that his statements and his behaviour amounted to contempt of court and he was given the opportunity to speak. And while there was a reasonable expectation that Mr Kyprianou would calm down and that he would apologise, Mr Kyprianou, in the same tone and with the same intensity already referred to, shouted, ‘You can try me’.

Later, after a long break, Mr Kyprianou was given a second chance to address the court, in the hope that he would apologise and mitigate the damage caused by his behaviour. Unfortunately, at this stage Mr Kyprianou still showed no signs of regret or, at least, of apprehension for the unacceptable situation he had created. On the contrary, he stated that during the break he wondered what his crime had been, merely attributing his behaviour to the ‘very tense atmosphere’. However, he was solely responsible for the creation of that atmosphere and, therefore, he cannot use it as an excuse.

Mr Kyprianou did not hesitate to suggest that the exchange of views between the members of the bench amounted to an exchange of ‘*ravasakia*’, that is, ‘love letters’ (See: ‘Dictionary of Modern Greek - Spoudi ravasaki (Slavic ravas), love letter, written love note’). And he accused the Court, which was trying to regulate the course of the proceedings, as it had the right and the duty to do, of restricting him and of doing justice in secret.

We cannot conceive of another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate.

The judges as persons, whom Mr Kyprianou has deeply insulted, are the least of our concern. What really concerns us is the authority and integrity of justice. If the court’s reaction is not immediate and drastic, we feel that justice will have suffered a disastrous blow. An inadequate reaction on the part of the lawful and civilised order, as expressed by the courts, would mean accepting that the authority of the courts be demeaned.

It is with great sadness that we conclude that the only adequate response, in the circumstances, is the imposition of a sentence of a deterrent nature, which can only be imprisonment.

We are well aware of the repercussions of this decision since the person concerned is an advocate of long standing, but it is Mr Kyprianou himself who, through his conduct, brought matters to this end.

In the light of the above we impose a sentence of imprisonment of five days”.

20. Mr Kyprianou served his prison sentence immediately. He was in fact released before completing the full term in accordance with section 9 of the Prison Law (Law no. 62(I)/1996).

21. The applicant continued to be represented by Mr Kyprianou for the rest of his trial.

22. On 21 February 2001 the defence requested the judges to withdraw from the case in view of the events that had occurred so that the case could be tried by another bench. Mr Kyprianou requested that the court be addressed by another lawyer in this respect, given the fact that he had been directly concerned by the court's decision on contempt. The defence was concerned that the court would not be impartial. This request was granted.

23. On 2 March 2001, by an interim decision, the Assize Court dismissed the request for its withdrawal. Having examined the relevant case-law on the issue it found that no ground had been established for its withdrawal. In this connection it noted that:

“no reasonable person who had actual knowledge of the circumstances of the case from genuine sources – as opposed to plain rumours or the manner in which the matter had been presented in the media – would justifiably form the impression that there was a real likelihood of prejudice by the court against the defendant simply because of its conclusion that his lawyer's behaviour, at some stage of the proceedings, had been in contempt of court”.

24. Given that its decision on contempt had been a decision reached within the context of its exercise of its judicial functions and, as such, there was no issue of personal feelings of the judges or any prejudice on the part of the court, there was no reason why the court should abandon the examination of the case before the completion of the trial.

25. The proceedings therefore continued before the same bench.

26. On 10 May 2001 the Assize Court found the applicant guilty of manslaughter and robbery. The court dismissed the applicant's allegations that his confession had been fabricated by the police and taken under suspicious circumstances. It found that there had been clear, independent and persuasive evidence demonstrating the genuine nature of his confession to the police. Furthermore, it noted that apart from the free and voluntary confession, the conclusion about the applicant's guilt was supported by other strong and independent evidence and facts. In particular, the court relied on the applicant's further statement of 9 May 2000 (see paragraph 11 above), placing the applicant at the time and place of the crime and confirming that he used force against the victim, a statement of a friend of the applicant to whom the applicant had stated that he had been involved in a serious fight with the victim, and various testimonies confirming that the applicant had been seen in a pub drinking and talking to the victim, leaving the pub right after the victim and heading in the same direction as the victim. Moreover, further testimonies confirmed that the applicant was seen in the early hours of the following morning drinking in another pub dressed in clothes covered in mud. The medical evidence concerning the victim's death had confirmed that the cause of death had been multiple and violent blows, a finding which was consistent with the applicant's two statements as well as that of his co-accused. The confession of his co-accused could not be treated as evidence against the applicant.

27. On 24 May 2001 the Assize Court sentenced the applicant to two concurrent sentences of imprisonment for fourteen and six years for manslaughter and robbery respectively.

C. Appeal proceedings before the Supreme Court

28. On 29 May 2001 the applicant lodged an appeal with the Supreme Court against his conviction and sentence.

29. In challenging his conviction he repeated his arguments concerning the involuntary nature of his confession, the circumstances in which it had been taken and the violation of his right to the assistance of a lawyer. In particular, it was emphasised that the Director of Police had not advised the applicant himself that he should consult a lawyer and had not warned the applicant that he was under no obligation to state anything about the case. Moreover, the applicant maintained that his conviction had been the direct consequence of the hostility which had been openly expressed by the Assize Court towards his lawyer, who had also been tried, convicted by the same court for contempt and imprisoned. As a result, the applicant's confidence in the impartiality of the court and his lawyer had been shaken.

30. The prosecution also lodged an appeal challenging the sentence imposed as "manifestly insufficient" in the circumstances.

31. On 3 July 2003 the Supreme Court dismissed both appeals.

32. As to what had occurred at the pre-trial stages of the proceedings the Supreme Court noted that the applicant had gone to the police station accompanied by his father and both had been informed about the crime, the suspicion that the applicant had been involved in it and that they could be assisted by a lawyer if they so wished. The applicant had stated that he was innocent; he had then been arrested and taken for questioning in a different room. When his son had been taken for questioning the applicant's father had been warned about the seriousness of the case, that they could consult a lawyer and that he could be present during the questioning. However, he had preferred to wait outside. A few minutes later the applicant's father and the Police Director had been informed that the applicant had confessed his guilt. The court observed that the fact that the applicant had confessed did not necessarily lead to the conclusion that something improper had occurred.

33. As to the applicant's confession, the court noted that it had constituted the subject of a separate hearing within the trial and that the Assize Court had concluded that it had been the product of the free will of the applicant and found it admissible as evidence. The court observed that the Assize Court, following settled principles of Cypriot jurisprudence, had re-examined the content of the statement in the light of the entirety of the evidence in the main trial. Its judgment was elaborate and the evidential material was discussed with meticulousness together with the arguments of

the parties. A simple reading of the minutes confirmed the correctness of the Assize Court's judgment. As for the applicant's credibility, the Supreme Court noted that:

“as a general comment, ... the appellant appeared, as it is shown by the evidence, to have had a selective memory. He remembered all the details which did not incriminate him while he had complete lack of memory in respect of all the elements which linked him to the crime. This attitude is evident from his evidence both in the main trial and in the trial within a trial concerning the voluntariness of the contested statement. And in both proceedings he tried to negate the statements he had made in his earlier written confession.”

34. Moreover, there was sufficient, powerful and independent evidence putting the applicant at the time and place of the crime. Such evidence taken together with the applicant's admission contained in a second statement, the admissibility of which was not contested as having been submitted on an involuntary basis, rendered the applicant's guilt proven beyond any reasonable doubt.

35. The Supreme Court also dismissed the applicant's argument concerning the Assize Court's alleged lack of impartiality in view of his lawyer's conviction for contempt of court. In particular it stated the following:

“Following his conviction by the Assize Court (for contempt of court) Mr Kyprianou requested to withdraw from the proceedings and to stop acting as counsel for the appellant...The appellant's argument that, in view of what had happened before the Assize Court, this ceased to be an impartial court and the trial was rendered unfair, is incorrect. A simple reading of the voluminous transcript of the proceedings demonstrates the smooth conduct of the trial, in which all the evidence was presented before the court, which had to evaluate it and decide the extent to which the prosecution had managed to prove the charges against the appellant beyond all reasonable doubt. We have indicated above that the evidence against the appellant was conclusive. His advocate had put to the Assize Court everything that could be submitted in his defence in a trial; a task which was, admittedly, rather difficult. The Assize Court's decision not to allow the advocate to withdraw in the middle of the trial or to withdraw itself from the case, which would have led to a retrial, did not render the trial unfair, while the court itself had, in our opinion, preserved its impartiality throughout the proceedings.”

36. Finally, as regards the sentence imposed by the Assize Court, the Supreme Court found that there had been evident leniency in sentencing, making the length of the prison sentence imposed almost manifestly insufficient. Nevertheless, it decided not to interfere with the Assize Court's decision in this respect.

37. Concerning the Mr Kyprianou's request to stop acting as counsel for the applicant (see paragraphs 18 and 35 above), the Government clarified that it was made before the contempt proceedings. This was supported by the applicant and the relevant transcript of the proceedings.

II. RELEVANT DOMESTIC LAW AND INTERNATIONAL STANDARDS

A Rights of the accused

38. Article 11 (4) of the Constitution of the Republic of Cyprus provides as follows:

“Every person arrested shall be informed at the time of his arrest in a language which he understands of the reasons for his arrest and shall be allowed to have the services of a lawyer of his own choosing.”

39. Article 12 (4) and (5) of the Constitution provides, in so far as relevant, as follows:

(4) “Every person charged with an offence shall be presumed innocent until proved guilty according to law.

(5) Every person charged with an offence has the following minimum rights:

(a) to be informed promptly and in a language which he understands and in detail of the nature and grounds of the charge preferred against him;

(b) to have adequate time and facilities for the preparation of his defence; ...”

B. Right to a fair trial

40. Article 30 (2) and (3) provides, in so far as relevant, as follows:

(2) “In the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable time by an independent, impartial and competent court established by law.

...

(3) Every person has the right:

(a) to be informed of the reasons why he is required to appear before the court;

(b) to present his case before the court and to have sufficient time necessary for its preparation....”.

C. International Covenant on Civil and Political Rights 1966 (“ICCPR”)

41. The ICCPR provides in Article 14(4), which broadly corresponds to Article 6 of the European Convention, that:

“In the case of juvenile persons, the procedure shall be such as will take account of their age, and the desirability of promoting their rehabilitation.”

D. Treatment of a suspect

1. Domestic law

42. Section 8 of the Criminal Procedure Law, Cap. 155 provides as follows:

“Without prejudice to the generality of section 3 of this Law and without prejudice to the operation of section 5 of this Law the rules for the time being approved by Her Majesty’s Judges of the Queen’s Bench Division in England relating to the taking of statements by police officers (known as ‘The Judges’ Rules’) shall apply to the taking of statements in the Colony as they apply to the taking of statements in England”.

43. Section 13 of the Criminal Procedure Law, Cap. 155 provides, in so far as relevant, as follows:

“...Any [arrested] person while in custody shall be given reasonable facilities for obtaining legal advice, for taking steps to obtain bail and otherwise for making arrangements for his defence or release.”

44. Rule II of the Judges’ Rules provides as follows:

“As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms:

‘You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.’ ”

2. Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Ref: CPT/inf/E (2002) 1_Rev.2006)

45. The CPT standards on police detention were set out in its 2nd General Report [CPT/Inf (92) 3] as follows:

36. The CPT attaches particular importance to three rights for persons detained by the police: the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities). They are, in the CPT’s opinion, three fundamental safeguards against the ill-treatment of detained persons which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc).

37. Persons taken into police custody should be expressly informed without delay of all their rights, including those referred to in paragraph 36. Further, any possibilities offered to the authorities to delay the exercise of one or other of the latter rights in order to protect the interests of justice should be clearly defined and their application strictly limited in time. As regards more particularly the rights of access to a lawyer and to request a medical examination by a doctor other than one called by the police, systems whereby, exceptionally, lawyers and doctors can be chosen from pre-

established lists drawn up in agreement with the relevant professional organisations should remove any need to delay the exercise of these rights.

38. Access to a lawyer for persons in police custody should include the right to contact and to be visited by the lawyer (in both cases under conditions guaranteeing the confidentiality of their discussions) as well as, in principle, the right for the person concerned to have the lawyer present during interrogation.

46. The CPT standards on juveniles deprived of their liberty were set out in the CPT's 9th General Report [CPT/Inf (99) 12] as follows:

“In this context, the CPT has stressed that it is during the period immediately following deprivation of liberty that the risk of torture and ill-treatment is at its greatest. It follows that it is essential that all persons deprived of their liberty (including juveniles) enjoy, as from the moment when they are first obliged to remain with the police, the right to notify a relative or another third party of the fact of their detention, the right of access to a lawyer and the right of access to a doctor.”

E. Treatment of an accused's confession under the national law

47. In *Vouniotis v. The Republic* (1975) 2 C.L.R. 34 the Supreme Court held that the court should verify the truthfulness of a confession by independent evidence. In this case the following extracts from *R v Sykes* 8 Cr. App. Rev. were cited with approval:

“A man may be convicted on his own confession alone; there is no law against it... the first question [to be asked] when ... examining the confession of a man, is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in it of fact so far as we can test them true? ... Is it [the confession] consistent with other facts which have been ascertained and which have been, as in this case, proved before us? ...”

48. In the case of *Kafkaris v. The Republic* (1990) 2 CLR 203, the following was stated:

“A confession of a crime – so long as it is accepted as voluntary – can on its own constitute sufficient ground for an accused's conviction. No matter how voluntary a confession is, it is prudent, in accordance with the case-law... to have, where possible, corroborating evidence in support of the accuracy of its content. That would exclude the possibility of error and discourage the interrogating authorities to seek a confession as an easy alternative to having a crime properly investigated. The content of a confession must be judged not only on the basis of the authenticity of the allegations it contains, but also in conjunction with any other testimony that tends to support or disprove the accuracy of its content.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

49. The applicant made a number of complaints concerning the fairness of the various stages of the criminal proceedings under Article 6 of the Convention, which reads, in so far as relevant, as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...”

50. With regard to the pre-trial stage of the proceedings, the applicant complained that he had not been informed of his right to consult a lawyer prior to being questioned and submitting his statement and that he had not been provided with an adequate opportunity to find a lawyer at that stage. This had been particularly detrimental for his defence given that he was a minor at the time and had not even been questioned by the police in the presence of his guardian. He further complained that he had not been adequately warned of his right to remain silent.

51. The applicant also complained that he had not received a fair trial by the Assize Court given its acceptance of his confession, the admission of other evidence attempting to show his “bad character” and concerning his involvement in other criminal investigations, and the continual interferences by the court in the conduct of the trial which ended in a direct conflict with the applicant’s lawyer. His lawyer’s subsequent conviction and imprisonment for contempt of court had inhibited the lawyer’s ability to defend the applicant (see, for the relevant facts, *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-...).

52. Finally, the applicant complained that there was no third-instance appeal jurisdiction in Cyprus to review the lawfulness of the findings of the Supreme Court on appeal.

53. The Government contested the applicant’s arguments in their entirety.

A. Admissibility

54. The Court considers that the complaints concerning the pre-trial stage of the proceedings and the fairness of the trial at first instance and on appeal raise questions of law which are sufficiently serious that their determination should depend on an examination of the merits. No other ground for declaring them inadmissible has been established. These complaints must therefore be declared admissible.

55. In connection with the applicant's complaint, concerning the lack of a third level of jurisdiction in Cyprus to which the soundness and lawfulness of the judgments of the Supreme Court on appeal could be challenged, the Court considers that it falls to be examined under Article 2 of Protocol No. 7 of the Convention. The Court observes that the applicant, following his conviction and sentence by the Assize Court, appealed to the Supreme Court, which dealt with his elaborate grounds of appeal providing adequate reasoning for its findings. The applicant therefore had his conviction and sentence reviewed by a higher tribunal in conformity with Article 2 of Protocol No. 7. In this connection, the Court notes that neither this provision nor any other provision of the Convention or its Protocols guarantees a right to have a case heard by three judicial instances.

56. Accordingly, this complaint is manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

B. Merits

1. Complaints concerning the pre-trial stage of the proceedings

(a) The Government

57. The Government maintained that the police had drawn the applicant's attention to his right to remain silent on three occasions: at the time of his arrest, when he was taken for questioning and before his written statement was taken. In particular, the applicant had been warned in accordance with the wording of Rule II of the Judges' Rules which apply in Cyprus by virtue of section 8 of the Criminal Procedure Law.

58. The Government stated that the testimony of the witnesses for the prosecution concerning the events at the pre-trial stage of the proceedings had been accepted by the Assize Court both in the trial within a trial and in the main proceedings. They noted that in the trial within a trial the prosecution had succeeded in proving beyond all reasonable doubt that the applicant's confession, given shortly after his arrest, had been voluntary.

59. Although the applicant's father, who was acting at the time as the applicant's guardian, had been made fully aware of the seriousness of the case and had been prompted to appoint a lawyer immediately after the applicant was taken for questioning, the father did not appoint a lawyer and

preferred not to be present when the applicant gave his written statement to the police. Moreover, neither the applicant nor his father had requested the assistance of a lawyer to which they were entitled from the initial stages of the investigation in accordance with domestic law. Had they requested such services, access to a lawyer would have been granted. There had therefore been no denial of the applicant's rights in this respect and he had benefited from the assistance of a lawyer from the day following his arrest and throughout the proceedings.

60. In the light of the entirety of the proceedings, the absence of legal assistance on the day of the applicant's arrest had not deprived him of a fair hearing. The applicant had had every opportunity under domestic law to challenge the voluntary nature and admissibility of his written statement in the subsequent proceedings. He had been represented by counsel and had the witnesses of the prosecution cross-examined, whereas the burden of satisfying the court as to the voluntary character of the confession, to the requisite criminal standard of proof, had remained with the prosecution.

61. The applicant's father, being at the time the applicant's guardian, had by his conduct unequivocally waived the applicant's right to have the assistance of a lawyer at the pre-trial stage of the proceedings. The Government could not be held accountable in the present circumstances for the applicant's failure to exercise his right in this respect.

(b) The applicant

62. The applicant maintained that he had not been advised to find a lawyer before he was taken for questioning, and that his father had only been advised to do so while the applicant was being questioned. The applicant, being underage at the time, had been unable to comprehend the seriousness of the matter and was totally unaware of the fact that had he asked for a lawyer the police questioning could have been deferred pending the lawyer's arrival. Moreover, his father had been unable to respond and request a lawyer for his son immediately as according to the testimonies of the police officers he had been "stunned, shocked and unable to speak".

63. Moreover, due respect by the State of the applicant's rights required that he himself be advised of his right to consult a lawyer upon his arrest. If the police considered him mature enough to be arrested, taken for questioning alone, and able to make a statement to the police without the presence of his father or a lawyer, it was their duty to explain directly to the applicant that he had the right to consult a lawyer upon his arrest and that he was entitled to legal aid.

(c) The Court's assessment

64. At the outset the Court observes that, even if the primary purpose of Article 6, as far as criminal matters are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not

follow that the Article has no application to pre-trial proceedings. Article 6 – especially paragraph 3 – may be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its requirements (see *Öcalan v. Turkey* [GC], no. 46221/99, § 131, ECHR 2005-IV, and *Imbrioscia v. Switzerland*, 24 November 1993, § 36, Series A no. 275). The manner in which Article 6 §§ 1 and 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In order to determine whether the aim of Article 6 – a fair trial – has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case (*Imbrioscia*, cited above, § 38).

65. Moreover, the Court reiterates that the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (see *John Murray v. the United Kingdom*, 8 February 1996, § 45, *Reports of Judgments and Decisions* 1996-I, and *Funke v. France*, 25 February 1993, § 44, Series A no. 256-A). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, *inter alia*, *Saunders v. the United Kingdom*, 17 December 1996, § 68, *Reports* 1996-VI; *Heaney and McGuinness v. Ireland*, no. 34720/97, § 40, ECHR 2000-XII; *J.B. v. Switzerland*, no. 31827/96, § 64, ECHR 2001-III; and *Allan v. the United Kingdom*, no. 48539/99, § 44, ECHR 2002-IX). In this sense the right is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention.

66. As regards the applicant's complaints which concern the lack of legal consultation at the pre-trial stage of the proceedings, the Court observes that the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation. The lack of legal assistance during an applicant's interrogation would constitute a restriction of his defence rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings.

67. The Court notes that the applicant was 17 years old at the material time. In its case-law on Article 6 the Court has held that when criminal charges are brought against a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings (see *T. v. the United*

Kingdom [GC], no. 24724/94, 16 December 1999, § 84). The right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police. The authorities must take steps to reduce as far as possible his feelings of intimidation and inhibition (see, *mutatis mutandis*, *T. v. the United Kingdom*, cited above, § 85) and ensure that the accused minor has a broad understanding of the nature of the investigation, of what is at stake for him or her, including the significance of any penalty which may be imposed as well as of his rights of defence and, in particular, of his right to remain silent (*mutatis mutandis*, *S.C. v. the United Kingdom*, no. 60958/00, § 29, ECHR 2004-IV). It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said by the arresting officer and during his questioning by the police (*ibid*).

68. The Court reiterates that a waiver of a right guaranteed by the Convention – in so far as it is permissible – must not run counter to any important public interest, must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to the waiver's importance (*Håkansson and Stureson v. Sweden*, 21 February 1990, Series A No. 171, § 66, and most recently *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-...). Moreover, before an accused can be said to have impliedly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Talat Tunç v. Turkey*, no. 32432/96, 27 March 2007, § 59, and *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003). The Court considers that given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right under Article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct.

69. Having examined all the material submitted by the parties and, in particular, the testimonies submitted in the first-instance proceedings as recorded in the relevant transcript, the Court makes the following findings as to the sequence of events concerning the applicant's confession. The applicant, who was a minor at the relevant time, visited the Police Director's office together with his father. The Police Director explained to the father, in the applicant's presence, that the police were investigating a murder and robbery, that there was evidence linking the applicant with the commission of these crimes and that an arrest warrant had been issued against him. The

arresting officer then entered the Director's office, showed the arrest warrant and arrested the applicant. During his arrest, the applicant was "cautioned" within the meaning of the relevant Judges Rules (see paragraph 44 above). He was therefore told that he was not obliged to say anything and that anything he did say could be used in subsequent court proceedings. The applicant was then taken into a separate room for questioning. The applicant's father was concerned that the police might use force against the applicant and the Director reassured him that no such practices would be used. He explained that the case was serious and that they should seek the assistance of a lawyer. A few minutes later and while the applicant was already being questioned, they were informed that the applicant had confessed his guilt. The Director suggested that the applicant's father join the applicant in the interview room so that he could hear himself what the applicant had admitted. The applicant's father preferred to wait outside. The applicant was cautioned before his written statement confessing his guilt was taken by a police officer.

70. The Court observes that the Government did not dispute the fact that the applicant was not offered legal assistance and that the suggestion to find a lawyer was only put to the applicant's father while the applicant was being interrogated. The Court considers that the authorities' treatment of the applicant ranged from treating him as a minor and, as such, addressing his father to explain the seriousness of the case and describe the evidence existing against the applicant, to approaching him as a person capable of being questioned in the absence of his guardian, without informing him of his right to consult a lawyer before proceeding to make any statement. Neither the applicant nor his father were adequately informed of the applicant's rights to legal representation before the applicant's questioning. Moreover, the applicant's father was not invited to accompany the applicant during his initial questioning nor was any other person who would be in a position to assist the applicant to understand the proceedings. The applicant himself was not advised that he could see a lawyer before saying anything to the police and before he had his written statement taken.

71. In view of the above the Court considers that it was unlikely, given the applicant's age, that he was aware that he was entitled to legal representation before making any statement to the police. Moreover given the lack of assistance by a lawyer or his guardian, it was also unlikely that he could reasonably appreciate the consequences of his proceeding to be questioned without the assistance of a lawyer in criminal proceedings concerning the investigation of a murder (see *Talat Tunç*, cited above, § 60).

72. The Court takes note of the Government's argument that the authorities had remained willing at all times to allow the applicant to be assisted by a lawyer if he so requested. It observes that the obstacles to the effective exercise of the rights of the defence could have been overcome if the domestic authorities, being conscious of the difficulties for the applicant,

had actively ensured that he understood that he could request the assignment of a lawyer free of charge if necessary (see *Talat Tunç*, cited above, § 61, and *Padalov v. Bulgaria*, no. 54784/00, 10 August 2006, § 61). The passive approach adopted by the authorities in the present circumstances was clearly not sufficient to fulfil their positive obligation to furnish the applicant with the necessary information enabling him to access legal representation.

73. Accordingly, the Court finds that the lack of provision of sufficient information on the applicant's right to consult a lawyer before his questioning by the police, especially given the fact that he was a minor at the time and not assisted by his guardian during the questioning, constituted a breach of the applicant's defence rights. The Court moreover finds that neither the applicant nor his father acting on behalf of the applicant had waived the applicant's right to receive legal representation prior to his interrogation in an explicit and unequivocal manner.

74. Concerning the applicant's complaint as to his right to remain silent, the Court notes that the Government maintained that the applicant had been cautioned in accordance with domestic law both at the time of his arrest and before his written statement had been taken. The applicant did not dispute this. The Court notes that in accordance with domestic law the applicant was told that he was not obliged to say anything unless he wished to do so and that what he said could be put into writing and given in evidence in subsequent proceedings (see paragraph 44 above). The Court finds, given the circumstances of the present case, in which the applicant had been underage and was taken for questioning without his legal guardian and without being informed of his right to seek and obtain legal representation before he was questioned, that it was unlikely that a mere caution in the words provided for in the domestic law would be enough to enable him to sufficiently comprehend the nature of his rights.

75. Lastly, the Court considers that although the applicant had the benefit of adversarial proceedings in which he was represented by the lawyer of his choice, the nature of the detriment he suffered because of the breach of due process at the pre-trial stage of the proceedings was not remedied by the subsequent proceedings, in which his confession was treated as voluntary and was therefore held to be admissible as evidence.

76. In this connection the Court notes that despite the fact that the voluntariness of the applicant's statement taken shortly after his arrest was challenged and formed the subject of a separate trial within the main trial, and although it was not the sole evidence on which the applicant's conviction was based, it was nevertheless decisive for the prospects of the applicant's defence and constituted a significant element on which his conviction was based. It is indicative in this respect that the Supreme Court found that throughout the course of the first-instance proceedings the applicant had consistently tried to negate his initial statement, an approach which had a great impact on the court's assessment of his credibility.

77. In the light of the above considerations the Court concludes that there has been a violation of Article 6 § 3 (c) in conjunction with Article 6 § 1 of the Convention on account of the lack of legal assistance to the applicant in the initial stages of police questioning.

2. *Complaints concerning the use of the applicant's confession and other evidence in the proceedings*

(a) **The domestic courts' reliance on the applicant's confession**

78. The applicant complained about the use made of his confession in the proceedings before the Assize Court resulting in his conviction which was upheld on appeal.

79. The Government did not make any submissions on this point.

80. The Court notes that it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Jalloh v. Germany* [GC], no. 54810/00, § 94, ECHR 2006-..., and *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports* 1998-IV).

81. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question and the nature of the violation found (see, *inter alia*, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; and *Allan*, cited above, § 42). The severity of the sentence that may be imposed upon the conclusion of the criminal proceedings would increase the level of due diligence that is required from the domestic authorities in this respect.

82. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is

correspondingly weaker (see, *inter alia*, *Khan*, cited above, §§ 35, 37, and *Allan*, cited above, § 43).

83. As for the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court reiterates that these are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (see paragraph 65 above).

84. Turning to the facts of the present case, the Court repeats its findings of a violation of the applicant's rights of defence at the pre-trial stage of the proceedings due to the fact that, whilst being a minor, his questioning had taken place in the absence of his guardian and without him being sufficiently informed of his right to receive legal representation or of his right to remain silent. The Court notes that the applicant's confession obtained in the above circumstances constituted a decisive element of the prosecution's case against him that substantially inhibited the prospects of his defence at trial and which was not remedied by the subsequent proceedings.

85. The Court notes that in addition to the applicant's confession his conviction was supported by his second statement admitting that he had kicked the victim, a testimony reporting the applicant's statement that he had been involved in a serious fight with the victim and various testimonies confirming that the applicant had been drinking with the victim on the evening the victim died and that his clothes had been covered in mud in the early hours of the following morning. There was also medical evidence confirming that the cause of the victim's death was multiple and violent blows. While it is not the Court's role to examine whether the evidence in the present case was correctly assessed by the national courts, the Court considers that the conviction was based to a decisive extent on the applicant's confession, corroborated largely by his second statement. It considers that the extent to which the second statement made by the applicant was tainted by the breach of his rights of defence due to the circumstances in which the confession had been taken was not addressed by the trial court and remains unclear. Moreover, the Court observes that having regard to the Assize Court's acceptance of the applicant's first statement, it appears that it would have been futile for him to contest the admissibility of his second statement.

86. In the light of the above considerations, the Court concludes that there has been a violation of Article 6 of the Convention because of the use in trial of the applicant's confession obtained in circumstances which breached his rights to due process and thus irreparably undermined his rights of defence.

(b) Admission of evidence of "bad character"

87. The applicant also complained that he had not received a fair trial given the admission in the main trial of evidence attempting to show his

“bad character” and concerning his involvement in other criminal investigations.

88. The Court considers that the applicant’s submission was left undeveloped and unsubstantiated. Hence, it concludes that there has been no violation of Article 6 § 1 in this respect.

3. Complaints concerning the Assize Court’s treatment of counsel for the defence

(a) The Government

89. The Government submitted that the applicant’s trial taken as a whole had been fair and in conformity with the Convention. They maintained that the Assize Court had been impartial towards the applicant throughout the criminal proceedings from both an objective and a subjective standpoint. The dispute between the applicant’s counsel and the court concerning certain behaviour of the counsel had been an isolated incident that had not had any impact on the objective examination of the case or on its outcome. Moreover, the applicant’s counsel had not applied to withdraw from the case following his conviction for contempt of court.

90. There was no evidence of bias against the applicant on the part of the Assize Court. The applicant had not submitted anything before the Court indicating any factor that could objectively raise a legitimate fear as to the impartiality of the judges in relation to the conduct of the proceedings and their findings.

91. The Assize Court had delivered a detailed and reasoned judgment with a thorough evaluation of the evidence put before it together with the position of the defence. Its interventions in the proceedings had not exceeded what was permissible in the circumstances. The Supreme Court had confirmed the findings of the Assize Court and found that the trial had been fair and the conviction and the sentence justified.

(b) The applicant

92. The applicant submitted that his case could not be distinguished from the case that his lawyer had lodged with the Court and in which a violation of his lawyer’s rights under Articles 6 §§ 1, 2 and 3 and 10 of the Convention had been found by this Court’s Grand Chamber (see *Kyprianou v. Cyprus*, cited above). He stated that his trial had been a continuous confrontation between the bench and his lawyer; a confrontation which had reached its climax with his lawyer’s trial, conviction for contempt of court and imprisonment. During the trial the Assize Court had made continual and clearly inappropriate interferences in the proceedings. It was indicative that his lawyer had requested permission to withdraw from the case since he felt unable to defend the applicant as a result of the court’s approach towards him; a request which was refused thus compelling him to continue

defending the applicant against his will. Moreover, the applicant's faith in his lawyer had been seriously undermined as a result of the contempt proceedings.

93. Following the contempt proceedings, his lawyer had felt unable to repeat the same request to withdraw from the case as the matter had already been decided upon by the Assize Court. He had nevertheless requested that the court withdraw from the further examination of the case in view of the events that had occurred. The request had again been refused and the trial had resumed in a climate which did not coincide with the requirements of a democratic society.

(c) The Court's assessment

94. The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused (see *Kyprianou v. Cyprus*, cited above, § 118, and *Padovani v. Italy*, 26 February 1993, § 27, Series A no. 257-B).

95. The central question raised under this head of the applicant's complaint is whether the nature of the Assize Court's interferences with the defence counsel's exercise of his duties, combined with the deficiencies found by the Grand Chamber of this Court as to the trial judges' treatment of the applicant's lawyer, were such as to cast doubt on the fairness of the trial.

96. The Court notes that the applicant's lawyer and the judges of the Assize Court engaged in various disagreements over the course of the applicant's trial, and that the applicant's lawyer had felt the need to request leave to withdraw from the proceedings due to the court's interferences with his conduct of the applicant's defence. His request was refused and he continued to represent the applicant.

97. The Court further notes that upon the resumption of the main trial following the contempt proceedings Mr Kyprianou felt that it was necessary for another lawyer to represent the applicant and request the court itself to withdraw from the further examination of the case. The request was refused as the Assize Court considered that no reasonable person could conclude that the applicant could have been prejudiced in any way by the contempt proceedings.

98. While the Court does not doubt that the judges of the Assize Court were determined to exercise their functions in an impartial manner, it reiterates that in its judgment in the *Kyprianou* case (cited above, § 133) it concluded that the judges' personal conduct had breached the subjective test of impartiality. In particular, the Court concluded from the manner in which the contempt proceedings were conducted, together with the decision and sentencing of Mr Kyprianou, that the court had failed to sufficiently detach itself from the facts of the case as the judges had been personally insulted by

Mr Kyprianou's comments. The Court considers that the personal conduct of the judges in the case undermined the applicant's confidence that his trial would be conducted in a fair manner. Although the contempt proceedings were separate from the applicant's main trial, the fact that the judges were offended by the applicant's lawyer when he complained about the manner in which his cross-examination was received by the bench undermined the conduct of the applicant's defence.

99. The Court also reiterates that in its judgment in the Kyprianou case (cited above, § 179) it found that although the conduct of the applicant's lawyer could be regarded as disrespectful for the judges of the Assize Court, his comments were aimed at and were limited to the manner in which the judges were trying the case and, in particular, their allegedly insufficient attention to his cross-examination of a witness carried out in the course of defending the applicant. In this respect, the interference with the freedom of expression of the applicant's lawyer in conducting the applicant's defence, had breached Article 10 of the Convention (*ibid.*, § 183). Moreover, the Court held that the sentence imposed on the applicant's lawyer had been capable of having a "chilling effect" on the performance of the duties attached to lawyers when acting as defence counsel.

100. The Court finds that the refusal of Mr Kyprianou's request for leave to withdraw from the proceedings due to the fact that he felt unable to continue defending the applicant in an effective manner exceeded, in the present circumstances, the limits of a proportionate response given the impact on the applicant's rights of defence. Further, in the view of the Court, the Assize Court's response to Mr Kyprianou's discourteous criticism of the manner in which they were trying the case, which was to convict him immediately of contempt of court and impose a sentence of imprisonment on him, was also disproportionate. It further considers that the "chilling effect" on Mr Kyprianou's performance of his duties as defence counsel was demonstrated by his insistence, upon the resumption of the proceedings, that another lawyer should address the court in respect of the request for the continuation of the proceedings before a different bench.

101. In these circumstances, the Court concludes that the Assize Court's handling of the confrontation with the applicant's defence counsel rendered the trial unfair. It follows that there has been a violation of Article 6 § 1 in this respect.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

103. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account. It reiterates that when an applicant has been convicted despite an infringement of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position that he would have been in had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested (see *Öcalan v. Turkey*, cited above, § 210 *in fine*).

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning the pre-trial stage of the proceedings and the fairness of the trial at first instance and on appeal admissible and the remainder of the application inadmissible;
2. *Holds* by 6 votes to 1 that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention on account of the lack of legal assistance in the initial stages of police questioning;
3. *Holds* by 6 votes to 1 that there has been a violation of Article 6 § 1 of the Convention due to the use of the applicant’s confession in his main trial;
4. *Holds* unanimously that there has been no violation of Article 6 § 1 of the Convention due to the admission of “bad character” evidence in the applicant’s main trial;
5. *Holds* by 5 votes to 2 that there has been a violation of Article 6 § 1 of the Convention due to the Assize Court’s handling of the confrontation with the applicant’s defence counsel;

Done in English, and notified in writing on 11 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) joint concurring opinion of Judges Spielmann and Jebens;
- (b) partly dissenting, partly concurring opinion of Judge Vajić;
- (c) dissenting opinion of Judge Erotocritou.

C.L.R.
S.N.

JOINT CONCURRING OPINION OF JUDGES SPIELMANN AND JEBENS

1. We agree in all respects with the Court's conclusions as to the violations of Article 6 as identified in points 2, 3, 4 and 5 of the operative part of the judgment.

2. We would, however, have liked the reasoning set out in paragraph 103 of the judgment, on account of its importance, to have been included in the operative provisions as well, for reasons which have already been explained to a certain extent in the joint concurring opinion of Judges Spielmann and Malinverni in *Vladimir Romanov v. Russia* (no. 41461/02, judgment of 24 July 2008) as well as the concurring opinion of Judge Spielmann in *Polufakin and Chernyshev v. Russia* (no. 30997/02, judgment of 25 September 2008) and most importantly in the concurring opinion of Judges Rozakis, Spielmann, Ziemele and Lazarova Trajovska in *Salduz v. Turkey* ([GC], no. 36391/02, ECHR 2008-...), and which are now repeated here.

3. Firstly, since the Court has jurisdiction to interpret and apply the Convention, it also has jurisdiction to assess "the form and quantum of reparation to be made" (See J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 211). Indeed, the Court reiterates in paragraph 103 of the judgment that when a person has been convicted in breach of the procedural safeguards afforded by Article 6, he should, as far as possible, be put in the position in which he would have been had the requirements of that Article not been disregarded (the principle of *restitutio in integrum*).

4. The principle of *restitutio in integrum* has its origin in the judgment of 13 September 1928 of the Permanent Court of International Justice in the case concerning the *Factory at Chorzów* ((claim for indemnity) (merits) Series A, no. 17, p. 47):

"The essential principle is ... that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."

5. In *Papamichalopoulos and Others v. Greece* ((Article 50), 31 October 1995, § 34, Series A no. 330-B) the Court held as follows:

"The Court points out that by Article 53 of the Convention the High Contracting Parties undertook to abide by the decision of the Court in any case to which they were parties; furthermore, Article 54 provides that the

judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution. It follows that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.

The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law does not allow - or allows only partial - reparation to be made for the consequences of the breach, Article 50 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.”

6. This principle, namely that *restitutio in integrum* is considered to be the primary remedy for effecting reparation for breaches of international law, has been constantly reaffirmed in international case-law and practice, and is enshrined in Article 35 of the Draft Articles on State responsibility adopted by the International Law Commission in 2001.

7. Article 35 of the Draft Articles reads as follows:

“A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”

8. There is no reason not to apply this principle to make reparation for international wrongful acts in the field of human rights (see Loukis G. Loucaides, “Reparation for Violations of Human Rights under the European Convention and *Restitutio in integrum*”, in [2008] *European Human Rights Law Review*, pp. 182-192; see also A. Orakhelashvili, “The European Convention on Human Rights and International Public Order”, in (2002-2003) 5 *Cambridge Yearbook of European Legal Studies*, p. 237 at p. 260).

9. The reason why we wish to stress this point is that it must not be overlooked that the damages which the Court orders to be paid to victims of a violation of the Convention are, according to the terms and the spirit of Article 41, of a subsidiary nature. This is in line with the subsidiary character attributed to compensation for damage in international law. Article 36 of the Draft Articles on State responsibility provides:

“1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. ...”

It is therefore right that, wherever possible, the Court should seek to restore the *status quo ante* for the victim.

10. In the present case, the fairness of the criminal proceedings under examination had been irretrievably prejudiced, notably by the absence of a lawyer at the time the applicant was questioned by the police.

11. The applicant’s statement obtained in such circumstances constituted “the fruit of the poisonous tree” which, however, was admitted in the proceedings and which contaminated them as a whole.

This was further aggravated by the confrontation between the applicant’s lawyer and the bench.

12. Given that the multiple violations of Article 6 of the Convention irretrievably affected his defence rights, and as the Court indicated in paragraph 103 of the judgment, the best means of redressing the violations found would be the reopening of the proceedings and the commencement of a new trial at which all the guarantees of a fair trial would be observed, provided, of course, that the applicant requests this option.

13. In Cyprus, there is no legislative provision setting out the procedure for reopening of domestic proceedings which are found to be unfair by the European Court of Human Rights, unlike the situation in other Council of Europe Member States¹.

¹ For example, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Moldova, the Netherlands, Norway, Poland, Romania, San Marino, Serbia-Montenegro, the Slovak Republic, Slovenia, Spain, Switzerland, “The Former Yugoslav Republic of Macedonia”, Turkey and the United Kingdom (special review committee).

Admittedly, States are not required by the Convention to introduce procedures into their domestic legal systems whereby judgments of their Supreme Courts constituting *res judicata* may be reviewed. However, they are strongly encouraged to do so, especially in criminal matters. Incidentally, in a judgment of 9 April 2008, the Belgian Court of Cassation, for the first time ordered a retrial on the basis of Articles 442 *bis et seq.* of the *Code d’instruction criminelle* (introduced by an Act of 1 April 2007) in respect of the case of *Da Luz Domingues Ferreira v. Belgium* (no. 50049/99, 24 May 2007) (*Cass.b.*, 9 April 2008, P.08.0051.F/1, *Journal des Tribunaux*, 2008, p. 403, observations by J. Van Meerbeeck).

14. That should not, however, be an obstacle to the inclusion by the Court of appropriate directions in the operative part of the judgment. As the Court has held in *Papamichalopoulos and Others v. Greece*, if national law does not allow – or allows only partial – reparation to be made, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *Papamichalopoulos and Others*, cited above, § 34; see also *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I).

15. We would also like to add that the Court has already included directions of this nature in the operative provisions of judgments. For example, in *Claes and Others v. Belgium* (nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99, 2 June 2005) it held in point 5 (a) of the operative provisions of its judgment:

“unless it grants a request by [the] applicants for a retrial or for the proceedings to be reopened, the respondent State is to pay [sums in respect of non-pecuniary damage and costs and expenses], within three months from the date on which the applicant in question indicates that he does not wish to submit such a request or it appears that he does not intend to do so, or from the date on which such a request is refused”.

Similarly, in *Lungoci v. Romania* (no. 62710/00, 26 January 2006) the Court held in point 3 (a) of the operative provisions of its judgment:

“the respondent State is to ensure that, within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the proceedings are reopened if the applicant so desires, and at the same time is to pay her EUR 5,000 ... in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount, to be converted into Romanian lei at the rate applicable at the date of settlement.”

16. It is common knowledge that, while the reasoning of a judgment allows the Contracting States to ascertain the grounds on which the Court reached a finding of a violation, or not, of the Convention, and is of decisive importance on that account for the interpretation of the Convention, it is the operative provisions that are binding on the parties for the purposes of Article 46 § 1 of the Convention.

17. By virtue of Article 46 § 2 of the Convention, supervision of the execution of the Court’s judgments is the responsibility of the Committee of Ministers. That does not mean, however, that the Court should not play any part in the matter and should not take measures designed to facilitate the Committee of Ministers’ task in discharging these functions.

18. To that end, it is essential that in its judgments the Court should not merely give as precise a description as possible of the nature of the Convention violation found but should also indicate to the State concerned in the operative provisions, if the circumstances of the case so require, the

measures it considers most appropriate in order to secure redress for the violation.

**PARTLY DISSENTING, PARTLY CONCURRING OPINION
OF JUDGE VAJIĆ**

1. I have not voted with the majority on point 5 of the operative part of the judgment as I am of the opinion that there has been no violation of Article 6 §1 of the Convention on account of the Assize Court's handling of the confrontation with the applicant's defence counsel in the present case. In this respect I join the dissenting opinion of Judge Erotocritou, that is to say, point (3), paragraphs 13-16 of that opinion.

2. I also share Judge Erotocritou's final remarks relating to the structure of the operative part of the judgment (paragraph 17 of his dissenting opinion), according to which the proceedings should have been taken as a whole (although, ultimately, I do not follow his conclusion as to the merits). There was no need in this case to find multiple separate violations of Article 6 § 1 of the Convention in the operative part and thus split up the main violation, namely the lack of a fair trial. In my opinion, the finding in the operative part should answer the question whether the trial taken as a whole was fair. The different reasons that led the Court to find such a violation are well explained in the text of the judgment, and, according to the usual approach, did not need to be repeated in the operative part.

DISSENTING OPINION OF JUDGE EROTOCRITOU

I agree on the facts as outlined in the judgment. However, while I respect the view of the majority, I cannot agree with the conclusions drawn.

1. The complaints concerning the pre-trial stage of the proceedings

(a) The lack of legal assistance in the initial stages of the proceedings

1. The main complaint of the applicant is that he was deprived of his right to consult a lawyer, contrary to Article 6 § 3 (c) of the Convention, and in particular, that he was not informed of his right before making a written statement. The applicant, when arrested by the police, was under age (17 years and 8 months), and for this reason he was called to the police station accompanied by his father and guardian. Article 6 § 3 (c) of the Convention, although it protects the right to legal representation, does not specify the manner of exercising it and everything seems to depend on the circumstances. It must be noted that under domestic law there was no requirement at the material time for the authorities to warn persons arrested of their right to be legally represented. The only requirement under Article 11 §4 of the Constitution of the Republic of Cyprus is that the arrested person “*shall be allowed*” the services of a lawyer. To my mind, the distinction between denial of the right to have access to legal assistance and failure to inform of the existence of such right is important and must be borne in mind when examining a possible violation of the Convention. I do not dispute that, under the Convention, a right to be informed might exist under certain circumstances. Nevertheless, as the Convention does not detail the manner in which the right to be legally represented may be exercised and domestic law did not at the time have such a requirement, I would prefer to look at the totality of the proceedings before I decide on their fairness and whether any limitation of the right, through failure to inform, could amount to a violation under Art. 6 § 3 (c). As stated by the Court in *Imbrioscia v. Switzerland*, no. 13972/88, § 37, “The right set out in paragraph 3 (c) of Article 6 (art. 6-3-c) is one element, amongst others, of the concept of a fair trial in criminal proceedings...”.

2. The reason I differ from the view of the majority is that, in the present case, the father and guardian of the applicant was actually told by the police director that the case was very serious and that it was advisable for him to find a lawyer to assist his son. The warning was given 30-40 minutes before the first written confession was made by the applicant. The father had, in my opinion, ample time to seek the services of a lawyer or even request that further interrogation be halted or delayed, until he could consult a lawyer. However, he elected to remain inactive. There is, in my opinion, no doubt that, on behalf of his son, the father waived any right that he may have had

and it would not be fair to throw the blame for his inactivity on the investigating authorities. The police authorities, as stated by the Government and as has not been disputed, were at all times ready and willing to allow legal assistance, had it been requested. Furthermore, the father was invited by the authorities to be present during his son's questioning, but again he preferred to stay outside the investigating room and walk up and down. Therefore, I cannot come to the conclusion that, in the circumstances, there was a denial of the right to have access to a lawyer at the initial stages of the proceedings, or that the whole treatment of the applicant by the police was in any way unfair.

3. I would like to go a stage further. Even if I were to accept that, due to the failure to inform, some limitation of the applicant's right to legal assistance did occur, its effect must nevertheless be examined in the context of the whole proceedings and not in isolation. The applicant, less than 24 hours after his arrest, had the services of a lawyer who represented him at the remand proceedings the very next day. Within one week he appointed a second lawyer and, throughout the one and a half years the trial lasted, he was at all times legally represented and had the opportunity to test all the evidence adduced. The fact that his guardian and not the applicant himself was informed of the right to consult a lawyer cannot make any difference. In any event the issue was examined by the Assize Court during the trial within a trial and it was found that the warning to the father was sufficient, and that the statement the applicant gave was in any event voluntary. These findings were subsequently scrutinised and upheld by the Supreme Court. In *G v. the United Kingdom*, no. 9370/81, 35 DR 75 (1983), where the accused was similarly questioned in the absence of a lawyer, the Commission was satisfied that the statement was voluntary by the mere availability of *voir dire* proceedings. Identical procedural mechanisms existed in the present case and I see no valid reason to reach a different conclusion.

4. I further consider that, after the statement was declared voluntary and admissible, it would be an inconsequence to hold otherwise now. The Court would appear to be acting contrary to its established case-law that, unless the case is exceptional, it does not interfere with questions of admissibility and assessment of evidence when such issues have been decided by the domestic courts. My non-exhaustive search of the case-law under Article 6 § 3 (c) has not revealed a similar case where failure to inform alone led to a violation. In most cases the denial of the right in question takes the form of a request by the arrested person to have the services of a lawyer, followed by a denial on the part of the authorities. For instance, in *Brennan v. the United Kingdom* (no. 39846/98, ECHR 2001-X), the applicant requested a lawyer but access was delayed. The applicant was then interviewed for 35 hours on 4 consecutive days, during which he made a confession. Even

so, the Court was not persuaded that the denial of access to legal assistance had infringed the applicant's right under Article 6 § 3 (c). Having in mind the entirety of the proceedings, I consider any prejudice there may have been in the present case relatively much less serious than in *Brennan and G v. the United Kingdom* (cited above) and I see no reason for reaching a different conclusion.

(b) The complaints concerning the right to remain silent

5. The second complaint is that the applicant was not informed of his right to remain silent, contrary to Article 6, when in fact he was properly informed of his right. It is not disputed that, in the initial stages, the applicant was cautioned three times as to his right to remain silent. The first caution was given on arrest in the presence of his father, the second when he was to be interviewed by the police shortly after arrest and the third before a written statement was taken from him. I cannot subscribe to the view that a mere caution in words is not enough to enable the applicant to comprehend the nature of the right. The applicant was of sufficient maturity to understand the nature and implications of the caution. I also doubt whether in ordinary cases, and in the absence of special factors or some form of incapacity, we should place a special duty on the investigating authorities to make sure that an arrested person comprehends the caution given. Irrespective of the objective difficulties involved, the danger is that we may return to where we started, i.e. again using verbal or written means in order to ensure that an accused person comprehends.

6. One other reason why I cannot accept the complaint that the applicant's right to remain silent has been violated is that no such ground was explicitly included in the application and therefore it should not have been made an issue before this Court.

(2) Complaints concerning the main trial

The domestic courts' reliance on the applicant's confessions

7. I come now to the alleged violation that concerns the use by the Assize Court of the applicant's two written confessions. My first comment is that the domestic courts, both the Assize and the Supreme Court, have already decided on the issue of the admissibility of the confessions and I consider that this Court, in line with its established case-law, should refrain from acting as an appellate court by re-examining the admissibility of the confessions. This should only be done where there is an allegation that the final judgment of the domestic court was either arbitrary or inadequate. No such allegation was made in the present application and none exists.

8. In view of my dissenting conclusion that the applicant's right to be legally represented was not violated, I cannot find that a violation occurred as a result of the use of the first confession. Nor do I agree that the first confession was tainted in any way by what happened at the pre-trial stage.

9. With regard to the first confession, it must also be noted that, as the Supreme Court pointed out in its judgment, the conviction was not based solely on the applicant's confession. There was also other supportive evidence which, although circumstantial, by itself would have been sufficient to secure a conviction. The Supreme Court states emphatically that:

“The lawyer of the Appellant suggested that his written confession was the only evidence against him and that, without it, his conviction would not have been possible. We are of the opinion that the suggestion is ill-founded. There was sufficient, strong and independent evidence which placed the Appellant and his co-accused at the scene at the time the crime was committed.”

The Supreme Court then proceeds to analyse each piece of evidence, namely that (a) the appellant and his co-accused were seen drinking with the victim, (b) they left the bar immediately after the victim, (c) they were seen later with their clothes covered in mud, which they tried to clean and (d) the appellant made a voluntary statement (second confession), which he did not dispute, admitting kicking the victim twice and trying to minimise the extent of his complicity.

10. Even stronger is my objection to the finding of the majority with regards to the use of the second written confession. Firstly, it must be noted that the second confession was given about 15 days after the first written confession and at a time when the applicant was legally represented. Secondly, it was given after the applicant had been properly informed of his right to remain silent. Thirdly, it was admitted in evidence without the defence ever raising any objection as to its admissibility or as to its voluntariness. Fourthly, the applicant, whilst giving evidence, admitted the statement, which in effect minimised his role to only kicking the victim twice. Lastly, in his application to this Court, the applicant does not include any ground relating to the voluntariness or fairness of this particular written confession but restricts his complaint to the first confession. Consequently, I consider that it cannot be in issue in these proceedings.

11. I cannot subscribe to the view that there was any violation of Article 6 § 1 as a result of the use in the main trial of the applicant's confessions. Although they were important pieces of evidence, the confessions were neither tainted by anything that happened during the pre-trial proceedings, nor were they the only evidence against the applicant. It must also be borne in mind that in the present case there is no evidence that

the police, during the 3-4 minutes that the whole initial questioning lasted, used force, duress or trickery of any form. In any event, as I have pointed out, the confessions and the circumstances in which they were taken were assessed and scrutinised by the domestic courts and found to be voluntary and admissible. I consider that, under the circumstances, there is no justification for this Court to evaluate afresh their voluntariness or admissibility and, in so doing, appearing to act as an appellate court.

(3) Complaints concerning the Assize Court's treatment of counsel for the defence

12. In the judgment of the majority (paragraph 101) it is concluded that the Assize Court's handling of the confrontation with the applicant's defence counsel rendered the applicant's trial unfair. Two main factors seem to have been taken into account. Firstly, the incident that led to the contempt proceedings against the applicant's lawyer, and secondly, the refusal of leave for him to withdraw.

13. As to the first factor, the findings of the majority are that the judges' personal conduct, in view of the findings of the Court in *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII, undermined the applicant's confidence that his trial would be conducted in a fair manner.

14. With respect, I cannot see how the incident with the applicant's lawyer could have affected the totality of the proceedings. The contempt proceedings against the lawyer were separate and distinct and in no way affected the applicant. The findings of the Court in the *Kyprianou* case (cited above) with regard to the lack of impartiality on the part of the Assize Court were confined to Mr Kyprianou and to the contempt proceedings against him and in no way extended to the rest of the proceedings or affected the applicant in any way. I consider any insinuation that, as a result of the incident with Mr. Kyprianou, the Assize Court lost its impartiality or fairness *towards the applicant* to be totally unfair to the judges of the Assize Court and generally to the judiciary of Cyprus. I therefore cannot agree that, in respect of the applicant, there was any violation of Article 6 § 1 of the Convention as a result of the contempt proceedings that took place against the applicant's Counsel.

15. As to the second factor, it has been argued that the refusal by the Assize Court of leave for the applicant's lawyer to withdraw from the case had a "chilling effect" on counsel's performance and that the Court exceeded the limits of a proportionate response, given the impact on the applicant's right of defence. With all respect, I cannot agree. The Assize Court, in refusing leave, based its judgment on established domestic jurisprudence and took into account both the interests of justice and those of

the defence. With regard to the interests of justice, it must be noted that the lawyer's application to withdraw was made towards the end of the main trial and after most of the evidence had been admitted. To have granted leave at that late stage of the proceedings would have meant that the trial would be delayed until a new lawyer was found and the voluminous record of the court containing all the evidence was transcribed for the benefit of the new lawyer. It is likely that this would have taken a considerable time, thus further delaying the proceedings. In trying to safeguard the defence interests, the Assize Court considered that a new lawyer, who would not have had the opportunity to see or hear the witnesses testify in court, would have been at a serious disadvantage. I do not detect any fault in the reasoning of the court, nor do I see any unfairness in the way the court dealt with the lawyer's request. Had the applicant's lawyer considered that he could not do his best for his client, as he was obliged to do at all times and under any circumstances, he should have advised his client to dismiss him forthwith, rather than continue with the trial and complain afterwards. The applicant himself never raised the issue and never indicated that he wanted to change his lawyer. Under the circumstances, I cannot agree that the refusal of leave for the lawyer to withdraw had any detrimental effect on the proceedings as a whole.

(4) Comments on the operative part of the judgment

16. One final point, as to the operative part of the judgment. Given the main violation that the majority finds, I do not see any need in this case to find separate violations. This, I understand, has not been the practice of the Court, except in cases where grievous violations take place. The facts of the present case are not such. The finding of separate violations is, with respect, unnecessary, serves no useful purpose and tends to eclipse the main violation that the majority of the court finds.

17. I would therefore conclude that, taking the proceedings as a whole and not fragmenting them, no violation occurred. The applicant was legally represented throughout the proceedings before the domestic courts, was properly and adequately cautioned as to his right to remain silent, had all the benefits of an adversarial trial, including the *voir dire*, and the judgment of the Assize Court was fully reasoned and in any event was scrutinised by the Supreme Court. In my opinion, the trial of the applicant as a whole was fair and none of the incidents complained of had any decisive effect on the outcome of the proceedings. For my part, I would dismiss the application.



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF SALDUZ v. TURKEY

(Application no. 36391/02)

JUDGMENT

STRASBOURG

27 November 2008

In the case of Salduz v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Christos Rozakis,
Josep Casadevall,
Rıza Türmen,
Rait Maruste,
Vladimiro Zagrebelsky,
Stanislav Pavlovschi,
Alvina Gyulumyan,
Ljiljana Mijović,
Dean Spielmann,
Renate Jaeger,
Davíd Thór Björgvinsson,
Ján Šikuta,
Ineta Ziemele,
Mark Villiger,
Luis López Guerra,
Mirjana Lazarova Trajkovska, *judges*,

and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 19 March and on 15 October 2008,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36391/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Yusuf Salduz (“the applicant”), on 8 August 2002.

2. The applicant alleged, in particular, that his defence rights had been violated in that the written opinion of the Principal Public Prosecutor at the Court of Cassation had not been communicated to him and that he had been denied access to a lawyer while in police custody. In respect of his complaints, he relied on Article 6 §§ 1 and 3 (c) of the Convention.

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court).

4. By a decision dated 28 March 2006, the application was declared partly inadmissible by a Chamber of that Section, composed of Jean-Paul Costa, Andras Baka, Rıza Türmen, Karl Jungwiert, Mindia Ugrekhelidze,

Antonella Mularoni, Elisabet Fura-Sandström, judges, and Sally Dollé, Section Registrar.

5. In its judgment of 26 April 2007 (“the Chamber judgment”), the Chamber, made up of Françoise Tulkens, Andras Baka, Ireneu Cabral Barreto, Rıza Türmen, Mindia Ugrekhelidze, Antonella Mularoni and Danutė Jočienė, judges, and Sally Dollé, Section Registrar, held unanimously that there had been a violation of Article 6 § 1 of the Convention on account of the non-communication of the Principal Public Prosecutor’s written opinion and further held by five votes to two that there had been no violation of Article 6 § 3 (c) of the Convention on account of the lack of legal assistance to the applicant while in police custody.

6. On 20 July 2007 the applicant requested that the case be referred to the Grand Chamber (Article 43 of the Convention).

7. On 24 September 2007 a panel of the Grand Chamber decided to accept his request (Rule 73).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. The applicant and the Government each filed observations on the merits.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 19 March 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr M. ÖZMEN,

Co-Agent,

Ms N. ÇETİN,

Ms A. ÖZDEMİR,

Ms İ. KOCAYIĞIT,

Mr C. AYDIN,

Advisers;

(b) *for the applicant*

Mr U. KILINÇ,

Counsel,

Ms T. ASLAN,

Adviser.

The Court heard addresses by Mr Kılınç and Mr Özmen, as well as their replies to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born on 2 February 1984 and lives in İzmir.

A. The applicant's arrest and detention

12. On 29 May 2001 at about 10.15 p.m., the applicant was taken into custody by police officers from the anti-terrorism branch of the İzmir Security Directorate on suspicion of having participated in an unlawful demonstration in support of an illegal organisation, namely the PKK (the Workers' Party of Kurdistan). The applicant was also accused of hanging an illegal banner from a bridge in Bornova on 26 April 2001.

13. At about 12.30 a.m. on 30 May 2001 the applicant was taken to the Atatürk Teaching and Research Hospital, where he was examined by a doctor. The medical report stated that there was no trace of ill-treatment on his body.

14. Subsequently, at about 1 a.m., the applicant was interrogated at the anti-terrorism branch in the absence of a lawyer. According to a form explaining arrested persons' rights which the applicant had signed, he had been reminded of the charges against him and of his right to remain silent. In his statement, the applicant admitted his involvement in the youth branch of HADEP (*Halkın Demokrasi Partisi* – the People's Democracy Party). He gave the names of several persons who worked for the youth branch of the Bornova District Office. He explained that he was the assistant youth press and publications officer and was also responsible for the Osmangazi neighbourhood. He further stated that it had been part of his job to assign duties to other members of the youth branch. He admitted that he had participated in the demonstration on 29 May 2001 organised by HADEP in support of the imprisoned leader of the PKK. He said that there had been about sixty demonstrators present and that the group had shouted slogans in support of Öcalan and the PKK. He had been arrested on the spot. He also admitted that he had written "Long live leader Apo" on a banner which had been hung from a bridge on 26 April 2001. The police took samples of the applicant's handwriting and sent it to the police laboratory for examination.

15. On 1 June 2001 the İzmir Criminal Police Laboratory issued a report after comparing the applicant's handwriting to that on the banner. It concluded that although certain characteristics of the applicant's handwriting bore similarities to the handwriting on the banner, it could not be established whether or not the writing on the banner was in fact his.

16. At 11.45 p.m. on 1 June 2001 the applicant was again examined by a doctor, who stated that there were no traces of ill-treatment on his body.

17. On the same day, the applicant was brought before the public prosecutor and subsequently the investigating judge. Before the public prosecutor, he explained that he was not a member of any political party, but had taken part in certain activities of HADEP. He denied fabricating an illegal banner or participating in the demonstration on 29 May 2001. He stated that he was in the Doğanlar neighbourhood to visit a friend when he was arrested by the police. The applicant also made a statement to the investigating judge, in which he retracted his statement to the police, alleging that it had been extracted under duress. He claimed that he had been beaten and insulted while in police custody. He again denied engaging in any illegal activity and explained that on 29 May 2001 he had gone to the Doğanlar neighbourhood to visit a friend and had not been part of the group shouting slogans. After the questioning was over, the investigating judge remanded the applicant in custody, having regard to the nature of the offence of which he was accused and the state of the evidence. The applicant was then allowed to have access to a lawyer.

B. The trial

18. On 11 July 2001 the public prosecutor at the İzmir State Security Court filed an indictment with that court accusing the applicant and eight other accused of aiding and abetting the PKK, an offence under Article 169 of the Criminal Code and section 5 of the Prevention of Terrorism Act (Law no. 3713).

19. On 16 July 2001 the State Security Court held a preparatory hearing. It decided that the applicant's detention on remand should be continued and that the accused be invited to prepare their defence submissions.

20. On 28 August 2001 the State Security Court held its first hearing, in the presence of the applicant and his lawyer. It heard evidence from the applicant in person, who denied the charges against him. The applicant also rejected the police statement, alleging that it had been extracted from him under duress. He explained that while he was in custody, police officers had ordered him to copy the words from a banner. He also stated that he had witnessed the events that had taken place on 29 May 2001; however, he had not taken part in the demonstration as alleged. Instead, he had been in the neighbourhood to visit a friend named Özcan. He also denied hanging an illegal banner from a bridge on 26 April 2001.

21. At the next hearing, which was held on 25 October 2001, the applicant and his lawyer were both present. The court also heard from other accused persons, all of whom denied having participated in the illegal demonstration on 29 May 2001 and retracted statements they had made previously. The prosecution then called for the applicant to be sentenced pursuant to Article 169 of the Criminal Code and the applicant's lawyer requested time to submit the applicant's defence submissions.

22. On 5 December 2001 the applicant made his defence submissions. He denied the charges against him and requested his release. On the same day, the İzmir State Security Court delivered its judgment. It acquitted five of the accused and convicted the applicant and three other accused as charged. It sentenced the applicant to four years and six months' imprisonment, which was reduced to two and a half years as the applicant had been a minor at the time of the offence.

23. In convicting the applicant, the State Security Court had regard to the applicant's statements to the police, the public prosecutor and the investigating judge respectively. It also took into consideration his co-defendants' evidence before the public prosecutor that the applicant had urged them to participate in the demonstration of 29 May 2001. The court noted that the co-defendants had also given evidence that the applicant had been in charge of organising the demonstration. It further took note of the expert report comparing the applicant's handwriting to that on the banner and of the fact that, according to the police report on the arrest, the applicant had been among the demonstrators. It concluded:

“... in view of these material facts, the court does not accept the applicant's denial and finds that his confession to the police is substantiated.”

C. The appeal

24. On 2 January 2002 the applicant's lawyer appealed against the judgment of the İzmir State Security Court. In her notice of appeal, she alleged a breach of Articles 5 and 6 of the Convention, arguing that the proceedings before the first-instance court had been unfair and that the court had failed to assess the evidence properly.

25. On 27 March 2002 the Principal Public Prosecutor at the Court of Cassation lodged a written opinion with the Ninth Division of the Court of Cassation in which he submitted that the Division should uphold the judgment of the İzmir State Security Court. This opinion was not served on the applicant or his representative.

26. On 10 June 2002 the Ninth Division of the Court of Cassation, upholding the İzmir State Security Court's reasoning and assessment of the evidence, dismissed the applicant's appeal.

II. RELEVANT LAW AND PRACTICE

A. Domestic law

1. The legislation in force at the time of the application

27. The relevant provisions of the former Code of Criminal Procedure (Law no. 1412), namely Articles 135, 136 and 138, provided that anyone

suspected or accused of a criminal offence had a right of access to a lawyer from the moment they were taken into police custody. Article 138 clearly stipulated that for juveniles, legal assistance was obligatory.

28. According to section 31 of Law no. 3842 of 18 November 1992, which amended the legislation on criminal procedure, the above-mentioned provisions were not applicable to persons accused of offences falling within the jurisdiction of the State Security Courts.

2. Recent amendments

29. On 15 July 2003, by Law no. 4928, the restriction on an accused's right of access to a lawyer in proceedings before the State Security Courts was lifted.

30. On 1 July 2005 a new Code of Criminal Procedure entered into force. According to the relevant provisions of the new Code (Articles 149 and 150), all detained persons have the right of access to a lawyer from the moment they are taken into police custody. The appointment of a lawyer is obligatory if the person concerned is a minor or if he or she is accused of an offence punishable by a maximum of at least five years' imprisonment.

31. Finally, section 10 of the Prevention of Terrorism Act (Law no. 3713), as amended on 29 June 2006, provides that for terrorist-related offences, the right of access to a lawyer may be delayed for twenty-four hours on the order of a public prosecutor. However, the accused cannot be interrogated during this period.

B. Relevant international law materials

1. Procedure in juvenile cases

(a) Council of Europe

32. The Recommendation of the Committee of Ministers to member States of the Council of Europe concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Rec(2003)20), adopted on 24 September 2003 at the 853rd meeting of the Ministers' Deputies, in so far as relevant, reads as follows:

“15. Where juveniles are detained in police custody, account should be taken of their status as a minor, their age and their vulnerability and level of maturity. They should be promptly informed of their rights and safeguards in a manner that ensures their full understanding. While being questioned by the police they should, in principle, be accompanied by their parent/legal guardian or other appropriate adult. They should also have the right of access to a lawyer and a doctor ...”

33. The Recommendation of the Committee of Ministers to member States of the Council of Europe on social reactions to juvenile delinquency (Recommendation No. R (87) 20), adopted on 17 September 1987 at the

410th meeting of the Ministers' Deputies, in so far as relevant, reads as follows:

“Recommends the governments of member States to review, if necessary, their legislation and practice with a view:

8. to reinforcing the legal position of minors throughout the proceedings, including the police interrogation, by recognising, *inter alia*:

– the right to the assistance of a counsel who may, if necessary, be officially appointed and paid by the State.”

(b) United Nations

(i) Convention on the Rights of the Child

34. Article 37 of the Convention on the Rights of the Child (CRC), in so far as relevant, reads as follows:

“States Parties shall ensure that: ...

(d) every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

(ii) General Comment No. 10 of the Committee on the Rights of the Child, dated 25 April 2007 (CRC/C/GC/10)

35. The relevant part of this text concerning legal assistance to minors in police custody provides as follows:

“49. The child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence. CRC does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of the States Parties to determine how this assistance is provided but it should be free of charge ...

...

52. The Committee recommends that the States Parties set and implement time-limits for the period between the communication of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body. These time-limits should be much shorter than those set for adults. But at the same time, decisions without delay should be the result of a process in which the human rights of the child and legal safeguards are fully respected. In this decision-making process without delay, the legal or other appropriate assistance must be present. This presence should not be limited to the trial before the court or other judicial body, but also applies to all other stages of the process, beginning with the interviewing (interrogation) of the child by the police.”

(iii) Concluding Observations of the Committee on the Rights of the Child: Turkey, dated 9 July 2001 (CRC/C/15/Add.152)

36. The relevant part of this text provides as follows:

“66. The Committee recommends that the State Party continue reviewing the law and practices regarding the juvenile justice system in order to bring it into full compliance with the Convention [on the Rights of the Child], in particular Articles 37, 40 and 39, as well as with other relevant international standards in this area, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), with a view to raising the minimum legal age for criminal responsibility, extending the protection guaranteed by the Juvenile Law Court to all children up to the age of 18 and enforcing this law effectively by establishing juvenile courts in every province. In particular, it reminds the State Party that juvenile offenders should be dealt with without delay, in order to avoid periods of incommunicado detention, and that pre-trial detention should be used only as a measure of last resort, should be as short as possible and should be no longer than the period prescribed by law. Alternative measures to pre-trial detention should be used whenever possible.”

2. Right of access to a lawyer during police custody

(a) Council of Europe

(i) Rules adopted by the Committee of Ministers

37. Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (Resolution (73) 5 of the Committee of Ministers of the Council of Europe) provides:

“An untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representation ... and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him and to receive, confidential instructions. At his request, he shall be given all necessary facilities for this purpose. ... Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official.”

38. Furthermore, the Recommendation of the Committee of Ministers to member States of the Council of Europe on the European Prison Rules (Rec(2006)2), adopted on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies, in so far as relevant, reads as follows:

“Legal advice

23.1 All prisoners are entitled to legal advice, and the prison authorities shall provide them with reasonable facilities for gaining access to such advice.

23.2 Prisoners may consult on any legal matter with a legal adviser of their own choice and at their own expense.

...

23.5 A judicial authority may in exceptional circumstances authorise restrictions on such confidentiality to prevent serious crime or major breaches of prison safety and security.”

(ii) *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*

39. Following its visit to Turkey in July 2000, the CPT published its report dated 8 November 2001 (CPT/Inf(2001)25). It stated:

“61. Despite the many changes to legislation in recent years, certain weaknesses remain as regards formal safeguards against ill-treatment. Perhaps the most important shortcoming is that persons detained on suspicion of collective offences falling under the jurisdiction of the State Security Courts are still not entitled to access to a lawyer during the first four days of their custody. Further, despite earlier affirmations to the contrary, the Turkish authorities made clear in their response to the report on the February/March 1999 visit that such persons are being denied during the first four days of their custody the possibility to inform a relative of their situation. Such incommunicado detention can only facilitate the infliction of ill-treatment.

The CPT must therefore reiterate once again the recommendation that all persons deprived of their liberty by the law enforcement agencies, including persons suspected of offences falling under the jurisdiction of the State Security Courts, be granted as from the outset of their custody the right of access to a lawyer. The CPT recognises that in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person’s access to a lawyer of his choice; however, in such cases, access to another independent lawyer should be arranged.

The implementation of the above recommendation will require legislative measures. However, in the meantime, immediate steps should be taken to ensure that existing legal provisions are complied with. Indeed, the information gathered during the July 2000 *ad hoc* visit clearly indicates that even after the first four days of police custody, access to a lawyer for persons suspected of State Security Court offences is in practice the exception rather than the rule. The CPT recommends that the officials responsible for carrying out checks and inspections under the previously-mentioned compliance monitoring procedure be instructed to pay particular attention to whether persons suspected of collective offences falling under the jurisdiction of the State Security Courts are being informed of their right to have access to a lawyer after the first four days of their custody and are being placed in a position effectively to exercise that right.”

40. The CPT visited Turkey again in September 2001 and in its report dated 24 April 2002 (CPT/Inf(2002)8) stated:

“12. The amendments made to Article 16 of the Law on the Organisation and Trial Procedures of State Security Courts have also introduced an improvement as regards access to a lawyer for persons detained on suspicion of collective offences falling under the jurisdiction of State Security Courts. For such persons, the right of access to a lawyer becomes operative after the prosecutor has issued a written order for the extension of police custody beyond forty-eight hours; in other words, they are now denied access to a lawyer only for two days as compared to four days under the previous law.

Whilst welcoming this step forward, the CPT regrets that the opportunity was not taken to guarantee to persons detained for collective State Security Court offences a right of access to a lawyer as from the very outset of their custody (and hence align their rights in this respect with those of ordinary criminal suspects). The CPT trusts that the Turkish authorities will in the near future implement the Committee’s long-

standing recommendation that all persons deprived of their liberty by law enforcement agencies, including persons suspected of offences falling under the jurisdiction of the State Security Courts, be granted as from the outset of their custody the right of access to a lawyer.

...

46. Reference has been made earlier to recent positive legislative developments concerning the rights of access to a lawyer and to have one's custody notified to a relative (cf. paragraphs 12 to 14). They have further improved an already impressive legal and regulatory framework to combat torture and ill-treatment. Nevertheless, the CPT remains very concerned by the fact that persons detained on suspicion of collective offences falling under the jurisdiction of State Security Courts are still denied access to a lawyer during the first two days of their custody; its position on this point has been made clear in paragraph 12.

Further, the actual content of the right of access to a lawyer for persons suspected of State Security Court offences remains less well developed than in the case of ordinary criminal suspects. In particular, as far as the CPT can ascertain, it is still the case that such suspects are not entitled to have the lawyer present when making a statement to the police and that the procedure allowing for the appointment of a lawyer by the Bar Association is not applicable to them. Similarly, the provision making obligatory the appointment of a lawyer for persons under 18 still does not apply to juveniles who are detained on suspicion of State Security Court offences. In this regard, the CPT reiterates the recommendation already made in the report on the October 1997 visit, that the relevant provisions of Articles 135, 136 and 138 of the Code of Criminal Procedure be rendered applicable to persons suspected of offences falling under the jurisdiction of the State Security Courts."

(b) United Nations

(i) International Covenant on Civil and Political Rights

41. Article 14 § 3 (b) of the International Covenant on Civil and Political Rights provides that everyone charged with a criminal offence is to be entitled "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing".

(ii) United Nations Committee against Torture

42. In its Conclusions and Recommendations on Turkey, dated 27 May 2003 (CAT/C/CR/30/5), the Committee stated the following:

"5. The Committee expresses concern about

...

(c) allegations that persons in police custody have been denied prompt and adequate access to legal and medical assistance and that family members have not been promptly notified of their detention;

...

7. The Committee recommends that the State Party

(a) ensure that detainees, including those held for offences under the jurisdiction of State Security Courts, benefit fully in practice from the available safeguards against ill-treatment and torture, particularly by guaranteeing their right to medical and legal assistance and to contact with their families;

...”

43. In its General Comment No. 2, dated 24 January 2008 (CAT/C/GC/2), the Committee stated:

“13. Certain basic guarantees apply to all persons deprived of liberty. Some of these are specified in the Convention, and the Committee consistently calls upon the States Parties to use them. The Committee’s recommendations concerning effective measures aim to clarify the current baseline and are not exhaustive. Such guarantees include, *inter alia*, ... the right promptly to receive independent legal assistance ...”

(c) European Union

44. Article 48 of the Charter of Fundamental Rights states that “[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed”. Article 52 § 3 further states that the meaning and scope of the right guaranteed under Article 48 are the same as the equivalent right laid down by the European Convention on Human Rights.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. Access to a lawyer during police custody

45. The applicant alleged that his defence rights had been violated as he had been denied access to a lawyer during his police custody. He relied on Article 6 § 3 (c) of the Convention, which provides:

“3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

1. *The Chamber judgment*

46. In its judgment of 26 April 2007, the Chamber held that there had been no violation of Article 6 § 3 (c) of the Convention. In that connection, it pointed out that the applicant had been represented during the trial and appeal proceedings by a lawyer and that the applicant’s statement to the police was not the sole basis for his conviction. According to the Chamber,

the applicant had had the opportunity of challenging the prosecution's allegations under conditions which did not place him at a substantial disadvantage *vis-à-vis* his opponent. The Chamber also noted that in convicting the applicant, the İzmir State Security Court had had regard to the circumstances in which the applicant was arrested, the expert report concerning the handwriting on the banner, and witness statements. In view of the above, it concluded that the fairness of the applicant's trial had not been prejudiced by the lack of legal assistance during his police custody.

2. *The parties' submissions*

(a) **The applicant**

47. The applicant contested the grounds on which the Chamber had found that there had been no violation of Article 6 § 3 (c) of the Convention. He stated that the assistance of a lawyer in police custody was a fundamental right. He reminded the Court that all the evidence which had been used against him had been collected at the preliminary investigation stage, during which he had been denied the assistance of a lawyer. At this point, the applicant also argued that although the domestic court had convicted him, there had been no evidence to prove that he was guilty. He also stated that he had been ill-treated during his police custody and had signed his statement to the police under duress. That statement had been used by the İzmir State Security Court, although he had clearly retracted it before the public prosecutor, the investigating judge and at the trial. The applicant also stressed that he had been a minor at the material time and had no previous criminal record. In his submission, in view of the serious charges that had been brought against him, the lack of legal assistance had breached his right to a fair trial. He also argued that the Government had failed to submit any good reason to justify the lack of legal assistance.

(b) **The Government**

48. The Government asked the Grand Chamber to endorse the Chamber's finding that there had been no violation of Article 6 § 3 (c) of the Convention. They stated, firstly, that the legislation had been changed in 2005. Furthermore, in their submission, the restriction imposed on the applicant's access to a lawyer had not infringed his right to a fair trial under Article 6 of the Convention. Referring to the case-law of the Court (see, in particular, *Imbrioscia v. Switzerland*, 24 November 1993, Series A no. 275; *John Murray v. the United Kingdom*, 8 February 1996, *Reports of Judgments and Decisions* 1996-I; *Averill v. the United Kingdom*, no. 36408/97, ECHR 2000-VI; *Magee v. the United Kingdom*, no. 28135/95, ECHR 2000-VI; and *Brennan v. the United Kingdom*, no. 39846/98, ECHR 2001-X), they maintained that in assessing whether or not the trial was fair, regard should be had to the entirety of the proceedings.

Thus, as the applicant had been represented by a lawyer during the proceedings before the İzmir State Security Court and the Court of Cassation, his right to a fair hearing had not been violated. The Government further drew attention to several Turkish cases (see *Saraç v. Turkey* (dec.), no. 35841/97, 2 September 2004; *Yurtsever v. Turkey* (dec.), no. 42086/02, 31 August 2006; *Uçma v. Turkey* (dec.), no. 15071/03, 3 October 2006; *Yavuz and Others v. Turkey* (dec.), no. 38827/02, 21 November 2006; and *Yıldız v. Turkey* (dec.), nos. 3543/03 and 3557/03, 5 December 2006), in which the Court had declared similar complaints inadmissible as being manifestly ill-founded on the ground that, since the police statements had not been the only evidence to support the convictions, the lack of legal assistance during police custody had not constituted a violation of Article 6 of the Convention.

49. Turning to the facts of the instant case, the Government maintained that when the applicant was taken into police custody, he was reminded of his right to remain silent and that during the ensuing criminal proceedings his lawyer had had the opportunity to challenge the prosecution's allegations. They further emphasised that the applicant's statement to the police was not the sole basis for his conviction.

3. *The Court's assessment*

(a) **The general principles applicable in this case**

50. The Court reiterates that, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially paragraph 3 thereof – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see *Imbrioscia*, cited above, § 36). As the Court has already held in its previous judgments, the right set out in Article 6 § 3 (c) of the Convention is one element, among others, of the concept of a fair trial in criminal proceedings contained in Article 6 § 1 (see *Imbrioscia*, cited above, § 37, and *Brennan*, cited above, § 45).

51. The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Poitrimol v. France*, 23 November 1993, § 34, Series A no. 277-A, and *Demebukov v. Bulgaria*, no. 68020/01, § 50, 28 February 2008). Nevertheless, Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is

consistent with the requirements of a fair trial. In this respect, it must be remembered that the Convention is designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective” and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see *Imbrioscia*, cited above, § 38).

52. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right has so far been considered capable of being subject to restrictions for good cause. The question, in each case, has therefore been whether the restriction was justified and, if so, whether, in the light of the entirety of the proceedings, it has not deprived the accused of a fair hearing, for even a justified restriction is capable of doing so in certain circumstances (see *John Murray*, cited above, § 63; *Brennan*, cited above, § 45; and *Magee*, cited above, § 44).

53. These principles, outlined in paragraph 52 above, are also in line with the generally recognised international human rights standards (see paragraphs 37-42 above) which are at the core of the concept of a fair trial and whose rationale relates in particular to the protection of the accused against abusive coercion on the part of the authorities. They also contribute to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused.

54. In this respect, the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (see *Can v. Austria*, no. 9300/81, Commission’s report of 12 July 1984, § 50, Series A no. 96). At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Jalloh v. Germany* [GC], no. 54810/00, § 100, ECHR 2006-IX, and *Kolu v. Turkey*, no. 35811/97, § 51, 2 August 2005). Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has

extinguished the very essence of the privilege against self-incrimination (see, *mutatis mutandis*, *Jalloh*, cited above, § 101). In this connection, the Court also notes the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (see paragraphs 39-40 above), in which the CPT repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.

55. Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective” (see paragraph 51 above), Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 (see, *mutatis mutandis*, *Magee*, cited above, § 44). The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

(b) Application of the above principles to the present case

56. In the present case, the applicant’s right of access to a lawyer was restricted during his police custody, pursuant to section 31 of Law no. 3842, as he was accused of committing an offence falling within the jurisdiction of the State Security Courts. As a result, he did not have access to a lawyer when he made his statements to the police, the public prosecutor and the investigating judge respectively. Thus, no other justification was given for denying the applicant access to a lawyer than the fact that this was provided for on a systematic basis by the relevant legal provisions. As such, this already falls short of the requirements of Article 6 in this respect, as set out at paragraph 52 above.

57. The Court further observes that the applicant had access to a lawyer following his detention on remand. During the ensuing criminal proceedings, he was also able to call witnesses on his behalf and had the possibility of challenging the prosecution’s arguments. It is also noted that the applicant repeatedly denied the content of his statement to the police, both at the trial and on appeal. However, as is apparent from the case file, the investigation had in large part been completed before the applicant appeared before the investigating judge on 1 June 2001. Moreover, not only did the İzmir State Security Court not take a stance on the admissibility of

the applicant's statements made in police custody before going on to examine the merits of the case, it also used the statement to the police as the main evidence on which to convict him, despite his denial of its accuracy (see paragraph 23 above). In this connection, the Court observes that in convicting the applicant, the İzmir State Security Court in fact used the evidence before it to confirm the applicant's statement to the police. This evidence included the expert's report dated 1 June 2001 and the statements of the other accused to the police and the public prosecutor. In this respect, however, the Court finds it striking that the expert's report mentioned in the judgment of the first-instance court was in favour of the applicant, as it stated that it could not be established whether the handwriting on the banner matched the applicant's (see paragraph 15 above). It is also significant that all the co-defendants, who had testified against the applicant in their statements to the police and the public prosecutor, retracted their statements at the trial and denied having participated in the demonstration.

58. Thus, in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer in that his statement to the police was used for his conviction. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody. However, it is not for the Court to speculate on the impact which the applicant's access to a lawyer during police custody would have had on the ensuing proceedings.

59. The Court further notes that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II; *Kolu*, cited above, § 53; and *Colozza v. Italy*, 12 February 1985, § 28, Series A no. 89). Thus, in the present case, no reliance can be placed on the assertion in the form stating his rights that the applicant had been reminded of his right to remain silent (see paragraph 14 above).

60. Finally, the Court notes that one of the specific elements of the instant case was the applicant's age. Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody (see paragraphs 32-36 above), the Court stresses the fundamental importance of providing access to a lawyer where the person in custody is a minor.

61. Still, in the present case, as explained above, the restriction imposed on the right of access to a lawyer was systematic and applied to anyone held in police custody, regardless of his or her age, in connection with an offence falling under the jurisdiction of the State Security Courts.

62. In sum, even though the applicant had the opportunity to challenge the evidence against him at the trial and subsequently on appeal, the absence of a lawyer while he was in police custody irretrievably affected his defence rights.

(c) Conclusion

63. In view of the above, the Court concludes that there has been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 in the present case.

B. The non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation

64. The applicant complained that the written opinion of the Principal Public Prosecutor at the Court of Cassation had not been communicated to him. In this respect, he relied on Article 6 § 1 of the Convention, the relevant part of which provides:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

1. The Chamber judgment

65. In its judgment of 26 April 2007, the Chamber found that, in the light of the established case-law on the matter, the non-communication to the applicant of the written opinion of the Principal Public Prosecutor at the Court of Cassation had infringed his right to adversarial proceedings. It therefore concluded that there had been a violation of Article 6 § 1 of the Convention.

2. The parties' submissions

66. The parties filed no further observations on this question.

3. The Court's assessment

67. The Court considers, for the reasons given by the Chamber, that the applicant's right to adversarial proceedings has been breached. There has therefore been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

1. The parties' submissions

69. The applicant claimed 5,000 euros (EUR) in respect of pecuniary damage and EUR 10,000 in respect of non-pecuniary damage.

70. The Government contended that the amounts claimed were excessive and unacceptable.

2. The Chamber judgment

71. The Chamber did not award any pecuniary compensation to the applicant, holding that he had failed to substantiate his claims. It considered that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

3. The Court's assessment

72. The Court reiterates that the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which he would have been had this provision not been disregarded (see *Teteriny v. Russia*, no. 11931/03, § 56, 30 June 2005; *Jeličić v. Bosnia and Herzegovina*, no. 41183/02, § 53, ECHR 2006-XII; and *Mehmet and Suna Yiğit v. Turkey*, no. 52658/99, § 47, 17 July 2007). The Court finds that this principle applies in the present case as well. Consequently, it considers that the most appropriate form of redress would be the retrial of the applicant in accordance with the requirements of Article 6 § 1 of the Convention, should the applicant so request (see, *mutatis mutandis*, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003).

73. As regards the remaining non-pecuniary damage, ruling on an equitable basis, it awards the applicant EUR 2,000.

B. Costs and expenses

1. The parties' submissions

74. The applicant claimed EUR 3,500 for the costs and expenses incurred in the domestic proceedings and before the Chamber, without submitting any documents in support of his claims. It is to be noted that the applicant has not amended the initial claim he made before the Chamber, but has submitted a legal-aid request for the expenses incurred before the Grand Chamber.

75. The Government contested the claim, arguing that it was unsubstantiated.

2. *The Chamber judgment*

76. The Chamber awarded the applicant EUR 1,000 for costs and expenses.

3. *The Court's assessment*

77. The Court observes that the applicant had the benefit of legal aid for the costs and expenses incurred during the Grand Chamber proceedings. As a result, the costs and expenses only include those incurred in the proceedings before the domestic courts and the Chamber.

78. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and are also reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, among other authorities, *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002, and *Sahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003-VIII).

79. In the light of the above, the Court awards the applicant the sum already awarded by the Chamber, namely EUR 1,000.

C. **Default interest**

80. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1, on account of the lack of legal assistance to the applicant while he was in police custody;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention, in respect of the non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into Turkish liras at the rate applicable at the date of settlement:
 - (i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

- (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 November 2008.

Vincent Berger
Jurisconsult

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Bratza;
- (b) joint concurring opinion of Judges Rozakis, Spielmann, Ziemele and Lazarova Trajkovska;
- (c) concurring opinion of Judge Zagrebelsky, joined by Judges Casadevall and Türmen.

N.B.
V.B.

CONCURRING OPINION OF JUDGE BRATZA

The central issue in the present case concerns the use made in evidence against the applicant of a confession made during the course of police interrogation at a time when he had been denied access to a lawyer. The Grand Chamber has found that the restriction on such access irretrievably prejudiced the applicant's rights of defence and that neither the legal assistance subsequently provided to the applicant nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred while the applicant was in police custody. The applicant's rights under Article 6 § 3 (c) of the Convention, read in conjunction with Article 6 § 1, were accordingly violated on account of this lack of legal assistance. I am in full agreement with this conclusion.

In paragraph 55 of the judgment, the Court states as a general principle that in order for the right to a fair trial to remain sufficiently "practical and effective", Article 6 requires that, as a rule, access to a lawyer should be provided "as from the first interrogation of a suspect by the police". This principle is consistent with the Court's earlier case-law and is clearly sufficient to enable the Court to reach a finding of a violation of Article 6 on the facts of the present case. However, I share the doubts of Judge Zagrebelsky as to whether, in appearing to hold that the right of access to a lawyer only arises at the moment of first interrogation, the statement of principle goes far enough. Like Judge Zagrebelsky, I consider that the Court should have used the opportunity to state in clear terms that the fairness of criminal proceedings under Article 6 requires that, as a rule, a suspect should be granted access to legal advice from the moment he is taken into police custody or pre-trial detention. It would be regrettable if the impression were to be left by the judgment that no issue could arise under Article 6 as long as a suspect was given access to a lawyer at the point when his interrogation began or that Article 6 was engaged only where the denial of access affected the fairness of the interrogation of the suspect. The denial of access to a lawyer from the outset of the detention of a suspect which, in a particular case, results in prejudice to the rights of the defence may violate Article 6 of the Convention whether or not such prejudice stems from the interrogation of the suspect.

JOINT CONCURRING OPINION OF JUDGES ROZAKIS, SPIELMANN, ZIEMELE AND LAZAROVA TRAJKOVSKA

1. We agree in all respects with the Court’s conclusions as to the violation of Article 6 § 3 (c) in conjunction with Article 6 § 1 of the Convention.

2. We would, however, have liked the reasoning set out in paragraph 72 of the judgment, on account of its importance, to have been included in the operative provisions as well, for reasons which have already been explained to a certain extent in the joint concurring opinion of Judges Spielmann and Malinverni in *Vladimir Romanov v. Russia* (no. 41461/02, 24 July 2008), as well as the concurring opinion of Judge Spielmann in *Polufakin and Chernyshev v. Russia* (no. 30997/02, 25 September 2008), and are now repeated here.

3. Firstly, it is common knowledge that while the reasoning of a judgment allows the Contracting States to ascertain the grounds on which the Court reached a finding of a violation or no violation of the Convention, and is of decisive importance on that account for the interpretation of the Convention, it is the operative provisions that are binding on the parties for the purposes of Article 46 § 1 of the Convention.

4. And indeed, what the Court says in paragraph 72 of the judgment is in our view of the utmost importance. It reiterates that when a person has been convicted in breach of the procedural safeguards afforded by Article 6, he should, as far as possible, be put in the position in which he would have been had the requirements of that Article not been disregarded (the principle of *restitutio in integrum*).

5. The principle of *restitutio in integrum* has its origin in the judgment of 13 September 1928 of the Permanent Court of International Justice (PCIJ) in the case concerning the *Factory at Chorzów* (claim for indemnity) (merits), where the Court held as follows:

“The essential principle is ... that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” (Collection of Judgments, Series A no. 17, p. 47)

6. This principle, namely that *restitutio in integrum* is considered to be the primary remedy for effecting reparation for breaches of international law, has been constantly reaffirmed by international case-law and practice, and is recalled in Article 35 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which reads as follows:

“A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”

There is no reason not to apply this principle to make reparation for internationally wrongful acts in the field of human rights (see Loukis G. Loucaides, “Reparation for Violations of Human Rights under the European Convention and *Restitutio in Integrum*”, [2008] *European Human Rights Law Review*, pp. 182-92).

In *Papamichalopoulos and Others v. Greece* ((Article 50), 31 October 1995, Series A no. 330-B) the Court held:

“34. The Court points out that by Article 53 of the Convention the High Contracting Parties undertook to abide by the decision of the Court in any case to which they were parties; furthermore, Article 54 provides that the judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution. It follows that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.

The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 50 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.”

7. In the present case, and given that the absence of a lawyer while the applicant was in police custody irretrievably affected his defence rights (see paragraph 62 of the judgment), the best means of achieving this is the reopening of the proceedings and the commencement of a new trial at which all the guarantees of a fair trial would be observed, provided, of course, that the applicant requests this option and it is available in the domestic law of the respondent State.

8. The reason why we wish to stress this point is that it must not be overlooked that the damages which the Court orders to be paid to victims of a violation of the Convention are, according to the terms and the spirit of Article 41, of a subsidiary nature. This is in line with the subsidiary character attributed to compensation of damages in international law. Article 36 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts states:

“1. The State responsible for an internationally wrongful act is under an obligation to compensate the damage caused thereby, insofar as such damage is not made good by restitution. ...”

It is therefore right that, wherever possible, the Court should seek to restore the *status quo ante* for the victim. However, the Court should also take into consideration that “Wiping out all the consequences of the wrongful act may ... require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused” (see J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 211, (2)) and in view of the remedies available at the domestic level (Article 41).

9. Admittedly, States are not required by the Convention to introduce procedures in their domestic legal systems whereby judgments of their Supreme Courts constituting *res judicata* may be reviewed. However, they are strongly encouraged to do so, especially in criminal matters.

10. In Turkey, Article 311 § 1 (f) of the Turkish Code of Criminal Procedure provides that the reopening of domestic proceedings which are found to be unfair by the European Court of Human Rights can be requested within one year following the final decision of the European Court of Human Rights.

There is, however, a temporal limitation for the applicability of this provision. Article 311 § 2 states that the above-mentioned provision is not applicable to applications which were lodged with the European Court of Human Rights before 4 February 2003 and for those judgments which became final before 4 February 2003. We believe that where, as in the present case, the respondent State has equipped itself with such a procedure it is the Court’s duty not only to suggest timidly that reopening is the most appropriate form of redress, as paragraph 72 of the judgment does, but also to urge the authorities to make use of that procedure, however unsatisfactory it may appear, or to adapt existing procedures, provided, of course, that the applicant so wishes. However, this is not legally possible unless such an exhortation appears in the operative provisions of the judgment.

11. Moreover, the Court has already included directions of this nature in the operative provisions of judgments. For example, in *Claes and Others v. Belgium* (nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99, 2 June 2005) it held in point 5 (a) of the operative provisions of its judgment that “unless it grants a request by [the] applicants for a retrial or for the proceedings to be reopened, the respondent State is to pay, within three months from the date on which the applicant in question indicates that he does not wish to submit such a request or it appears that he does not intend to do so, or from the date on which such a request is refused”, sums in respect of non-pecuniary damage and costs and expenses. Similarly, in *Lungoci v. Romania* (no. 62710/00, 26 January 2006) the Court held in point 3 (a) of the operative provisions of its judgment that “the respondent State is to ensure that, within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the

Convention, the proceedings are reopened if the applicant so desires, and at the same time is to pay her EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount, to be converted into Romanian lei at the rate applicable at the date of settlement”.

12. By virtue of Article 46 § 2 of the Convention, supervision of the execution of the Court’s judgments is the responsibility of the Committee of Ministers. That does not mean, however, that the Court should not play any part in the matter and should not take measures designed to facilitate the Committee of Ministers’ task in discharging these functions. In fact, there is nothing in Article 41 or anywhere else in the Convention that would prevent the Court from assessing the issue of full reparation in accordance with the principles outlined above. Since the Court has jurisdiction to interpret and apply the Convention, it also has jurisdiction to assess “the form and quantum of reparation to be made” (see J. Crawford, *ibid.*, p. 201). As was explained by the PCIJ in the *Factory at Chorzów* case: “Reparation ... is the indispensable complement of a failure to apply a convention ...” (p. 21).

13. To that end, it is essential that in its judgments the Court should not merely give as precise a description as possible of the nature of the Convention violation found but should also indicate to the State concerned in the operative provisions, if the circumstances of the case so require, the measures it considers the most appropriate to redress the violation.

CONCURRING OPINION OF JUDGE ZAGREBELSKY,
JOINED BY JUDGES CASADEVALL AND TÜRMEŒ

(Translation)

To my vote in favour of the judgment’s operative provisions, I would like to add a few words to explain the meaning of the Court’s reasoning, as I understand it.

The Court found a violation “of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1, on account of the lack of legal assistance to the applicant while he was in police custody” (point 1 of the operative provisions). It thus replied to the applicant’s complaint “that his defence rights had been violated in that ... he had been denied access to a lawyer while in police custody”. That complaint, raised by the applicant under Article 6 § 3 (c), was rightly formulated more precisely by the Court, which linked it with Article 6 § 1.

To my mind, the meaning of the Court’s judgment is quite clear. If there is any doubt at all, what the Court says in paragraph 53, referring back to paragraph 37, makes things clearer still. The generally recognised international standards, which the Court accepts and which form the framework for its case-law, provide: “An untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representation ... and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him and to receive, confidential instructions ...”

It is therefore at the very beginning of police custody or pre-trial detention that a person accused of an offence must have the possibility of being assisted by a lawyer, and not only while being questioned.

The importance of interrogations in the context of criminal procedure is obvious, so that, as the judgment makes clear, the impossibility of being assisted by a lawyer while being questioned amounts, subject to exceptions, to a serious failing with regard to the requirements of a fair trial. But the fairness of proceedings against an accused person in custody also requires that he be able to obtain (and that defence counsel be able to provide) the whole wide range of services specifically associated with legal assistance, including discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support to an accused in distress, checking his conditions of detention and so on.

The legal principle to be derived from the judgment is therefore that, normally and apart from exceptional limitations, an accused person in custody is entitled, right from the beginning of police custody or pre-trial detention, to be visited by defence counsel to discuss everything concerning his defence and his legitimate needs. Failure to allow that possibility, regardless of the question of interrogations and their use by the courts, amounts, subject to exceptions, to a violation of Article 6 of the Convention.

I would add that, naturally, the fact that defence counsel may see the accused throughout his detention in police stations or in prison is more apt than any other measure to prevent treatment prohibited by Article 3 of the Convention.

The foregoing considerations would not have been necessary if the Court's reasoning had not contained passages capable of suggesting to the reader that the Court requires accused persons to be assisted by defence counsel only from the start of and during interrogation (or even only during an interview of which a formal record is to be produced to be used as evidence by the court). From paragraph 55 onwards the text adopted by the Court concentrates entirely on the answers given by the applicant when questioned which were later used against him.

I would find such a reading of the judgment too reductive. The importance of the Court's decision for the protection of an accused person deprived of his liberty would be severely weakened thereby. And wrongly so, to my mind, since the reasoning linked to the questioning of the applicant and the way his answers were used by the courts is easily explained by the Court's concern to take into consideration the specific facts of the case before it.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 98/08
[2009] ZACC 18

CENTRE FOR CHILD LAW

Applicant

versus

MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

First Respondent

MINISTER FOR CORRECTIONAL SERVICES

Second Respondent

LEGAL AID BOARD

Third Respondent

and

NATIONAL INSTITUTE FOR CRIME PREVENTION
AND THE RE-INTEGRATION OF OFFENDERS

Amicus Curiae

Heard on : 5 March 2009

Decided on : 15 July 2009

JUDGMENT

CAMERON J:

Introduction

[1] The applicant applies for confirmation of declarations of statutory invalidity made by the North Gauteng High Court, Pretoria. The High Court (Potterill AJ)

struck down various provisions of the Criminal Law Amendment Act¹ (CLAA) in the form it took after amendment by section 1 of the Criminal Law (Sentencing) Amendment Act² (the Amendment Act). The impugned sections make minimum sentences applicable to offenders aged 16 and 17 at the time they committed the offence. The High Court found these sections inconsistent with provisions of the Bill of Rights pertaining to children.³

[2] The applicant, the Centre for Child Law (the Centre), is a law clinic established by the University of Pretoria and registered with the Law Society of the Northern Provinces. Its main objective is to establish and promote child law and to uphold the rights of children in South Africa. Invoking the standing provisions of the Bill of Rights,⁴ the Centre asserts that it brings the application in its own interest, on behalf of all 16 and 17 year old children at risk of being sentenced under the new provisions,

¹ 105 of 1997.

² 38 of 2007.

³ Section 28(1)(g) of the Constitution provides:

“Every child has the right—

- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child’s age”.

Section 28(2) of the Constitution provides: “A child’s best interests are of paramount importance in every matter concerning the child.”

⁴ Section 38 of the Constitution provides that the persons who may approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened are:

- “(a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”

and in the public interest. In addition to supporting confirmation of the High Court's order, the Centre now seeks relief in respect of children already sentenced under the new provisions which the High Court did not grant.

[3] The respondents are the Minister for Justice and Constitutional Development (the Minister), the Minister for Correctional Services, and the Legal Aid Board, an autonomous statutory body⁵ providing legal services to indigent persons. The second and third respondents did not oppose the application and filed notices to abide by the outcome. The Minister opposed the relief in the High Court, opposed confirmation of the declarations of invalidity, and lodged a notice of appeal with this Court against the High Court's findings.

Background: the minimum sentencing regime

[4] Section 51 of the CLAA creates a minimum sentencing regime for specified classes of serious offences.⁶ It was introduced on 1 May 1998 as a temporary measure for two years.⁷ Since then it has been extended from time to time;⁸ and the Amendment Act has rendered it permanent.⁹

⁵ Established by the Legal Aid Act 22 of 1969.

⁶ The Schedules of the CLAA generally cover the following crimes: murder and rape, when committed in particular circumstances or against certain persons; various offences referred to in the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004; various offences under the Drugs and Drug Trafficking Act 140 of 1992; trafficking in persons for sexual purposes; sexual exploitation of a child or mentally disabled person; offences related to the dealing in or smuggling or possession of ammunition, firearms, explosives or armaments; any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, involving certain sums of money or committed under certain circumstances; and treason, sedition or robbery if committed with a firearm that one intends to use in the commission of that offence.

⁷ CLAA section 53(1) (pre-amendment).

⁸ Section 53(2) of the CLAA (pre-amendment) empowered the President, with the concurrence of Parliament, to extend the operation of sections 51 and 52. It was extended for 12 months with effect from 1 May 2000 (Government Gazette 21122 GN 23, 20 April 2000); for two years with effect from 1 May 2001 (Government

[5] Before the Amendment Act came into force, this regime had limited application to children who were under 18 at the time of the offence. The CLAA created a distinctive regime for this group,¹⁰ and exempted those under 16 altogether.¹¹ In *S v B*¹² the Supreme Court of Appeal held that under the legislative scheme the fact that an offender was under 18 though over 16 at the time of the offence automatically conferred a discretion on the sentencing court, leaving it free without more to depart from the prescribed minimum sentence; that offenders in this group do not have to establish substantial and compelling circumstances to avoid the minimum sentences; but that the prescribed sentences, as the sentences Parliament has ordinarily ordained for the offences in question, nevertheless operate as a “weighting factor”, conducing to generally heavier sentences.

Gazette 7059 GN 29, 30 April 2001); for two years with effect from 1 May 2003 (Government Gazette 24804 GN 40, 30 April 2003); for two years with effect from 1 May 2005 (Government Gazette 27549 GN 21, 29 April 2005); and for two years with effect from 1 May 2007 (Government Gazette 29831 GN 10, 25 April 2007).

⁹ Section 3 of the Amendment Act repealed section 53 of the CLAA.

¹⁰ Before the Amendment Act, CLAA section 51(3) provided as follows:

“(a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.”

¹¹ CLAA section 51(6): “The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.”

¹² 2006 (1) SACR 311 (SCA); [2005] 2 All SA 1 (SCA) at para 24.

[6] On 31 December 2007, the Amendment Act came into force.¹³ Its effect (and, according to the answering affidavit of the Minister, its express object) was to reverse the decision of the Supreme Court of Appeal in *S v B* and to apply the minimum sentencing regime to children who were 16 or 17 at the time of the offence. Section 51(6) now makes incontestably clear that only children under the age of 16 at the time of the offence are excluded. Section 53A, a transitional provision, applies the new provisions to trials of 16 and 17 year olds that are already under way at the time of its coming into force.¹⁴

[7] On 3 March 2008, the Centre launched these proceedings.

The proceedings in the High Court

[8] In the High Court, the Minister raised two preliminary objections, challenging the Centre's legal standing and asserting that the application is purely academic and without any factual basis. The High Court found that while the Centre did not allege that the rights of any specific child were threatened, the rights of all 16 and 17 year old children are threatened, as the Amendment Act subjects them to the minimum

¹³ Government Gazette 30638 GN 1257, 31 December 2007.

¹⁴ Section 53A of the CLAA as amended now provides:

“If a regional court has, prior to the date of the commencement of the Criminal Law (Sentencing) Amendment Act, 2007—

- (a) committed an accused for sentence by a High Court under this Act, the High Court must dispose of the matter as if the Criminal Law (Sentencing) Amendment Act, 2007, had not been passed; or
- (b) not committed an accused for sentence by a High Court under this Act, then the regional court must dispose of the matter in terms of this Act, as amended by the Criminal Law (Sentencing) Amendment Act, 2007.”

sentencing regime. It found that in attacking the CLAA's constitutional validity on principle, the Centre—

“does not require a set of facts; the facts speak for themselves. The child will be 16 or 17 years old, has committed a serious offence of either rape, robbery or murder, and the Presiding Officer will have to start the sentencing process with the minimum sentence prescribed by the Legislature.”¹⁵

The High Court concluded that the Centre therefore did not have a merely academic or hypothetical interest, and was acting in the public interest and on behalf of all 16 and 17 year olds and therefore had legal standing.

[9] On the substance of the challenge, the High Court found that applying minimum sentences to 16 and 17 year olds negates the Constitution's principles of imprisonment as a last resort and for the shortest appropriate period of time. Before the Amendment Act and under *S v B*, the court began with a “clean slate” when sentencing child offenders, although giving the ordained sentences a weighting effect. In contrast, the Amendment Act “has left Courts in applying the minimum sentencing regime with no discretion but to start with the minimum sentence, clearly not a clean slate, but imprisonment as a first resort.”¹⁶

[10] The Centre also sought orders requiring the first and second respondents to have the sentences of those children already sentenced under the Amendment Act

¹⁵ *Centre for Child Law v Minister for Justice and Constitutional Development and Others*, Case No 11214/08, 4 November 2008, as yet unreported, at para 9.

¹⁶ *Id* at para 22.

reconsidered. The High Court did not deal with these prayers, but postponed them indefinitely (*sine die*). It accordingly granted an order declaring—

“that ss 51(1), 51(2), 51(6), 51(5)(b) and 53A(b) of the Criminal Law Amendment Act, Act 105 of 1997, as amended by section 1 of the Criminal Law (Sentencing) Amendment Act, 38 of 2007 are inconsistent with section 28(1)(g) and 28(2) of the Constitution”.

The High Court reserved costs and referred the declarations to this Court for confirmation in terms of section 172(2)(a) of the Constitution.

Intervention of amicus curiae

[11] The National Institute for Crime Prevention and the Re-integration of Offenders (NICRO), a non-profit organisation working towards crime reduction and for community rehabilitation of offenders, applied for and was granted admission as amicus curiae. In its written submissions, NICRO supported the confirmation of invalidity, but focused its argument on the unconstitutionality of section 51(6) (which exempts only those under 16 from minimum sentences). NICRO contended that it is irrational and unfairly discriminatory to subject offenders aged 16 and 17 to the regime, since section 28 of the Bill of Rights (the children’s rights provision) affords special protective guarantees for all children under 18.

Abstract review

[12] Before considering the issues, it is convenient to mention at the outset that in this Court the Minister did not persist with his challenge to the Centre’s legal

standing, or with the contention that the issues were purely academic.¹⁷ That approach was in my view correct. Although the Centre did not act on behalf of (or join) any particular child sentenced under the statute as amended, its provisions are clearly intended to have immediate effect on its promulgation. So the prospect of children being sentenced under the challenged provisions was immediate, and the issue anything but abstract or academic. The Centre's stated focus is children's rights, and in this case it has standing to protect them. It was thus entitled to take up the cudgels. To have required the Centre to augment its standing by waiting for a child to be sentenced under the new provisions would, in my view, have been an exercise in needless formalism.

[13] This Court has in any event previously indicated that it may be incumbent on it to deal with the substance of a dispute about the constitutionality of legislation a High Court has declared unconstitutional, even in the absence of a party with proper standing.¹⁸ This is for good public policy reasons, mainly to rescue disputed

¹⁷ The Minister's notice of appeal made no mention of the standing or abstract review points. Rule 16(3) of this Court's rules requires an appellant to "set forth clearly the grounds on which the appeal is brought, indicating which findings of fact and/or law are appealed against".

¹⁸ *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) per Yacoob J for the majority at para 24 (where the Court held that the applicant in fact had standing):

"It may in any event be incumbent on this Court to deal with the substance of a dispute concerning the constitutionality of legislation that reaches this Court pursuant to section 172(2) of the Constitution. This is because a High Court has already declared a particular provision to be inconsistent with the Constitution. There are good public policy reasons to suggest that the uncertainty in relation to constitutional consistency ought not to be allowed to prevail. There is therefore a strong argument that the purpose of section 172(2) of the Constitution is to ensure that the uncertainty generated by the High Court decision of unconstitutionality is eliminated and that the substance of the debate raised by the declaration is finally determined."

See also the judgment of Madala J at para 80: "[T]hese are confirmation proceedings. The application must be dealt with on its merits so that finality can be reached in respect of the Court *a quo*'s findings."

provisions from the limbo of indeterminate constitutionality¹⁹ or, as it was expressed in *Phaswane*,²⁰ to achieve “the constitutional purpose of avoiding disruptive legal uncertainty”. Although this Court will not do so in every case where the High Court ought not to have decided the question,²¹ in general, “the only circumstances in which a court may not deal substantively with an application for confirmation is where no uncertainty will arise”.²² These reasons apply even more strongly in a case concerning penal provisions, which have imminent and adverse effects on those the statute targets. That is the case here.

The premises of the High Court judgment

[14] On appeal the Minister opposed confirmation of the declarations of invalidity, while the Centre and NICRO urged that they be confirmed. The Centre in addition pressed for the structural relief regarding already-sentenced youths that the High Court postponed. The parties’ opposing positions raise important issues about the way the criminal justice system treats children. These, in turn, raise difficult issues of constitutional power and interpretation. For clarity it may therefore be convenient to set out first the premises that underlie the judgment of the High Court. These may be compacted in a series of short propositions:

¹⁹ *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 21.

²⁰ *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development, Albert Phaswane and Aaron Mokoena (Centre for Child Law, Childline South Africa, RAPCAN, Children First, Operation Bobbi Bear, POWA and Cape Mental Health Society as Amici Curiae)* [2009] ZACC 8 at para 61.

²¹ *Id* at para 68.

²² *Id* at para 63.

- (a) The intention and effect of the minimum sentencing regime is to require courts to impose harsher sentences – that is, to send more offenders in the scheduled categories to jail, for longer periods.
- (b) Under the minimum sentencing regime, in default of a finding that substantial and compelling circumstances exist, a sentencing court is obliged to impose the minimum sentence. The starting point, and default position, is therefore the minimum sentence.
- (c) By contrast, before the Amendment Act, under *S v B*, the starting point in sentencing 16 and 17 year old offenders in the scheduled categories was without predisposing constraints regarding the appropriate sentence, which would depend on individualised factors relating to the crime and the offender, while taking into account the interests of society, including the fact that the legislature had ordinarily ordained the prescribed sentences.
- (d) The children’s rights provision creates a stark but beneficial distinction between adults and children. It draws a distinction between adults and children below the age of 18 and requires that those under 18 be treated differently from adults when authority is exercised over them.
- (e) It operates as a substantive constraint on the exercise of certain types of authority and imposes a legislative restraint on Parliament. It requires all those bound by the Constitution, including the judiciary and Parliament, to respect and apply its provisions.

- (f) The effect of the Amendment Act is to impose the minimum sentencing regime on 16 and 17 year old offenders in the scheduled categories, resulting in tougher sentences for them.
- (g) This removes the constitutionally mandated distinction between them and adult offenders, and requires sentencing courts to start with the obligation to impose the minimum sentences, and depart from these only in rare circumstances, when substantial and compelling circumstances are found to exist.
- (h) This limits the rights in section 28.
- (i) No sufficient or any justification has been tendered for the limitation.
- (j) It therefore constitutes an unconstitutional violation of the rights of the children at issue.

[15] I now examine these propositions. I do so under these headings: the minimum sentencing regime; the children's rights provision in the Bill of Rights; the effect of the Amendment Act; and whether any limitation of rights has been justified.

The minimum sentencing regime

[16] There can be no doubt that the intention and effect of the minimum sentencing regime introduced in May 1998 was to impose a harsher system of sentencing for the scheduled crimes. In *S v Malgas*,²³ the Supreme Court of Appeal emphasised that under the minimum sentencing regime the discretion entrusted to courts of law was

²³ 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA).

not expunged, but was substantially constrained. For sentencing courts it was no longer to be business as usual:

“First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the Legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response.”²⁴

[17] Under *Malgas*, the minimum sentencing legislation had two operative effects. First, the statutorily prescribed minimum sentences must ordinarily be imposed. Absent “truly convincing reasons” for departure, the scheduled offences are “required to elicit a severe, standardised and consistent response from the courts” through imposition of the ordained sentences.²⁵ Second, even where those sentences do not have to be imposed because substantial and compelling circumstances are found, the legislation has a weighting effect leading to the imposition of consistently heavier sentences.²⁶

[18] In *S v Dodo*²⁷ this Court endorsed *Malgas*. It found that the *Malgas* approach to sentencing steered “an appropriate path, which the Legislature doubtless intended, respecting the Legislature’s decision to ensure that consistently heavier sentences are

²⁴ Id at para 8.

²⁵ Id at para 25.

²⁶ Id at para 8.

²⁷ [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at para 11.

imposed in relation to the serious crimes” while at the same time promoting the spirit, purport and objects of the Bill of Rights. *Dodo* thus upheld the constitutional validity of a minimum sentencing regime requiring consistently heavier sentences for adults, so long as it retained a residual discretionary overlay. Legislative power to constrain the courts’ sentencing discretion derived, *Dodo* said, from the fact that “[b]oth the Legislature and the Executive share an interest in the punishment to be imposed by courts, both in regard to its nature and its severity”.²⁸ The courts thus do not enjoy sole authority in determining sentence:

“While our Constitution recognises a separation of powers between the different branches of the State and a system of appropriate checks and balances on the exercise of the respective functions and powers of these branches, such separation does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed on convicted persons.”²⁹

[19] One thing is beyond question: the minimum sentences have bitten hard, both in the courts’ approach to sentencing, and in outcome. More offenders have been sent to jail for longer periods. In *Vilakazi v S*,³⁰ the Supreme Court of Appeal described the aftermath of the new regime in these stark terms:

“That it has indeed not been ‘business as usual’ is reflected in the dramatic change in the profile of the prison population since the Act [the CLAA] took effect. Published figures indicate that the number of prisoners serving sentences of imprisonment between ten and fifteen years increased almost three times from 1998 to 2008. Those

²⁸ Id at para 23.

²⁹ Id at para 33.

³⁰ [2008] 4 All SA 396 (SCA).

serving sentences of life imprisonment increased over nine times.”³¹ (Footnotes omitted.)

[20] In addition, figures from the Department of Correctional Services show that the proportion of sentences being served that are longer than five years is now 66%. In 1997 only 25% of prisoners were serving sentences of two years or longer.³²

[21] By contrast, before enactment of the Amendment Act, under *S v B*, 16 and 17 year old offenders in the scheduled categories felt the “weighting effect” of the minimum sentences, but were not subject to them. The court in *S v B* held that section 51(3)(b) allowed a sentencing court, while mindful of the new harsher sentences, to start with a “clean slate”. This does not mean that the court starts the sentencing process void of any considerations – for that is impossible – but only that the court’s approach to sentencing is not bounded by obligatory predisposing constraints. Instead, sentence depends on individualised factors relating to the crime and the offender, while taking into account the interests of society.

[22] In the answering affidavit filed on behalf of the Minister in these proceedings, Mr Rudman, a senior official in the Department of Justice and Constitutional Development who heads its legislative branch, puts on record the government’s position that *S v B*’s interpretation of section 51(3)(b) “clearly departed” from the legislative intention to subject 16 and 17 year olds to minimum sentences. The

³¹ Id at para 51.

³² These statistics are available at <http://www.dcs.gov.za/WebStatistics>, accessed on 4 June 2009.

Amendment Act, he avers, sets out to repair the position. As will become clear when I revert to this evidence in dealing with justification, government’s objective in enacting legislation is relevant to determining its validity in the face of constitutional challenge. It does not of course determine what the statute means.

[23] The question, to which I now turn, is whether the amending provisions accord with the Constitution.

The children’s rights provision in the Bill of Rights

[24] Section 28 of the Bill of Rights provides, in relevant part:

- “(1) Every child has the right—
- g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child’s age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child’s best interests are of paramount importance in every matter concerning the child.
- (3) In this section ‘child’ means a person under the age of 18 years.”

[25] It is evident that this provision draws upon and reflects the Convention on the Rights of the Child.³³ Amongst other things section 28 protects children against the undue exercise of authority. The rights the provision secures are not interpretive guides. They are not merely advisory. Nor are they exhortatory. They constitute a real restraint on Parliament. And they are an enforceable precept determining how officials and judicial officers should treat children.

[26] The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.

[27] These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders. Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more capable of rehabilitation than adults.

[28] These are the premises on which the Constitution requires the courts and Parliament to differentiate child offenders from adults. We distinguish them because

³³ The Convention on the Rights of the Child was adopted by the United Nations General Assembly on 20 November 1989 and entered into force on 2 September 1990. It was ratified by South Africa on 16 June 1995.

we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.

[29] This is not to say that children do not commit heinous crimes. They do. The courts, which deal with child offenders every day, recognise this no less than Parliament. The affidavit on behalf of the Minister rightly points to legislators' concern about violent crimes committed by under-18s. The Constitution does not prohibit Parliament from dealing effectively with these offenders. The children's rights provision itself envisages that child offenders may have to be detained. The constitutional injunction that "[a] child's best interests are of paramount importance in every matter concerning the child" does not preclude sending child offenders to jail. It means that the child's interests are "more important than anything else",³⁴ but not that everything else is unimportant: the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment.

[30] It is in accordance with this approach, and recognising Parliament's due role in setting public policy standards in sentencing, that *S v B* enjoined courts to take into

³⁴ See the definition of "paramount", *New Oxford Dictionary of English*, (Oxford University Press, Oxford 1998).

account the weighting effect of the minimum sentences when sentencing 16 and 17 year olds.

[31] But while the Bill of Rights envisages that detention of child offenders may be appropriate, it mitigates the circumstances. Detention must be a last, not a first, or even intermediate, resort; and when the child is detained, detention must be “only for the shortest appropriate period of time”. The principles of “last resort” and “shortest appropriate period” bear not only on whether prison is a proper sentencing option, but also on the nature of the incarceration imposed. If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for the shortest possible period of time.

[32] In short, section 28(1)(g) requires an individuated judicial response to sentencing, one that focuses on the particular child who is being sentenced, rather than an approach encumbered by the rigid starting point that minimum sentencing entails. The injunction that the child may be detained only for the shortest “appropriate” period of time relates to the child and to the offence he or she has committed. It requires an individually appropriate sentence. It does not import a supervening legislatively imposed determination of what would be “appropriate” under a minimum sentencing system.

[33] The general considerations mitigating the treatment and punishment of child offenders find resonance with comparable systems of justice. In declaring unconstitutional the death penalty for offenders under 18, the Supreme Court of the United States of America has held that, as a category, children are less culpable.³⁵ It observed that—

“as any parent knows and as scientific and sociological studies . . . tend to confirm, [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”³⁶

[34] That court also alluded to the fact that juveniles are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”. In part, this is due to the fact that “juveniles have less control, or less experience with control, over their own environment”.³⁷

[35] As already pointed out, since the character and personality of children under 18 are not yet fully formed, child offenders may be uniquely capable of rehabilitation. Juveniles are still engaged in the process of defining their own identity. The United States Supreme Court has therefore pointed out that their “vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment”. Hence:

³⁵ *Roper, Superintendent, Potosi Correctional Center v Simmons* 543 U.S. 551 (2005) at 567.

³⁶ *Id.* at 569.

³⁷ *Id.*

“From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”³⁸

[36] The Supreme Court of Canada has similarly found that because of their heightened vulnerability, relative lack of maturity and reduced capacity for moral judgment, children are entitled to a presumption of diminished moral culpability.³⁹ This, the Court found, is “fundamental to our notions of how a fair legal system ought to operate”.⁴⁰ The Court therefore allowed a challenge based on the Canadian Charter of Rights to a statute that required the imposition of adult sentences on certain categories of violent child offenders unless the young person could justify why an adult sentence should not be imposed.

[37] In a practical and entirely unsentimental sense, children embody society’s hope for, and its investment in, its own future. The Bill of Rights recognises this. This is why it requires the state to afford them special nurturance, and affords them special protection from the state’s power.⁴¹

[38] Another provision of the Bill of Rights reflects these facts about children. The franchise guarantee, section 19, provides that every “adult citizen”⁴² has the right to

³⁸ Id at 570.

³⁹ *R v B (D)* 2008 SCC 25; (2008), 293 D.L.R. (4th) 278 at para 41.

⁴⁰ Id at para 68.

⁴¹ See too Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable: Children sentenced to life without possibility of parole in Illinois* (DLA Piper, Chicago 2008).

⁴² Section 1(xxv) of the Electoral Act 73 of 1998 defines “voter” as follows:

vote in elections and to stand for public office. Children, as non-adults, are both disenfranchised and incapacitated from holding public office. Their constitutional incapacities stem from the very disabilities of judgment and insight that warrant their constitutional protection against the full rigour of adult punishments.

[39] There is no intrinsic magic in the age of 18, except that in many contexts it has been accepted as marking the transition from childhood to adulthood. The Constitution’s drafters could conceivably have set the frontier at 19 or at 17. They did not. They chose 18. For so long as the Bill of Rights stipulates that ‘child’ means a person under the age of 18 years,⁴³ its benefits and protections must be afforded to all those under the age of 18 years. This is a bulwark that the legislature cannot overturn without cogent justification. The question is whether the amending provisions attempt to do so.

The effect of the amending provisions

[40] The expressly intended effect of the Amendment Act is to obliterate the distinction between offenders who are 16 and 17 at the time of the offence, on the one hand, and adults on the other. This applies the full rigour of the minimum sentencing regime to them. As explained earlier, under *Malgas*,⁴⁴ *Dodo*⁴⁵ and *Vilakazi*,⁴⁶ the

“[A] South African citizen—

- (a) who is 18 years or older; and
- (b) whose name appears on the voters’ roll”.

⁴³ Section 28(3) of the Constitution provides: “In this section ‘child’ means a person under the age of 18 years.”

⁴⁴ Above n 23.

⁴⁵ Above n 27.

starting point for a sentencing court is the minimum sentence, the next question being whether substantial and compelling circumstances can be found to exist. This is answered by considering whether the minimum sentence is clearly disproportionate to the crime.

[41] This is very far from the approach to sentencing that the Bill of Rights demands for children. The Minister argued that certain mitigating features of the amended regime lighten the position. He pointed to the effect of section 51(5)(b) of the amended statute.⁴⁷ This permits the suspension of up to half of a minimum sentence imposed on 16 and 17 year olds. The Minister contended that this distinguishes these children from adult offenders. In addition, the court may take into account the amount of time spent incarcerated as an awaiting trial prisoner; while parole might also reduce the period of incarceration. The net result, it was urged, is that a juvenile offender will be subjected to detention for the shortest period of time.

[42] But the power given to suspend half a minimum sentence merely underscores the impact of the new provisions, since it constricts the powers the courts had before the amendment. Before the Amendment Act, they could suspend the entire minimum sentence. Far from giving, the amendment only takes.

⁴⁶ Above n 30.

⁴⁷ CLAA section 51(5)(b) provides:

“Not more than half of a minimum sentence imposed in terms of subsection (2) may be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977, if the accused person was 16 years of age or older, but under the age of 18 years, at the time of the commission of the offence in question.”

[43] In argument the Minister contended that the legislation respected the “last resort” and “shortest appropriate period” precepts, albeit that it was Parliament that had made the determination in question. It is Parliament, the argument proceeded, that has stipulated that, for 16 and 17 year olds committing the scheduled offences, absent substantial and compelling circumstances, the option of last resort, and the shortest appropriate period, consists of the prescribed minimum sentences. Nothing in the children’s rights provision, counsel contended, precludes Parliament from itself making the determination in question.

[44] It is correct that Parliament has a role in the individuation of sentences, including sentences of child offenders. This *S v B* recognised by affording the legislatively ordained minimum sentences a weighting effect. But final individuation of sentences is the preserve of the courts. And that must occur in accordance with the children’s rights provisions in the Bill of Rights. Parliament cannot without weighty justification take it away. That is the basis of the *Dodo* dispensation.

[45] Counsel for the Minister conceded, as he had to, the principle of judicial individuation of sentence. This creates a difficulty in dealing with the impact of minimum sentences on the children’s rights provision. The very nature of minimum sentences is to diminish the courts’ power of individuation by constraining their discretion in the sentencing process. The Supreme Court of Appeal in *Vilakazi*⁴⁸ has recently emphasised that under *Malgas* and *Dodo* “disproportionate sentences are not

⁴⁸ Above n 30 at para 18.

to be imposed and that courts are not vehicles for injustice.”⁴⁹ Nevertheless, in its very essence the minimum sentencing regime makes for tougher and longer sentences. While the hands of sentencing courts are not bound, they are at least loosely fettered. As this Court noted in *Dodo*, the very object of the regime is to “ensure that consistently heavier sentences are imposed”.⁵⁰

[46] The minimum sentencing regime does this in three ways. First, it orientates the sentencing officer at the start of the sentencing process away from options other than incarceration. Second, it de-individualates sentencing by prescribing as a starting point the period for which incarceration is appropriate. Third, even when not imposed, the prescribed sentences conduce to longer and heavier sentences by weighing on the discretion.

[47] The first two elements go against the direct injunctions of the children’s rights provision. Those rights do not apply indifferently to children by category. A child’s interests are not capable of legislative determination by group. As Ngcobo J has recently affirmed, albeit in a different context:

“What must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion. This means that the child must ‘be treated in a caring and sensitive manner.’ This requires ‘taking into account [the child’s] personal situation, and immediate needs, age, gender, disability and level of maturity’. In

⁴⁹ Id.

⁵⁰ Above n 27 at para 11.

short, ‘[e]very child should be treated as an individual with his or her own individual needs, wishes and feelings.’”⁵¹ (Footnotes omitted.)

[48] The children’s rights provision thus applies to each child in his or her individual circumstances. This is no less so in the sentencing process than anywhere else. As Sachs J wrote for the Court in *S v M*:⁵²

“A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.”

[49] The conclusion is therefore unavoidable that the Amendment Act limits the rights in section 28. The question is whether the limitation is justifiable in terms of section 36.⁵³

Has the limitation of children’s rights been justified?

[50] In *Dodo*, this Court gave the minimum sentencing framework its imprimatur for adults. Here, in clear limitation of section 28(1)(g), Parliament has applied that

⁵¹ Above n 20 at para 123.

⁵² *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 24.

⁵³ Section 36(1) of the Constitution provides:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

framework to 16 and 17 year old offenders. While Parliament itself may not be called upon to explain its enactments, where a criminal statute limits a provision of the Bill of Rights, the executive, which initiates the great bulk of legislation enacted by Parliament and is charged with enforcing statutes,⁵⁴ is obliged to tender an adequate justification for purposes of a limitations analysis.

[51] In determining whether a limitation is reasonable and justifiable within the meaning of section 36 of the Constitution, “it is necessary to weigh the extent of the limitation of the right, on the one hand, with the purpose, importance and effect of the infringing provision on the other, taking into account the availability of less restrictive means to achieve this purpose.”⁵⁵

[52] The purpose of the present limitation appears from portions of the affidavit submitted on behalf of the Minister. The affidavit records views expressed in the legislature in 1997 when the CLAA was originally adopted. These views, as previously observed,⁵⁶ are relevant to assessing governmental purpose in enacting the legislation, as opposed to determining statutory meaning. Concern was then expressed at “growing tendencies . . . that indicate that many juveniles are committing the more serious of serious offences, particularly sexual offences”; since the legislation was “targeting the most serious crimes”, Parliament could not completely

⁵⁴ See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 138.

⁵⁵ *Richter v Minister for Home Affairs and Others (with Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* [2009] ZACC 3 at para 71.

⁵⁶ Above at [22].

exclude juveniles. The affidavit relates further that the government's original objective was to include 16 and 17 year old offenders in the minimum sentencing regime, and to exclude only under-16s. Contrary to this intent, however, the Supreme Court of Appeal decided in *S v B* that the regime did not apply to under-18s. Hence the necessity for the Amendment Act.

[53] From this it appears that government sought the enactment of the amendment to counter the detrimental social impact of scheduled crimes committed by 16 and 17 year olds, and that the purpose of the limitation is to elicit the social benefits that a legislative bulwark against them will deliver.

[54] The difficulty is that the Minister's affidavit tenders no facts from which the legitimacy of this purpose, and the efficacy of its execution, can be assessed. This Court has said that justification does not depend only on facts, but may derive from policy objectives based on reasonable inferences unsupported by empirical data.⁵⁷ But even the clear articulation of such policy objectives is lacking. What is more, even in the case of a policy objective—

“the party relying on justification should place sufficient information before the Court as to the policy that is being furthered, the reasons for that policy and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the Court may be unable to discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion.”⁵⁸

⁵⁷ *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at paras 35–6.

⁵⁸ *Id* at para 36.

[55] Such information would be particularly pertinent in this case. The Amendment Act lowers a line the Constitution itself expressly draws. For purposes of the application of minimum sentences, it supplants the distinction the Bill of Rights draws between under-18s and over-18s, and draws a new line instead at 16. The new broader sweep of the legislation targets specifically 16 and 17 year olds. It could therefore reasonably have been expected that the Minister would set out reasons or policies that pertain specifically to this group: in other words, what specific conduct and social patterns within the age-group previously exempt, but now encompassed, created the need to impose a limitation on the rights in section 28?

[56] Pertinent would be the frequency of offences in these categories; such offences as a proportion of other scheduled offences; and the increase in trend, if any. Thus, the Minister's affidavit could have set out—

- (a) How many of each of the scheduled crimes have been committed by 16 and 17 year olds within any recent statistical year;
- (b) What proportion of the total number of such crimes consist of offences by 16 and 17 year olds;
- (c) Whether there has been an absolute statistical increase in such crimes;
- (d) Whether such crimes have increased as a proportion of the total.

[57] In addition, it would have assisted this Court's assessment if the affidavit set out what specific social objectives the new framework's added severity aimed to

achieve: whether it sought to attain ends such as deterrence; or whether it was aimed at satisfying rightful public anger at juvenile crime.

[58] Given the Minister's explanation that the government's objective in enacting the Amendment Act was to reverse the outcome of *S v B*, one would have expected an explanation of the respects in which this regime (which the Supreme Court of Appeal crafted in the light of the pre-amendment provisions) was insufficient. But this is entirely lacking. Nor does the affidavit say how the new, tougher regime will achieve any constitutionally permitted objective.

[59] It was debated during argument whether the Court can take judicial notice that serious crime in all categories has increased. This is open to question since it has been a publicly presented article of faith of government that serious crime has stabilised and that in most categories it has in recent years come down. What the Court can take note of is that, generally, levels of crime are enormously and unacceptably high, especially those in the scheduled categories,⁵⁹ and that there is well-warranted public disquiet and anger about this.

[60] But high crime levels and well-justified public anger do not provide justification for a legislative intervention overriding a specific protection in the Bill of Rights. The effect of the Amendment Act is to single out one precisely defined group

⁵⁹ The statistics released by the Department of Correctional Services for the latest available period (2007/8) give a telling account of the pervasiveness of the scheduled crimes: see <http://www.dcs.gov.za/WebStatistics>, accessed on 1 June 2009.

of offenders and limit the rights the Constitution specially affords them. Justifying the limitation of their rights requires information or policies bearing directly on this group. But the Minister offers no such evidence, nor any stated policy objectives. In its absence, it is difficult to appraise less restrictive means.

[61] The Centre rightly submitted that several international law instruments count in favour of the view that minimum sentences should not apply to child offenders.⁶⁰ The principles evident from these documents regarding child sentences are: proportionality (children must be dealt with in a manner “appropriate to their well-being and proportionate both to their circumstances and the offence”);⁶¹ imprisonment as a measure of last resort and for the shortest appropriate period of time;⁶² that children must be treated differently from adults;⁶³ and that the well-being of the child is the central consideration.

⁶⁰ Key amongst these are the United Nations Convention on the Rights of the Child; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (General Assembly resolution 40/33, 1985) (the Beijing Rules); United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution 45/113, 1990) (JDLs); and the United Nations Guidelines for the Prevention of Juvenile Delinquency (General Assembly resolution 45/112, 1990) (the Riyadh Guidelines).

⁶¹ Rule 17(1)(a) of the Beijing Rules provides in relation to sentencing juveniles that the sentencing authority must be guided by the principle that “[t]he reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of society”.

⁶² This principle is emphasised by Rule 17(1)(b) of the Beijing Rules; Rule I(1) of the JDLs; and article 37(b) of the United Nations Convention on the Rights of the Child, which provides—

“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”

⁶³ Article 40(1) of the Convention on the Rights of the Child provides—

“States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”

[62] The Centre further submitted – and counsel for the Minister accepted – that the only comparable country that imposes minimum sentences on children is the United States of America. While the situation varies from country to country, counsel were agreed that children in comparable systems (such as the United Kingdom)⁶⁴ appear to be either excluded from minimum sentencing legislation applicable to adults, or to be subject to much shorter prescribed sentences.

[63] It is plain that the Bill of Rights in our Constitution amply embodies these internationally accepted principles. Its provisions merely need to be given their intended effect. This leads to the conclusion that no maintainable justification has been advanced for including 16 and 17 year olds in the minimum sentencing regime. Legislation cannot take away the right of 16 and 17 year olds to be detained only as a last resort, and for the shortest appropriate period of time, without reasons being provided that specifically relate to this group and explain the need to change the constitutional disposition applying to them.

[64] In these circumstances the premises underlying the judgment of the High Court, set out earlier,⁶⁵ are correct. It must follow that the limitation of section 28(1)(g) is unconstitutional and must be so declared.⁶⁶

⁶⁴ Section 226 of the United Kingdom Criminal Justice Act, 2003 makes provision for detention for life or detention for public protection for serious offences committed by those under 18. The section applies where an offender under 18 is convicted of a serious offence and that if a court is of the opinion “that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.” If in such cases the offence is one in respect of which the offender would anyhow be liable to detention for life, and “the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of detention for life”, the court must impose that sentence.

⁶⁵ See [14] above.

[65] I have had the opportunity of reading the judgment of my colleague Yacoob J, who finds that the amending provisions can be read so as to avoid conflict with section 28. I regret I do not find my colleague's approach persuasive and cannot endorse his conclusion. In my view the provisions are not reasonably capable of the interpretation he urges. This is for two reasons. The first is that my colleague's position entails an internal inconsistency. The second is that his position would, if enforced, give rise to grave practical difficulties in sentencing child offenders.

⁶⁶ The Centre referred the Court to the Child Justice Act 75 of 2008, which Parliament passed on 19 November 2008, and which was assented to (after the hearing in this Court), on 11 May 2009 (see Government Gazette 32225 GN 549). According to section 100 of the Act, it will take effect on 1 April 2010 or any earlier date fixed by the President by proclamation in the Government Gazette. Section 77(2) of the Act provides that:

“Notwithstanding any provision in this or any other law, a child who was 16 years or older at the time of the commission of an offence referred to in Schedule 2 to the Criminal Law Amendment Act, 1997 (Act no. 105 of 1997) must, if convicted, be dealt with in accordance with the provisions of section 51 of that Act.”

Section 69(4) of the Act provides:

“When considering the imposition of a sentence involving imprisonment in terms of section 77, the child justice court must take the following factors into account:

- (a) The seriousness of the offence, with due regard to—
 - (i) the amount of harm done or risked through the offence; and
 - (ii) the culpability of the child in causing or risking the harm;
- (b) the protection of the community;
- (c) the severity of the impact of the offence on the victim;
- (d) the previous failure of the child to respond to non-residential alternatives, if applicable; and
- (e) the desirability of keeping the child out of prison.”

Section 77(6) provides:

“In compliance with the Republic's international obligations, no law, or sentence of imprisonment imposed on a child, including a sentence of imprisonment for life, may, directly or indirectly, deny, restrict or limit the possibility of earlier release of a child sentenced to any term of imprisonment.”

[66] First, my colleague’s judgment equivocates between acknowledging that the amending provisions subject children to the prescribed minima and reading them as if they have no effect at all. While my colleague states that the Amendment Act “without doubt” makes the regime of prescribed minima applicable to 16 and 17 year old children (at [104] below), he denies that it does so in a de-individuating way since, he says, the statute does not oblige courts “to impose a sentence on children that is in excess of that mandated by section 28(1)(g)” (at [101] below). In my view this creates an untenable duality in his position. Both the propositions cannot simultaneously be true. The fact is that the minimum sentencing regime by its very nature de-individuates sentencing, thereby conducing to consistently longer sentences. Because of these features, applying that regime to children limits section 28 rights in a way that requires justification.

[67] Second, the approach of Yacoob J entails serious operational perils for the sentencing of child offenders. Because it equivocates in the way I have shown, it does not adequately explain how far the minimum sentencing regime can legitimately push sentences upwards. It therefore leaves an especially vulnerable group with a significant degree of uncertainty about the content of their constitutional rights. As this Court said in *Richter*, “a law that regulates a fundamental right should be expressed in a manner which will enable citizens to determine with relative clarity what rights they have and do not have.”⁶⁷

⁶⁷ Above n 55 at para 64.

[68] In my view the unconstitutional impact of the amending provisions cannot reasonably be interpreted away. It is therefore this Court's duty to declare them invalid.

What relief should be granted?

[69] As will be seen from the order of invalidity the High Court granted,⁶⁸ it included the provisions of section 53A(b).⁶⁹ This provision requires regional courts with pending sentencing proceedings that have not yet committed the accused persons for sentencing in the High Court to "dispose of the matter in terms of this Act, as amended". Before this Court, the Centre did not however contend that, should the Amendment Act be struck down for 16 and 17 year olds, section 53A has any offensive retrospective working. It seems to me the transitional provision can and should be interpreted to deal solely with the jurisdiction of the regional court to impose higher sentences. It gives no power to sentence 16 and 17 year olds whose offences predated the Amendment more harshly. It therefore has no retroactive effect and must be excluded from the declaration of invalidity.

[70] The rest of the order granted by the High Court, declaring the amended minimum sentence provisions "inconsistent with sections 28(1)(g) and 28(2) of the Constitution", was not as precise as the order the Centre sought in its notice of motion, which was in part:

⁶⁸ See [10] above.

⁶⁹ Above n 14.

- “(1) Declaring that sections 51(1) and (2) of the Criminal Law Amendment Act, 105 of 1997, as amended, are inconsistent with the Constitution and invalid, to the extent that they apply to persons who were under 18 years of age at the time of the commission of the offence.
- (2) Declaring that:
- (a) section 51(6) of the Criminal Law Amendment Act, 105 of 1997, as amended, is inconsistent with the Constitution and invalid; and
 - (b) to remedy the defect, section 51(6) of the Criminal Law Amendment Act, 105 of 1997, as amended, is to read as though it provides as follows:

‘This section does not apply in respect of an accused person who was under 18 at the time of the commission of an offence contemplated in subsection (1) or (2).’
- (3) Declaring that section 51(5)(b) of the Criminal Law Amendment Act, 105 of 1997, as amended, is inconsistent with the Constitution and invalid.”

[71] These prayers, while less compressed than the order granted by the High Court, have the merit of greater precision. Paragraph 1 of the order of the High Court should therefore be set aside and replaced with an order as sought in paragraphs 1, 2, and 3 of the notice of motion.

[72] Paragraphs 5, 6 and 7 of the Centre’s notice of motion, which the High Court postponed, sought structured relief aimed at securing reconsideration of sentences passed on juveniles under the amended provisions. The Centre sought an order directing the Minister and the Minister for Correctional Services to take all steps necessary to ensure that persons under 18 who have been sentenced under the CLAA as amended have their sentences reconsidered. The relief the Centre sought included identifying the children within two months, and causing them to be brought before a

competent court in order to have their sentences reconsidered, with adequate legal representation.

[73] These prayers aim to remedy the fact that children have been subject to unconstitutional sentencing decisions since 31 December 2007. The Centre contends that it would be intolerable if no relief was provided to such children. In the light of the fact that those affected are children and that they might not become aware of this Court's decision, it argues that the state is under a duty to take all steps necessary to ensure that such children have their sentences reconsidered in the light of the unconstitutionality of the Amendment Act. The Centre thus submits that it is appropriate to require the Ministers involved to file affidavits regarding the steps taken.⁷⁰

[74] But is the relief sought here compatible with the proper approach to retroactivity in criminal proceedings? In *S v Bhulwana*,⁷¹ this Court stated:

“Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the Court will not grant relief to successful litigants. In principle, too, the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants. On the other hand, as we stated

⁷⁰ A similar order was made in *Sibiya and Others v Director of Public Prosecutions: Johannesburg High Court and Others* [2005] ZACC 6; 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC), when after *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) abolished the death penalty, the state was required to ensure the substitution of death sentences with alternative suitable sentences. *Sibiya* granted a detailed supervisory order ensuring that those still detained under sentence of death were identified, their particulars provided, and affidavits filed with this Court by particular dates.

⁷¹ *S v Bhulwana*; *S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

in *S v Zuma* (at para [43]), we should be circumspect in exercising our powers under section 98(6)(a) so as to avoid unnecessary dislocation and uncertainty in the criminal justice process.” (References omitted.)

[75] In *National Coalition*,⁷² this Court declared the common law offence of sodomy unconstitutional, retroactive to the adoption of the interim Constitution in 1994. It nevertheless declined to grant an order of unqualified retrospectivity. It reasoned that—

“Persons might act directly under the order to have convictions set aside without adequate judicial supervision or institute claims for damages. The least disruptive way of giving relief to persons in respect of past convictions for consensual sodomy is through the established court structures. On the strength of the order of constitutional invalidity such persons could note an appeal against their convictions for consensual sodomy, where the period for noting such appeal has not yet expired, or, where it has, could bring an application for condonation of the late noting of an appeal or the late application for leave to appeal to a Court of competent jurisdiction. In this way effective judicial control can be exercised. Although this might result in cases having to be reopened, it will in all probability not cause dislocation of the administration of justice of any moment.”

[76] A less disruptive alternative to the relief the Centre seeks would thus be to follow the lead in *National Coalition*, while at the same time issuing directions requesting further information on affidavit from the two Ministers. The information sought should set out the number of affected juveniles sentenced under the Amendment Act between its coming into effect on 1 January 2008 and the date of this

⁷² *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 97.

Court's order. This will be combined with orders making it possible for those affected to initiate appeals against sentences imposed on them under the Amendment Act.

Costs

[77] In accordance with the now-established practice in this Court, the Centre, having succeeded in vindicating constitutional rights against a government respondent, should get its costs both in this court and the court below, including the costs of two counsel. There should be no order as to the amicus' costs.

Order

[78] The following order is granted:

1. The declarations of invalidity granted by the North Gauteng High Court, Pretoria (case number 11214/08) dated 4 November 2008 are set aside, and are substituted by the following order:
 - a. It is declared that sections 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, are inconsistent with the Constitution and invalid, to the extent that they apply to persons who were under 18 years of age at the time of the commission of the offence.
 - b. It is declared that:
 - i. Section 51(6) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law

(Sentencing) Amendment Act 38 of 2007, is inconsistent with the Constitution and invalid; and

- ii. To remedy the defect, section 51(6) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, is to read as though it provides as follows:

“This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) or (2).”

- c. It is declared that section 51(5)(b) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, is inconsistent with the Constitution and invalid.

2. In terms of section 172(1)(b) of the Constitution, the order in paragraph 1 above shall not invalidate any sentence imposed for scheduled offences in terms of sections 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, on persons who were younger than 18 and older than 16 at the time of the commission of the act that constitutes the offence, unless either an appeal from, or a review of, the relevant sentence is pending, or the time for noting of an appeal has not yet expired, or condonation for the late noting of an appeal or late filing of an application for leave to appeal is granted by a competent court.

3. The first and second respondents are directed by 30 September 2009 to furnish a report to the applicant, and to lodge a copy with this Court, setting out—
 - (a) the name of every person younger than 18 and older than 16 at the time the offence was committed who was sentenced for a scheduled offence in terms of sections 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007;
 - (b) the number of the case in which such sentence was passed;
 - (c) the court that passed the sentence; and
 - (d) the date on which the sentence was passed.
4. The first respondent is ordered to pay the costs of the applicant, in this Court and the High Court, including the costs of two counsel.

Langa CJ, Moseneke DCJ, Mokgoro J, O'Regan J, Sachs J and Van der Westhuizen J concur in the judgment of Cameron J.

YACOOB J:

Introduction

[79] This case raises important questions concerning the respective roles of the legislature and the courts in the sentencing of children, as well as the true impact of section 28(1)(g) of our Constitution on the sentencing of children. More specifically, the question to be answered is whether provisions of a law¹ which made certain minimum sentencing provisions applicable to 16 and 17 year old children are inconsistent with the Constitution.² The applicant for confirmation contended and the High Court held that the law offends the constitutional prescript that children must be subject to detention only as a “matter of last resort” and then only “for the shortest appropriate time”.

[80] I have read the judgment (the majority judgment) of my colleague Cameron J who eloquently concludes that the law is an unjustifiable limitation of the section 28(1)(g) right. I am regrettably unable to agree with this conclusion. I agree with much of the judgment of Cameron J particularly where my colleague expands upon the vulnerability of children, their immaturity, the fact that they are easily influenced as well as the circumstance that the possibilities of the rehabilitation of children and their reintegration into society must always be carefully considered by a sentencing court. It is indeed beyond debate that the Constitution requires children to be treated with special care and concern when they are sentenced. The main differences between

¹ Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007.

² In particular, section 28(1)(g).

this judgment and that of Cameron J concern the exposition of the meaning and impact of section 28(1)(g) of the Constitution and the minimum sentencing regime in so far as it relates to children who are 16 and 17 years of age.

[81] This judgment essentially reaches the following conclusions:

- (a) The executive, the legislature and the judiciary all have a role in the sentencing process in so far as it concerns children.
- (b) It is the duty of all three arms of government to respect, protect, promote and fulfil the rights of children in the Constitution.
- (c) The law that makes the minimum sentencing provisions applicable to 16 and 17 year old children is Parliament's response to certain perceived evils in society and its contribution to the sentencing process.
- (d) It is a court, and only a court, that sentences children and, in doing so, is bound by section 28(1)(g) of the Constitution.
- (e) The law would be unconstitutional only if it obliges a court to ignore the prescripts of section 28(1)(g) of the Constitution.
- (f) The legislature cannot do so, has not done so expressly, and, on a proper construction of the statute, plainly has not done so by necessary implication either.
- (g) In the circumstances the law is constitutionally compliant.

[82] This judgment discusses the following topics:

- (a) the meaning, scope and effect of section 28(1)(g) of the Constitution;

- (b) the role of Parliament and the executive in the sentencing of children and its limits;
- (c) the meaning and effect of the minimum sentencing regime in general and in so far as it relates to children in particular; and
- (d) whether the minimum sentencing legislation in so far as it relates to children is inconsistent with the Constitution.

The meaning, scope and effect of section 28(1)(g) of the Constitution

[83] Section 28(1)(g) provides:

“(1) Every child has the right—

- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child’s age”. (My emphasis.)

[84] It is apparent that section 28(1)(g) is not concerned simply with the sentencing of children by courts. It has a wide impact and applies to detentions of all kinds. It is not necessary in this judgment for us to consider any detention other than incarceration consequent upon the imposition of a sentence of imprisonment. I will accordingly develop this section of the judgment with respect to custodial sentences imposed upon children.

[85] The Constitution provides that the whole of the Bill of Rights, including section 28(1)(g), applies to all law and is binding on the legislature, the executive and the judiciary. It is the duty of all three arms of government therefore to respect, protect and fulfil the rights of children in the Bill of Rights. Our Constitution, however, envisages that sentencing is a judicial function and that this function will be performed by the courts and only the courts. Indeed any effort by an administrative, executive or legislative entity to impose a sentence on anyone would be inconsistent with the Constitution. In so far as section 28(1)(g) applies to sentencing, therefore, it is essentially and primarily an injunction to our courts; an injunction which must be taken seriously and which can under no circumstances be ignored; an injunction which no legislation can override constitutionally. This does not mean however that the legislature and the executive do not have obligations imposed upon them by this provision.

[86] All our courts are obliged when imposing sentence to ensure that a sentence of imprisonment must be imposed on any child, who by definition is any person under the age of 18 years, only as a matter of last resort and only for the shortest appropriate period. Each of these concepts must be examined briefly.

[87] Certain pronouncements by our courts on the meaning of the phrase “last resort” imply that the phrase renders appropriate a distinction between “first resort”

and “last resort” or even first resort, intermediate resort, and last resort.³ This approach implies that a court is obliged to consider all options other than imprisonment, exclude them one by one and consider imprisonment as a form of punishment only after it has concluded that each of the other methods of punishment are inappropriate in the circumstances. The approach is, with respect, somewhat mechanical and not conducive to giving the constitutional provision its full effect in the protection of children.

[88] The injunction that children must be sentenced to imprisonment as a matter of last resort means simply that a child must be sentenced to a term of imprisonment only if, after considering all the relevant circumstances, the court concerned concludes that there is no option but to sentence the child to imprisonment. These circumstances would include the nature and gravity of the offence, any mitigating circumstances, all the personal circumstances concerning the child as well as the requirements of society. Particular attention must of course be paid to the vulnerability of the child concerned, the fact that the child can easily be influenced, the child’s lack of maturity as well as the important aspect of rehabilitation. All these factors must be considered against the backdrop of an understanding of the preventive, rehabilitative and punitive purposes of punishment. It is only after all these facts are considered that a court can properly determine whether imprisonment is the only appropriate option. If it is, the shortest appropriate period of imprisonment must be imposed. Indeed, courts would be failing

³ See, for example, *S v B* 2006 (1) SACR 311 (SCA); [2005] 2 All SA 1 (SCA) at para 22.

in their duty if, where imprisonment is the only appropriate option, they impose a lesser sentence out of undue sympathy for the child concerned.

[89] Nor does a court err if it forms an initial view that a prison sentence is appropriate. It is beyond doubt that this could often be an unobjectionable first response in the case, for example, of a 16 year old child who has committed a heinous murder, demonstrates the maturity of an adult and has relevant serious previous convictions. To start an evaluation of what the appropriate sentence is for a child on this basis cannot and does not mean that a court regards imprisonment as a matter of first resort. Whatever its initial views might be, and the Constitution does not preclude any court from having a prima facie view, the court complies with section 28(1)(g) if it takes into account all the relevant circumstances and, in the ultimate analysis, makes a proper determination whether imprisonment is the only appropriate option in the case at hand.

[90] Concepts such as first resort and intermediate resort confuse the analysis. Simply put, if a court concludes that imprisonment is the only appropriate option, a custodial sentence complies with the Constitution. It does not matter where the court starts in the sentencing process; all that matters for the purposes of section 28(1)(g) is whether the sentence eventually imposed is unavoidable in the circumstances and is the shortest appropriate period. I emphasise that the Constitution prescribes no starting point in a court's reasoning concerning sentence.

[91] The next phrase that needs some attention is the phrase “for the shortest appropriate period of time”. It is difficult to see how this phrase has practical application to a court that is bound by it. This is because any court, after concluding that a sentence of imprisonment is appropriate, must determine, in all the circumstances, the appropriate period of incarceration. There cannot ordinarily be two appropriate periods, the one shorter than the other. The phrase does however have some practical significance but only in those cases in which the presiding officer is in some doubt about whether a shorter period of imprisonment or a somewhat longer one is appropriate. If this happens, courts would err if they imposed the longer prison term.

[92] I agree with the Supreme Court of Appeal⁴ that:

“Having regard to section 28(1)(g) of the Constitution and the relevant international instruments, as already indicated, it is clear that in every case involving a juvenile offender, the ambit and scope of sentencing will have to be widened in order to give effect to the principle that a child offender is ‘not to be detained except as a measure of last resort’ and if detention of a child is unavoidable, this should be ‘only for the shortest appropriate period of time’.”

I would add that section 28(1)(g), quite apart from widening the enquiry, as rightly pointed out by the Supreme Court of Appeal, both changes and concentrates the focus of the enquiry. Two specific questions must be asked: is imprisonment appropriate in the circumstances? If it is, what is the appropriate shortest period? I also agree that:

⁴ *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA); 2006 (1) SACR 243 (SCA) at para 18.

“Even in the case of a juvenile . . . the sentence imposed must be in proportion to the gravity of the offence.”⁵

[93] I agree with the principles as set out in *Nkosi*⁶ as being made applicable by section 28(1)(g) in imposing sentences on children. These are set out as follows:

- “(i) Wherever possible a sentence of imprisonment should be avoided, especially in the case of a first offender.
- (ii) Imprisonment should be considered as a measure of last resort, where no other sentence can be considered appropriate. Serious violent crimes would fall into this category.
- (iii) Where imprisonment is considered appropriate it should be for the shortest possible period of time, having regard to the nature and gravity of the offence and the needs of society as well as the particular needs and interests of the child offender.
- (iv) If at all possible the judicial officer must structure the punishment in such a way as to promote the rehabilitation and reintegration of the child concerned into his/her family or community.
- (v) The sentence of life imprisonment may only be considered in exceptional circumstances. Such circumstances would be present where the offender is a danger to society and there is no reasonable prospect of his or her rehabilitation.”⁷

[94] It must be emphasised that there are three requirements that section 28(1)(g) decidedly does not stipulate. The first is that the section does not require the sentence ultimately imposed on children to be necessarily lower than the sentence that is imposed on an adult for the same offence. The differentiation is exacted, not so much in relation to the ultimate sentence that is imposed, but rather in the way in which the

⁵ Id at para 22. See also above n 3 at para 20.

⁶ *S v Nkosi* 2002 (1) SA 494 (W); 2002 (1) SACR 135 (W).

⁷ Id at 505G-J; 147F-I.

sentence to be imposed is determined. A lower sentence for children might well be the result of the proper approach by a court in a large number of cases, but certainly not necessarily so. One can think of cases in which the sentence imposed on a child who is 17 years old might, in all the circumstances, quite properly be identical to a sentence imposed on an older accomplice. One can also imagine a situation, not so out of step with reality, in which a 25 year old person for example could be found to have been less mature and more susceptible to influence than a dominant 17-year-old child. In these circumstances, the child who is 17 years old could well receive a much heavier sentence than the adult.

[95] Secondly, section 28(1)(g) by no stretch of the imagination requires that the appropriate sentences for children be determined in isolation of the appropriate sentences for adults. It is right for a court to take into consideration what the appropriate term of imprisonment would be if the offence in question had been committed by a mature adult and, in that context, determine the sentence appropriate to a child convicted of the same offence after giving full weight to the special features of vulnerability, immaturity and rehabilitative possibilities in respect of that child. It is entirely appropriate, in my view, for a court, in the process of sentencing a child, to take into account, if that be the case, that the sentences being imposed on adults for similar offences have increased substantially in the recent past. Indeed, a court will be obliged to take this factor into account in its effort to comply with the requirement of proportionality. The sentences imposed on children committing the same offences as

adults could become disproportionately low if imposed without regard to a consideration of the sentences being imposed on adults for similar offences.

[96] It is an inevitable consequence of the requirement of proportionality that increases in sentences imposed on adults for certain offences would exert upward pressure on the sentences imposed on children for similar offences. And this consequence does not follow in the one direction only. Decreases in sentences imposed on adults for particular offences would have the concomitant result that the sentences imposed on children for similar offences would also go down. I therefore do not understand the concern that higher sentences are now being imposed upon children. If this is a consequence of the higher sentences being imposed on adults, it is in my view painfully unavoidable.

[97] Thirdly, section 28(1)(g) in no way either expressly or by implication limit the role of the executive and the legislature in the determination of sentences. The majority judgment does not say, and could not legitimately say, that this is so. Indeed, the section does not prevent Parliament from enacting minimum sentencing legislation in respect of children, nor does the Constitution require that all minimum sentences for children will be invalid. A law cannot therefore be in conflict with section 28(1)(g) merely because it provides for minimum sentences in relation to children. The majority judgment, to the extent that it favours a contention that section 28(1)(g) has deprived the legislature of the power to determine discretionary minimum sentences in relation to children, is not acceptable.

The role of Parliament and the executive in the sentencing of children and its limits

[98] It is now settled that the legislature and the executive have a legitimate role in the sentencing process. This Court has said in *Dodo*:⁸

“Both the Legislature and Executive share an interest in the punishment to be imposed by courts, both in regard to its nature and its severity. They have a general interest in sentencing policy, penology and the extent to which correctional institutions are used to further the various objectives of punishment.”⁹ (Footnote omitted.)

This Court said further:

“The executive and legislative branches of State have a very real interest in the severity of sentences. The Executive has a general obligation to ensure that law-abiding persons are protected, if needs be through the criminal laws, from persons who are bent on breaking the law. This obligation weighs particularly heavily in regard to crimes of violence against bodily integrity and increases with the severity of the crime.

In order to discharge this obligation, which is an integral part of constitutionalism, the executive and legislative branches must have the power under the Constitution to carry out these obligations. They must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society.”¹⁰

And I may add that a court should not unduly limit this necessary power.

⁸ *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC).

⁹ *Id* at para 23.

¹⁰ *Id* at paras 24-5.

[99] It has not been suggested, nor could it be, that the legislature and the executive do not have an equally important role in so far as the sentencing of children is concerned. They undoubtedly do. As I have pointed out earlier, nothing in section 28(1)(g) or anywhere else in the Constitution suggests that the legislature's important role in this regard should be curtailed other than to the extent described in the next paragraph. The legislature therefore cannot be said to be in violation of the Constitution merely because it passed legislation that has an impact on the sentences to be imposed on children. The Constitution does not reserve this power as the sole prerogative of the courts, and all courts are obliged to ensure that the appropriate role of the legislature is not negated but, on the contrary, is respected and protected.

[100] But there are also important limits to the power of the legislature. As was said in *Dodo*:

“The Legislature’s powers are decidedly not unlimited. . . . [Legislative] power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case. This power must be appropriately balanced with that of the Judiciary. What an appropriate balance ought to be is incapable of comprehensive abstract formulation, but must be decided as specific challenges arise. In the field of sentencing, however, it can be stated as a matter of principle that the Legislature ought not to oblige the Judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional State. It would *a fortiori* be so if the Legislature obliged the Judiciary to pass a sentence which was inconsistent with the Constitution and in particular with the Bill of Rights. The clearest example of this would be a statutory provision that obliged a court to impose a sentence which was inconsistent with an accused’s right not to be sentenced to a

punishment which was cruel, inhuman or degrading as envisaged by s 12(1)(e) of the Constitution, or to a fair trial under s 35(3).”¹¹ (Footnote omitted.)

[101] For the purpose of this judgment it must be emphasised that the legislature does have an important role and interest in the punishment to be imposed by courts on children but that, as has been authoritatively held by this Court, the legislature cannot oblige any court to pass a sentence that is inconsistent with the Constitution and in particular the Bill of Rights. The sentencing regime in relation to children would therefore be inconsistent with the Constitution if it obliged courts to impose a sentence on children that is in excess of that mandated by section 28(1)(g). If the court is obliged to impose a sentence that is in excess of that required by section 28(1)(g), the applicability of the minimum sentencing system to children who are 16 and 17 years old would be inconsistent with the Constitution. If the law places no obligation on any court to impose on a child a sentence in excess of that mandated by section 28(1)(g), it cannot be said to be inconsistent with the Constitution. In other words, if the impugned law does not have an impact on the court’s duty to apply section 28(1)(g) of the Constitution, it cannot be inconsistent with this injunction.

[102] The question for our decision is not whether the discretion of the court in the imposition of a sentence on a child is limited in any way by making minimum sentencing legislation applicable to 16 and 17 year old children. The Constitution does not require the discretion of a court that sentences children to be wholly unlimited. Nor is the issue for our determination whether the minimum sentence

¹¹ Id at para 26.

legislation would result in higher sentences being imposed on children for the offences in respect of which minimum sentences are specified. The only questions we must answer in this case are whether the application of the minimum sentence legislation to 16 and 17 year old children would oblige a court to, or have the effect that a court would—

- (a) impose a sentence of imprisonment when it is not appropriate to do so; or
- (b) impose a period of imprisonment that is longer than is considered to be appropriate by a court after considering all the relevant circumstances.

These questions must now receive attention in the context of a discussion of the meaning and effect of minimum sentences applicable to children.

The meaning and effect of the minimum sentencing regime generally and in its applicability to children

[103] Section 51 of the Act¹² to the extent relevant provides:

- “(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.
- (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in—
 - (a) Part II of Schedule 2, in the case of—
 - (i) a first offender, to imprisonment for a period not less than 15 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

¹² Above n 1.

- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
- (b) Part III of Schedule 2, in the case of—
 - (i) a first offender, to imprisonment for a period not less than 10 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and
- (c) Part IV of Schedule 2, in the case of—
 - (i) a first offender, to imprisonment for a period not less than 5 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years;

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.

- (3)(a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

....

- (5)(a) Subject to paragraph (b), the operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).
- (b) Not more than half of a minimum sentence imposed in terms of subsection (2) may be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977, if the accused person was 16 years of age or older, but under the age of 18 years, at the time of the commission of the offence in question.
- (6) This section does not apply in respect of an accused person who was under the age of 16 years at the time of the commission of an offence contemplated in subsection (1) or (2).”¹³

[104] The minimum sentences prescribed by the Act have now without doubt been made applicable to children who are 16 and 17 years old. The legislature has done so in the exercise of its role and responsibilities in relation to the sentencing of children. This law is therefore Parliament’s response to certain perceived evils in society and its contribution to the sentencing process. The relevant provisions must be interpreted on the basis that all children are the beneficiaries of the rights conferred by section 28(1)(g) of the Constitution. This is underlined by the fact that the legislature now clarifies that the imposition of the minimum sentences is discretionary and not mandatory.¹⁴

[105] We must determine the impact of this legislation and its application to children in the context of the circumstance that, as I have already said earlier, section 28(1)(g)

¹³ The Schedule covers extreme cases of murder, robbery and rape, offences under the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004, drug and drug trafficking offences, human trafficking and other serious offences.

¹⁴ The law changes the heading of its relevant section from “Minimum sentences for certain serious offences” to “Discretionary minimum sentences for certain serious offences”.

of our Constitution is binding on all courts; courts are obliged to give full effect to the provision. The legislation does not expressly require courts to ignore the provisions of section 28(1)(g) nor does it expressly oblige any court to impose a sentence on any child that is inappropriate. The only question to be answered therefore is whether the section does so by necessary implication. I pause here to point out that the majority judgment, on its own terms, does not conclude that courts have become obliged to impose a sentence that is inconsistent with the provisions of section 28(1)(g).

[106] The majority judgments approach is that the application of the minimum sentencing legislation to children would result in consistently heavier sentences being imposed on them.¹⁵ The judgment says that this is achieved by orientating the judge or magistrate away from options other than imprisonment. Secondly, the system de-individualises sentence by prescribing a period of imprisonment as a starting point. These two propositions taken together might imply that the net effect of the legislation is the imposition of sentences higher than those mandated by section 28(1)(g) of the Constitution. I examine these criticisms of the sentencing regime later. I must first develop the proposition that no court in this country is obliged to impose a sentence on any child inconsistently with the Constitution.

[107] The advent of our constitutional democracy with the principle of the supremacy of the Constitution that it introduced requires a fundamental change to the way in which the task of statutory interpretation is carried out. The effect of the supremacy

¹⁵ Above [45].

of the Constitution is that the Constitution (and every provision of it) permeates the law to every corner. In “one fell swoop” our supreme law brought about a decisive transformation of our legal system and the way we interpret statutes.¹⁶ To borrow a phrase, “it was no longer going to be business as usual” – that business being the statute as the starting point. The starting point is no longer the statute but the Constitution itself. This means the starting point is no longer what the statutory provision says but what the Constitution says.

[108] This interpretive injunction is expressly ordained by section 39(2) of the Constitution. There is a long line of judgments of this Court in which we have repeatedly emphasised the rule, by now axiomatic, that where a statutory provision is reasonably capable of a construction that would bring it in line with the Constitution, it is that construction which must be preferred provided that it is not strained.¹⁷ Judges and magistrates alike have the duty to comply with section 39(2). This means that a court construing a statute must first consider whether the statute is capable of a construction that will bring it within constitutional bounds.

¹⁶ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 36.

¹⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 72; *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 35; *Olitzi Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA); 2001 (8) BCLR 779 (SCA) at para 20; *S v Dzukuda and Others*; *S v Tshilo* [2000] ZACC 16; 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at para 37; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21-6; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 23-4; *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 85; and *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 59.

[109] A fundamental difference between the application of the minimum sentencing legislation to children who are 16 and 17 years old and the application of the legislation to adults must be stressed. When an appropriate sentence for adults is considered, section 28(1)(g) of the Constitution is not directly applicable. But the section is applicable to the sentencing of children. Courts that sentence children are engaged in the process of determining an appropriate sentence by making two focused enquiries. First, is imprisonment the only appropriate option? Secondly, what is the shortest appropriate period of imprisonment? Our Constitution requires judges and magistrates to apply themselves assiduously to these two questions.

[110] The Supreme Court of Appeal has determined the practical effect of minimum sentencing legislation in so far as it is applicable to adults.¹⁸ The approach has been approved by this Court in *Dodo*¹⁹ and is now binding. We must keep at the forefront of our minds the fact that all courts that sentence children are bound by the provisions of section 28(1)(g) of the Constitution and, in that context, investigate if and how the statement in *Malgas* concerning the application of the minimum sentencing regime on adults has implications for the application of minimum sentences to children who are 16 and 17 years old.

[111] It was said in *Malgas* that:

¹⁸ *S v Malgas* 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA).

¹⁹ Above n 8.

“What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary:

- A. Section 51 has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).
- B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.
- D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
- E. The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
- F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.
- G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (‘substantial and

compelling’) and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

- H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
- I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
- J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.”²⁰

[112] The whole of the above passage is relevant to our enquiry. I do, however, single out certain aspects for special consideration on the understanding that each of these aspects must be seen in their context. Neither the limitation of the court’s discretion²¹ nor the fact that courts must now approach the sentencing of children conscious that the legislature has ordained the prescribed sentence as the one that should ordinarily be imposed²² can, in my view, be problematic if due regard is had to the other principles mentioned by the Supreme Court of Appeal. Of seminal importance is the conclusion by the Supreme Court of Appeal that once there are truly convincing reasons for a response different from that required by the legislature, a court may depart from the minimum sentence and impose a lesser sentence. It is impossible for me to imagine a more truly convincing reason for a court to depart

²⁰ Above n 18 at para 25.

²¹ Id at para 25(A).

²² Id at para 25(B).

from the minimum sentence that is prescribed in relation to a child who is 16 or 17 years old than that, in all the circumstances, imprisonment is not appropriate within the meaning of section 28(1)(g) or that the minimum period of imprisonment prescribed exceeds the shortest appropriate period required to be imposed on all children by section 28(1)(g).

[113] It is true, as pointed out by the Supreme Court of Appeal that the minimum sentence law “has shifted [emphasis] to the objective gravity” of the crime and the need for effective sanctions.²³ Nevertheless, the court is obliged to take into account all the factors traditionally relevant to sentence at the outset²⁴ in order to determine whether these circumstances “render the prescribed sentence unjust in that it would be disproportionate to the crime”.²⁵ The object of the exercise as rightly pointed out by the Supreme Court of Appeal, and accepted by this Court, is to prevent an injustice from being done. I infer this object from the statement that if the court concludes that an injustice would be done by imposing the particular sentence, that court is entitled to impose a lesser sentence.²⁶ I would add that if investigation of the circumstances at the outset leads to the conclusion that an injustice is being done the court is more than entitled to interfere. It is indeed obliged to do so.

[114] The minimum sentencing regime, therefore, far from authorising the courts to perpetrate injustice, obliges a court not to do so. The sentencing court must determine

²³ Id at para 25(E).

²⁴ Id at para 25(F).

²⁵ Id at para 25(I).

²⁶ Id.

the cumulative effect of all the circumstances and determine whether an injustice will be done if the minimum sentence is imposed. This process is quite often said to be a matter for judicial instinct, but it is necessary to unpack the proposition a little.

[115] We must ask this question: when can it be properly said that the imposition of a prescribed minimum sentence results in an injustice and therefore should not be imposed? The imposition of a minimum sentence can be said to perpetrate an injustice only on some kind of comparative evaluation. Practically speaking the injustice would result only if the minimum sentence is considered to be too high. But the minimum sentence can be considered to be too high only if a sentencing court has some other sentence in mind which is considered appropriate in the circumstances. It follows that a court takes into account all the relevant circumstances including the minimum sentence and arrives at a conclusion (though not necessarily final) about what the appropriate sentence should be. If the minimum sentence is too high in relation to the court's view of what the sentence should be upon consideration of all the relevant circumstances, the imposition of the minimum sentence would wreak an injustice and cannot be imposed.

[116] On this basis I am unable to agree with the suggestion that the minimum sentencing regime renders imprisonment a matter of "first resort". It does not. The court in every case does not start with the minimum sentence. The first enquiry, the enquiry conducted "at the outset" in the words of the Supreme Court of Appeal, is whether the imposition of the minimum sentence will be unjust in the sense of being

disproportionate. It is only if the court concludes, after taking into account all the circumstances at the outset, that the minimum sentence would not be unjust that a court is authorised to impose it. If the court concludes at the first stage of the enquiry that the minimum sentence is either unjust or disproportionate, the sentencing court is precluded from imposing it. The minimum sentencing regime is no authority for the imposition of unjust or disproportionate sentences. It is precisely to avoid unjust and disproportionate sentences that the court is required to consider whether there are substantial and compelling circumstances that would justify the imposition of a lesser sentence.

[117] One more feature must be borne in mind. Section 290(1) of the Criminal Procedure Act²⁷ empowers a court sentencing juveniles to consider options of supervision by a probation officer or other person, or detention in a reform school, in the punishment of children.²⁸ This provision has not been repealed by the law with which we are concerned. A sentencing court is obliged to consider the appropriateness of resorting to section 290 in every case in which a child must be sentenced.

²⁷ 51 of 1977.

²⁸ Section 290(1) provides:

- “(1) Any court in which a person under the age of eighteen years is convicted of any offence may, instead of imposing punishment upon him for that offence—
- (a) order that he be placed under the supervision of a probation officer or a correctional official; or
 - (b) order that he be placed in the custody of any suitable person designated in the order; or
 - (c) deal with him both in terms of paragraphs (a) and (b); or
 - (d) order that he be sent to a reform school as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983).”

[118] It is against this background that we must examine the role of a court in applying the minimum sentencing regime to children who are 16 and 17 years old.

[119] Before the minimum sentencing regime came into force, any court sentencing a child was obliged to determine whether a sentence of imprisonment was appropriate and if so, what the shortest appropriate period of imprisonment should be. In making this determination courts took into account all the circumstances traditionally relevant to the issue of sentence with particular emphasis on the vulnerability, immaturity, susceptibility to influence and the possibilities of rehabilitation in relation to children. The fact that the minimum sentencing regime is now applicable to children who are 16 and 17 years old does not change any of this. Courts remain obliged, as they have been obliged in our constitutional dispensation, to consider all the relevant circumstances at the outset as they do in relation to a consideration of whether the minimum should be imposed on adults.

[120] But when it comes to children, the overriding purpose of considering all the circumstances is to determine whether a sentence of imprisonment is appropriate and if so whether the period of imprisonment is for the shortest appropriate period in the circumstances. If this enquiry leads to the conclusion that the imposition of a sentence of imprisonment is not appropriate the minimum sentence of imprisonment cannot be imposed because it is inconsistent with the Constitution and unjust. Equally a court is precluded from perpetrating an injustice and unconstitutionality by imposing the

minimum sentence if it concludes that, even though imprisonment is appropriate, the shortest appropriate period is less than the prescribed minimum sentence. It goes without saying that the court must take into account, as a factor, the circumstance that the legislature has prescribed minimum sentences for the children in question in determining whether a sentence of imprisonment is appropriate and if so the shortest appropriate period of imprisonment.

[121] The minimum sentencing regime authorises neither injustice nor unconstitutional conduct on the part of judges or magistrates. The majority judgment suggests that the minimum sentencing regime in some ways orientates a judicial officer away from considering alternatives to imprisonment. I disagree. The Constitution, not the minimum sentencing legislation, is supreme.²⁹ It is as well to emphasise that the minimum sentencing legislation is subordinate to the Constitution. All judges and magistrates are aware of this. Accordingly they know what the Constitution requires and will implement minimum sentencing legislation in a way that avoids injustice and in a way which ensures that the Constitution is observed as the primary instrument and the minimum sentencing legislation is at best secondary. The circumstance that a minimum sentence is greater than that found appropriate by a court upon a proper application of section 28(1)(g) would constitute “weighty justification” for the imposition of a lighter sentence,³⁰ and “truly convincing reasons

²⁹ Section 2 of the Constitution provides:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

³⁰ Above n 18 at para 25(B).

for a different response”,³¹ and a reason that is far from flimsy and justifies a departure from the specified sentence,³² and substantial and compelling circumstances that “justify a departure from the standardised response”,³³ and a sentence that is unjust and disproportionate to the crime.³⁴ The idea that the minimum sentencing law authorises a court to impose a sentence higher than that mandated by the Constitution has simply to be stated to be rejected. It is significant that the majority judgment does not support this notion.

[122] The majority also expresses the view that the application of the minimum sentences to children aged 16 and 17 years old somehow de-individualises the process of sentencing. As this Court pointed out in *Dodo*:

“Legislation is by its nature general. It cannot provide for each individually determined case. . . . [It is an] important function and power of a court to apply and adapt a general principle to the individual case.”³⁵

It is not for the legislature to de-individualise sentences. The legislature sets a generalised standard; it does not purport to do anything more. This generalised standard does not and cannot result in a compromise of the power and duty of the court to ensure that sentences are appropriately individualised. That power of the court remains untouched.

³¹ Id at para 25(C).

³² Id at para 25(D).

³³ Id at para 25(G).

³⁴ Id at para 25(I).

³⁵ Above n 8 at para 26.

[123] Although the majority judgment does not say so directly, it might advance the proposition, contended for in argument, that the minimum sentencing legislation being made applicable to children will have the effect that sentences imposed upon children would be unjust, disproportionately high or inconsistent with the sentence mandated by section 28(1)(g) of the Constitution. I cannot agree. The only basis on which it can be suggested that the effect of the discretionary minimum sentencing system will be the imposition of higher sentences on children than mandated by the Constitution is that magistrates or judges will not do their work properly. There is no basis for this suggestion. Indeed, the process to be followed by judicial officers is difficult as all sentence determinations are.

[124] Nonetheless, the process is well within the grasp of a sentencing judge or magistrate and is neither over-complicated nor unworkable:

- (a) When a judge or magistrate sentences children, the only enquiry is whether a prison sentence is appropriate and what the shortest appropriate period is.
- (b) If the minimum sentencing legislation is applicable, this investigation must be conducted in the light of that law.
- (c) The law requires a court to consider whether there are substantial and compelling circumstances for the imposition of the sentence that is less than the prescribed minimum.
- (d) A conclusion that the appropriate sentence mandated by section 28(1)(g) is less than the prescribed minimum necessarily constitutes a substantial and compelling circumstance because it is unjust, unconstitutional and improper.

- (e) The prescribed minimum sentence can be imposed only if it is not more severe than the sentence mandated by section 28(1)(g). It cannot otherwise be imposed.

[125] Thus construed, the minimum sentencing regime is not unconstitutional. Indeed, the harsh, regrettable and undeniable reality is that particularly heinous crimes are committed by children who are 16 and 17 years old. If one has regard to this (as we must), the legislature is justified in reflecting society's utter outrage. Our Constitution does not say that children who are 16 and 17 years old, who commit barbaric and despicable crimes against society and prey on innocent and vulnerable people should necessarily be given different sentences than adults who commit the same crimes. Any sentencing approach that suggests that age is the only factor fails in the preventive effort. The law must certainly come down as hard as is appropriate on these offenders.

Conclusion

[126] I conclude therefore that the minimum sentencing legislation in so far as it is applicable to children who are 16 and 17 years old is not inconsistent with the Constitution. I would therefore decline to confirm the order of unconstitutionality made by the High Court.

Ngcobo J, Nkabinde J and Skweyiya J concurred in the judgment of Yacoob J.

Counsel for the Applicant:

Advocate S Budlender and Advocate AM Skelton instructed by the Centre for Child Law.

Counsel for the First Respondent:

Advocate WRE Duminy SC and Advocate D Pillay instructed by the State Attorney, Pretoria.

Counsel for the Amicus Curiae:

Advocate K Pillay instructed by the Legal Resources Centre.



International Convention on the Elimination of All Forms of Racial Discrimination

Distr.: General
3 October 2011

Original: English

Committee on the Elimination of Racial Discrimination

Seventy-ninth session

8 August–2 September 2011

General recommendation No. 34 adopted by the Committee

Racial discrimination against people of African descent

The Committee on the Elimination of Racial Discrimination

Recalls the Charter of the United Nations and the Universal Declaration of Human Rights, according to which all human beings are born free and equal in dignity and rights and are entitled to the rights and freedoms enshrined therein without distinction of any kind, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,

Recalls also that people of African descent received greater recognition and visibility at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in 2001, South Africa, its preparatory conferences, particularly the + 5 Conference of Santiago, Chile, in 2000, reflected in the respective declarations and plans of action,

Reaffirms its general recommendations Nos. 28 (2002) on the follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, and 33 (2009) on follow-up to the Durban Review Conference, in which the Committee expressed its commitment to press for the implementation of the Durban Declaration and Programme of Action,

Notes also the condemnation of discrimination against people of African descent as expressed in the Durban Declaration and Programme of Action,

Observes that it has become evident from the examination of the reports of States parties to the Convention that people of African descent continue to experience racism and racial discrimination,

Having held a day-long thematic discussion on racial discrimination against people of African descent in the seventy-eighth session (February–March 2011) on the occasion of the International Year for People of African Descent, in which the Committee heard and exchanged ideas with States parties, United Nations organs and specialized agencies, special rapporteurs and their representatives, as well as non-governmental organizations, and decided to clarify some aspects of discrimination against such people and further support the struggle to overcome this discrimination worldwide,

Formulates the following recommendations addressed to States parties:

I. Description

1. For the purposes of this general recommendation, people of African descent are those referred to as such by the Durban Declaration and Programme of Action and who identify themselves as people of African descent.

2. The Committee is aware that millions of people of African descent are living in societies in which racial discrimination places them in the lowest positions in social hierarchies.

II. Rights

3. People of African descent shall enjoy all human rights and fundamental freedoms in accordance with international standards, in conditions of equality and without any discrimination.

4. People of African descent live in many countries of the world, either dispersed among the local population or in communities, where they are entitled to exercise, without discrimination, individually or in community with other members of their group, as appropriate, the following specific rights:

(a) The right to property and to the use, conservation and protection of lands traditionally occupied by them and to natural resources in cases where their ways of life and culture are linked to their utilization of lands and resources;

(b) The right to their cultural identity, to keep, maintain and foster their mode of life and forms of organization, culture, languages and religious expressions;

(c) The right to the protection of their traditional knowledge and their cultural and artistic heritage;

(d) The right to prior consultation with respect to decisions which may affect their rights, in accordance with international standards.

5. The Committee understands that racism and racial discrimination against people of African descent are expressed in many forms, notably structural and cultural.

6. Racism and structural discrimination against people of African descent, rooted in the infamous regime of slavery, are evident in the situations of inequality affecting them and reflected, *inter alia*, in the following domains: their grouping, together with indigenous peoples, among the poorest of the poor; their low rate of participation and representation in political and institutional decision-making processes; additional difficulties they face in access to and completion and quality of education, which results in the transmission of poverty from generation to generation; inequality in access to the labour market; limited social recognition and valuation of their ethnic and cultural diversity; and a disproportionate presence in prison populations.

7. The Committee observes that overcoming the structural discrimination that affects people of African descent calls for the urgent adoption of special measures (affirmative action), as established in the International Convention on the Elimination of All Forms of Racial Discrimination (arts. 1, para. 4, and 2, para. 2). The need for special measures has been the subject of reiterated observations and recommendations made to the State parties under the Convention, summarized in general recommendation No. 32 (2009) on the

meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination.

8. For the exercise of the rights of people of African descent, the Committee recommends that States parties adopt the following measures:

III. Measures of a general nature

9. Take steps to identify communities of people of African descent living in their territories, especially through the collection of disaggregated data on the population, bearing in mind the Committee's general recommendations, particularly general recommendations Nos. 4 (1973) on demographic composition of the population (art. 9); 8 (1990) on identification with a particular racial or ethnic group (art. 1, paras. 1 and 4), and 24 (1999) on reporting of persons belonging to different races, national/ethnic groups, or indigenous peoples (art. 1).

10. Review and enact or amend legislation, as appropriate, in order to eliminate, in line with the Convention, all forms of racial discrimination against people of African descent.

11. Review, adopt and implement national strategies and programmes with a view to improving the situation of people of African descent and protecting them against discrimination by State agencies and public officials, as well as by any persons, group or organization.

12. Fully implement legislation and other measures already in place to ensure that people of African descent are not discriminated against.

13. Encourage and develop appropriate modalities of communication and dialogue between communities of people of African descent and/or their representatives and the relevant authorities in the State.

14. Take the necessary measures, in cooperation with civil society and members of affected communities, to educate the population as a whole in a spirit of non-discrimination, respect for others and tolerance, especially concerning people of African descent.

15. Strengthen existing institutions or create specialized institutions to promote respect for the equal human rights of people of African descent.

16. Conduct periodic surveys, in line with paragraph 1 above, on the reality of discrimination against people of African descent and provide disaggregated data in their reports to the Committee on, inter alia, the geographical distribution and the economic and social conditions of people of African descent, including a gender perspective.

17. Effectively acknowledge in their policies and actions the negative effects of the wrongs occasioned on people of African descent in the past, chief among which are colonialism and the transatlantic slave trade, the effects of which continue to disadvantage people of African descent today.

IV. The place and role of special measures

18. Adopt and implement special measures meant to eliminate all forms of racial discrimination against people of African descent, taking into account the Committee's general recommendation No. 32 (2009).

19. Formulate and put in place comprehensive national strategies with the participation of people of African descent, including special measures in accordance with articles 1 and 2

of the Convention, in order to eliminate discrimination against people of African descent and ensure their full enjoyment of all human rights and fundamental freedoms.

20. Educate and raise the awareness of the public on the importance of special measures (affirmative action programmes) to address the situation of victims of racial discrimination, especially discrimination as a result of historical factors.

21. Develop and implement special measures aimed at promoting the employment of people of African descent in both the public and private sectors.

V. Gender-related dimensions of racial discrimination

22. Recognizing that some forms of racial discrimination have a unique and specific impact on women, design and implement measures aimed at eliminating racial discrimination, paying due regard to the Committee's general recommendation No. 25 (2000) on gender-related dimensions of racial discrimination.

23. Take into account, in all programmes and projects planned and implemented and all measures adopted, the situation of women of African descent, who are often victims of multiple discrimination.

24. Include in all reports to the Committee information on the measures taken to implement the Convention that specifically address racial discrimination against women of African descent.

VI. Racial discrimination against children

25. Recognizing the particular vulnerability of children of African descent, which may lead to the transmission of poverty from generation to generation, and the inequality affecting people of African descent, adopt special measures to ensure equality in the exercise of their rights, in particular corresponding to the areas that most affect the lives of children.

26. Undertake initiatives specifically aimed at protecting the special rights of the girl child and the rights of boys in vulnerable situations.

VII. Protection against hate speech and racial violence

27. Take measures to prevent any dissemination of ideas of racial superiority and inferiority or ideas which attempt to justify violence, hatred or discrimination against people of African descent.

28. Also ensure the protection of the security and integrity of people of African descent without any discrimination by adopting measures for preventing racially motivated acts of violence against them; ensure prompt action by the police, prosecutors and the judiciary for investigating and punishing such acts; and ensure that perpetrators, be they public officials or other persons, do not enjoy impunity.

29. Take strict measures against any incitement to discrimination or violence against people of African descent including through the Internet and related facilities of similar nature.

30. Take measures to raise awareness among media professionals of the nature and incidence of discrimination against people of African descent, including the media's responsibility not to perpetuate prejudices.

31. Take resolute action to counter any tendency to target, stigmatize, stereotype or profile people of African descent on the basis of race, by law enforcement officials, politicians and educators.

32. Develop educational and media campaigns to educate the public about people of African descent, their history and their culture, and the importance of building an inclusive society, while respecting the human rights and identity of all people of African descent.

33. Encourage the development and implementation of methods of self-monitoring by the media through codes of conduct for media organizations in order to eliminate the use of racially discriminatory or biased language.

VIII. Administration of justice

34. In assessing the impact of a country's system of administration of justice, take into consideration its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, and pay particular attention to the measures below where they pertain to people of African descent.

35. Take all the necessary steps to secure equal access to the justice system for all people of African descent including by providing legal aid, facilitating individual or group claims, and encouraging non-governmental organizations to defend their rights.

36. Introduce into criminal law the provision that committing an offence with racist motivation or aim constitutes an aggravating circumstance allowing for a more severe punishment.

37. Ensure the prosecution of all persons who commit racially motivated crimes against people of African descent and guarantee the provision of adequate compensation for victims of such crimes.

38. Also ensure that measures taken in the fight against crimes, including terrorism, do not discriminate in purpose or effect on the grounds of race and colour.

39. Take measures to prevent the use of illegal force, torture, inhuman or degrading treatment or discrimination by the police or other law enforcement agencies and officials against people of African descent, especially in connection with arrest and detention, and ensure that people of African descent are not victims of practices of racial or ethnic profiling.

40. Encourage the recruitment of people of African descent into the police and as other law enforcement officials.

41. Organize training programmes for public officials and law enforcement agencies with a view to preventing injustices based on prejudice against people of African descent.

IX. Civil and political rights

42. Ensure that authorities at all levels in the State respect the right of members of communities of people of African descent to participate in decisions that affect them.

43. Take special and concrete measures to guarantee people of African descent the right to participate in elections, to vote and stand for election on the basis of equal and universal suffrage and to have due representation in all branches of government.

44. Promote awareness among members of the communities of people of African descent of the importance of their active participation in public and political life and eliminate obstacles to such participation.

45. Take all necessary steps, including special measures, to secure equal opportunities for participation of people of African descent in all central and local government bodies.

46. Organize training programmes to improve the political policymaking and public administration skills of public officials and political representatives who belong to communities of people of African descent.

X. Access to citizenship

47. Ensure that legislation regarding citizenship and naturalization does not discriminate against people of African descent and pay sufficient attention to possible barriers to naturalization that may exist for long-term or permanent residents of African descent.

48. Recognize that deprivation of citizenship on the basis of race or descent is a breach of States parties' obligation to ensure non-discriminatory enjoyment of the right to nationality.

49. Take into consideration that, in some cases, denial of citizenship for long-term or permanent residents could result in the creation of disadvantage for the people affected in terms of access to employment and social benefits, in violation of the Convention's anti-discrimination principles.

XI. Economic, social and cultural rights

50. Take steps to remove all obstacles that prevent the enjoyment of economic, social and cultural rights by people of African descent especially in the areas of education, housing, employment and health.

51. Take measures to eradicate poverty among communities of people of African descent within particular States parties' territories and combat the social exclusion or marginalization often experienced by people of African descent.

52. Design, adopt and implement plans and programmes of economic and social development on an equal and non-discriminatory basis.

53. Take measures to eliminate discrimination against people of African descent in relation to working conditions and work requirements including employment rules and practices that may have discriminatory purposes or effects.

54. Work with intergovernmental organizations, including international financial institutions, to ensure that development or assistance projects which they support take into account the economic and social situation of people of African descent.

55. Ensure equal access to health care and social security services for people of African descent.

56. Involve people of African descent in designing and implementing health-based programmes and projects.

57. Design and implement programmes aimed at creating opportunities for the general empowerment of people of African descent.

58. Adopt or make more effective legislation prohibiting discrimination in employment and all discriminatory practices in the labour market that affect people of African descent and protect them against all such practices.

59. Take special measures to promote the employment of people of African descent in the public administration as well as in private companies.

60. Develop and implement policies and projects aimed at avoiding the segregation of people of African descent in housing, and involve communities of people of African descent as partners in housing project construction, rehabilitation and maintenance.

XII. Measures in the field of education

61. Review all the language in textbooks which conveys stereotyped or demeaning images, references, names or opinions concerning people of African descent and replace it with images, references, names and opinions which convey the message of the inherent dignity and equality of all human beings.

62. Ensure that public and private education systems do not discriminate against or exclude children based on race or descent.

63. Take measures to reduce the school dropout rate for children of African descent.

64. Consider adopting special measures aimed at promoting the education of all students of African descent, guarantee equitable access to higher education for people of African descent and facilitate professional educational careers.

65. Act with determination to eliminate any discrimination against students of African descent.

66. Include in textbooks, at all appropriate levels, chapters about the history and cultures of peoples of African descent and preserve this knowledge in museums and other forums for future generations, encourage and support the publication and distribution of books and other print materials, as well as the broadcasting of television and radio programmes about their history and cultures.



**International Convention
on the Elimination
of all Forms of
Racial Discrimination**

Distr.
GENERAL

CERD/C/USA/CO/6
8 May 2008

Original: ENGLISH

COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Seventy-second session
Geneva, 18 February - 7 March 2008

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 9 OF THE CONVENTION**

**Concluding observations of the Committee on the
Elimination of Racial Discrimination**

UNITED STATES OF AMERICA

1. The Committee considered the fourth, fifth and sixth periodic reports of the United States of America, submitted in a single document (CERD/C/USA/6), at its 1853rd and 1854th meetings (CERD/C/SR.1853 and 1854), held on 21 and 22 February 2008. At its 1870th meeting (CERD/C/SR.1870), held on 5 March 2008, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the reports, and the opportunity to continue an open and constructive dialogue with the State party. The Committee also expresses appreciation for the detailed responses provided to the list of issues, as well as for the efforts made by the high-level delegation to answer the wide range of questions raised during the dialogue.

B. Positive aspects

3. The Committee welcomes the acknowledgement of the multi-racial, multi-ethnic, and multi-cultural nature of the State party.

4. The Committee notes with satisfaction the work carried out by the various executive departments and agencies of the State party which have responsibilities in the field of the elimination of racial discrimination, including the Civil Rights Division of the U.S. Department of Justice, the Equal Employment Opportunity Commission (EEOC) and the Department of Housing and Urban Development (HUD).

5. The Committee welcomes the reauthorisation, in 2005, of the Violence Against Women Act of 1994 (VAWA).
6. The Committee also welcomes the reauthorisation, in 2006, of the Voting Rights Act of 1965 (VRA).
7. The Committee commends the launch, in 2007, of the E-RACE Initiative (“Eradicating Racism and Colorism from Employment”), aimed at raising awareness on the issue of racial discrimination in the workplace.
8. The Committee notes with satisfaction the creation, in 2007, of the National Partnership for Action to End Health Disparities for Ethnic and Racial Minority Populations, as well as the various programmes adopted by the U.S. Department of Health and Human Services (HHS) to address the persistent health disparities affecting low-income persons belonging to racial, ethnic and national minorities.
9. The Committee also notes with satisfaction the California Housing Element Law of 1969, which requires each local jurisdiction to adopt a housing element in its general plan to meet the housing needs of all segments of the population, including low-income persons belonging to racial, ethnic and national minorities.

C. Concerns and recommendations

10. The Committee reiterates the concern expressed in paragraph 393 of its previous concluding observations of 2001 (A/56/18, paras. 380-407) that the definition of racial discrimination used in the federal and state legislation and in court practice is not always in line with that contained in article 1, paragraph 1, of the Convention, which requires States parties to prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect. In this regard, the Committee notes that indirect, or de facto,– discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (art.1 (1)).

The Committee recommends that the State party review the definition of racial discrimination used in the federal and state legislation and in court practice, so as to ensure, in light of the definition of racial discrimination provided for in article 1, paragraph 1, of the Convention,– that it prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.

11. While appreciating that the Constitution and laws of the State party may be used in many instances to prohibit private actors from engaging in acts of racial discrimination, the Committee remains concerned about the wide scope of the reservation entered by the State party at the time of ratification of the Convention with respect to discriminatory acts perpetrated by private individuals, groups or organisations (art. 2).

The Committee recommends that the State party consider withdrawing or narrowing the scope of its reservation to article 2 of the Convention, and to broaden the protection afforded by the law against discriminatory acts perpetrated by private individuals, groups or organizations.

12. The Committee notes that no independent national human rights institution established in accordance with the Paris Principles (General Assembly resolution 48/134, annex) exists in the State party (art. 2).

The Committee recommends that the State party consider the establishment of an independent national human rights institution in accordance with the Paris Principles.

13. While welcoming the acknowledgement by the delegation that the State party is bound to apply the Convention throughout its territory and to ensure its effective application at all levels, federal, state, and local, regardless of the federal structure of its Government, the Committee notes with concern the lack of appropriate and effective mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, state and local levels (art. 2).

The Committee recommends that the State party establish appropriate mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, state and local levels.

14. The Committee notes with concern that despite the measures adopted at the federal and state levels to combat racial profiling, including the elaboration by the Civil Rights Division of the U.S. Department of Justice of the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,— such practice continues to be widespread. In particular, the Committee is deeply concerned about the increase in racial profiling against Arabs, Muslims and South Asians in the wake of the 11 September 2001 attack, as well as about the development of the National Entry and Exit Registration System (NEERS) for nationals of 25 countries, all located in the Middle East, South Asia or North Africa (arts. 2 and 5 (b)).

Bearing in mind its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends that the State party strengthen its efforts to combat racial profiling at the federal and state levels, inter alia, by moving expeditiously towards the adoption of the End Racial Profiling Act, or similar federal legislation. The Committee also draws the attention of the State party to its general recommendation No. 30 (2004) on discrimination against non-citizens, according to which measures taken in the fight against terrorism must not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin, and urges the State party, in accordance with article 2, paragraph 1 (c), of the Convention, to put an end to the National Entry

and Exit Registration System (NEERS) and to eliminate other forms of racial profiling against Arabs, Muslims and South Asians.

15. The Committee notes with concern that recent case law of the U.S. Supreme Court and the use of voter referenda to prohibit states from adopting race-based affirmative action measures have further limited the permissible use of special measures as a tool to eliminate persistent disparities in the enjoyment of human rights and fundamental freedoms (art. 2 (2)).

The Committee reiterates that the adoption of special measures “when circumstances so warrant” is an obligation arising from article 2, paragraph 2, of the Convention. The Committee therefore calls once again upon the State party to adopt and strengthen the use of such measures when circumstances warrant their use as a tool to eliminate the persistent disparities in the enjoyment of human rights and fundamental freedoms and ensure the adequate development and protection of members of racial, ethnic and national minorities.

16. The Committee is deeply concerned that racial, ethnic and national minorities, especially Latino and African American persons, are disproportionately concentrated in poor residential areas characterised by sub-standard housing conditions, limited employment opportunities, inadequate access to health care facilities, under-resourced schools and high exposure to crime and violence (art. 3).

The Committee urges the State party to intensify its efforts aimed at reducing the phenomenon of residential segregation based on racial, ethnic and national origin, as well as its negative consequences for the affected individuals and groups. In particular, the Committee recommends that the State party:

- (i) Support the development of public housing complexes outside poor, racially segregated areas;**
- (ii) Eliminate the obstacles that limit affordable housing choice and mobility for beneficiaries of Section 8 Housing Choice Voucher Program; and**
- (iii) Ensure the effective implementation of legislation adopted at the federal and state levels to combat discrimination in housing, including the phenomenon of “steering” and other discriminatory practices carried out by private actors.**

17. The Committee remains concerned about the persistence of de facto racial segregation in public schools. In this regard, the Committee notes with particular concern that the recent U.S. Supreme Court decisions in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) and *Meredith v. Jefferson County Board of Education* (2007) have rolled back the progress made since the U.S. Supreme Court’s landmark decision in *Brown v. Board of Education* (1954), and limited the ability of public school districts to address de facto segregation by prohibiting the use of race-conscious measures as a tool to promote integration (arts. (2), 3 and 5 (e) (v)).

The Committee recommends that the State party undertake further studies to identify the underlying causes of de facto segregation and racial inequalities in education, with a view to elaborating effective strategies aimed at promoting school desegregation and providing equal educational opportunity in integrated settings for all students. In this regard, the Committee recommends that the State party take all appropriate measures, including the enactment of legislation,– to restore the possibility for school districts to voluntarily promote school integration through the use of carefully tailored special measures adopted in accordance to article 2, paragraph 2, of the Convention.

18. While appreciating that some forms of hate speech and other activities designed to intimidate, such as the burning of crosses, are not protected under the First Amendment to the U.S. Constitution, the Committee remains concerned about the wide scope of the reservation entered by the State party at the time of ratification of the Convention with respect to the dissemination of ideas based on racial superiority and hatred (art. 4).

The Committee draws the attention of the State party to its general recommendations No. 7 (1985) and 15 (1993) concerning the implementation of article 4 of the Convention, and request the State party to consider withdrawing or narrowing the scope of its reservations to article 4 of the Convention. In this regard, the Committee wishes to reiterate that the prohibition of all ideas based on racial superiority or hatred is compatible with the right to freedom of opinion and expression, given that the exercise of this right carries special duties and responsibilities, including the obligation not to disseminate racist ideas.

19. While noting the explanations provided by the State party with regard to the situation of the Western Shoshone indigenous peoples, considered by the Committee under its early warning and urgent action procedure, the Committee strongly regrets that the State party has not followed up on the recommendations contained in paragraphs 8 to 10 of its decision 1 (68) of 2006 (CERD/C/USA/DEC/1) (art.5).

The Committee reiterates its Decision 1 (68) in its entirety, and urges the State party to implement all the recommendations contained therein.

20. The Committee reiterates its concern with regard to the persistent racial disparities in the criminal justice system of the State party, including the disproportionate number of persons belonging to racial, ethnic and national minorities in the prison population, allegedly due to the harsher treatment that defendants belonging to these minorities, especially African American persons, receive at various stages of criminal proceedings (art.5 (a)).

Bearing in mind its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, according to which stark racial disparities in the administration and functioning of the criminal justice system, including the disproportionate number of persons belonging to racial,

ethnic and national minorities in the prison population, may be regarded as factual indicators of racial discrimination, the Committee recommends that the State party take all necessary steps to guarantee the right of everyone to equal treatment before tribunals and all other organs administering justice, including further studies to determine the nature and scope of the problem, and the implementation of national strategies or plans of action aimed at the elimination of structural racial discrimination.

21. The Committee notes with concern that according to information received, young offenders belonging to racial, ethnic and national minorities, including children, constitute a disproportionate number of those sentenced to life imprisonment without parole (art. 5 (a)).

The Committee recalls the concerns expressed by the Human Rights Committee (CCPR/C/USA/CO/3/Rev.1, para. 34) and the Committee against Torture (CAT/C/USA/CO/2, para. 34) with regard to federal and state legislation allowing the use of life imprisonment without parole against young offenders, including children. In light of the disproportionate imposition of life imprisonment without parole on young offenders, including children, belonging to racial, ethnic and national minorities, the Committee considers that the persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.

22. While welcoming the recent initiatives undertaken by the State party to improve the quality of criminal defence programmes for indigent persons, the Committee is concerned about the disproportionate impact that persistent systemic inadequacies in these programmes have on indigent defendants belonging to racial, ethnic and national minorities. The Committee also notes with concern the disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities (art. 5 (a)).

The Committee recommends that the State party adopt all necessary measures to eliminate the disproportionate impact that persistent systemic inadequacies in criminal defence programmes for indigent persons have on defendants belonging to racial, ethnic and national minorities, inter alia, by increasing its efforts to improve the quality of legal representation provided to indigent defendants and ensuring that public legal aid systems are adequately funded and supervised. The Committee further recommends that the State party allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs, such as housing, health care, or child custody, are at stake.

23. The Committee remains concerned about the persistent and significant racial disparities with regard to the imposition of the death penalty, particularly those associated with the race of the victim, as evidenced by a number of studies, including a recent study released in October 2007 by the American Bar Association (ABA)¹ (art. 5 (a)).

Taking into account its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends that the State party undertake further studies to identify the underlying factors of the substantial racial disparities in the imposition of the death penalty, with a view to elaborating effective strategies aimed at rooting out discriminatory practices. The Committee wishes to reiterate its previous recommendation contained in paragraph 396 of its previous concluding observations of 2001, that the State party adopt all necessary measures, including a moratorium, to ensure that death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers.

24. The Committee regrets the position taken by State party that the Convention is not applicable to the treatment of foreign detainees held as “enemy combatants”, on the basis of the argument that the law of armed conflict is the exclusive *lex specialis* applicable, and that in any event the Convention “would be inapplicable to allegations of unequal treatment of foreign detainees” in accordance to article 1, paragraph 2, of the Convention. The Committee also notes with concern that the State party exposes non-citizens under its jurisdiction to the risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment by means of transfer, rendition, or refoulement to third countries where there are substantial reasons to believe that they will be subjected to such treatment (arts. 5 (a), 5 (b) and 6).

Bearing in mind its general recommendation No. 30 (2004) on non-citizens, the Committee wishes to reiterate that States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of the rights set forth in article 5 of the Convention, including the right to equal treatment before the tribunals and all other organs administering justice, to the extent recognised under international law, and that article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination set out in article 1, paragraph 1, of the Convention.

The Committee also recalls its Statement on racial discrimination and measures to combat terrorism (A/57/18), according to which States parties to the Convention are under an obligation to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin.

¹ American Bar Association, “State Death Penalty Assessments: Key Findings,” 29 October 2007, <http://www.abanet.org/moratorium/assessmentproject/keyfindings.doc>.

The Committee therefore urges the State party to adopt all necessary measures to guarantee the right of foreign detainees held as “enemy combatants” to judicial review of the lawfulness and conditions of detention, as well as their right to remedy for human rights violations. The Committee further requests the State party to ensure that non-citizens detained or arrested in the fight against terrorism are effectively protected by domestic law, in compliance with international human rights, refugee and humanitarian law.

25. While recognising the efforts made by the State party to combat the pervasive phenomenon of police brutality, the Committee remains concerned about allegations of brutality and use of excessive or deadly force by law enforcement officials against persons belonging to racial, ethnic or national minorities, in particular Latino and African American persons and undocumented migrants crossing the U.S.-Mexico border. The Committee also notes with concern that despite the efforts made by the State party to prosecute law enforcement officials for criminal misconduct, impunity of police officers responsible for abuses allegedly remains a widespread problem (arts. 5 (b) and 6).

The Committee recommends that the State party increase significantly its efforts to eliminate police brutality and excessive use of force against persons belonging to racial, ethnic or national minorities, as well as undocumented migrants crossing the U.S.-Mexico border, inter alia, by establishing adequate systems for monitoring police abuses and developing further training opportunities for law enforcement officials. The Committee further requests the State party to ensure that reports of police brutality and excessive use of force are independently, promptly and thoroughly investigated and that perpetrators are prosecuted and appropriately punished.

26. While welcoming the various measures adopted by the State party to prevent and punish violence and abuse against women belonging to racial, ethnic and national minorities, the Committee remains deeply concerned about the incidence of rape and sexual violence experienced by women belonging to such groups, particularly with regard to American Indian and Alaska Native women and female migrant workers, especially domestic workers. The Committee also notes with concern that the alleged insufficient will of federal and state authorities to take action with regard to such violence and abuse often deprives victims belonging to racial, ethnic and national minorities, and in particular Native American women, of their right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered (arts. 5 (b) and 6).

The Committee recommends that the State party increase its efforts to prevent and punish violence and abuse against women belonging to racial, ethnic and national minorities, inter alia, by:

- (i) **Setting up and adequately funding prevention and early assistance centres, counselling services and temporary shelters;**

- (ii) **Providing specific training for those working within the criminal justice system, including police officers, lawyers, prosecutors and judges, and medical personnel;**
- (iii) **Undertaking information campaigns to raise awareness among women belonging to racial, ethnic and national minorities about the mechanisms and procedures provided for in national legislation on racism and discrimination; and**
- (iv) **Ensuring that reports of rape and sexual violence against women belonging to racial, ethnic and national minorities, and in particular Native American women, are independently, promptly and thoroughly investigated, and that perpetrators are prosecuted and appropriately punished.**

The Committee requests the State party to include information on the results of these measures and on the number of victims, perpetrators, convictions, and the types of sanctions imposed, in its next periodic report.

27. The Committee remains concerned about the disparate impact that existing felon disenfranchisement laws have on a large number of persons belonging to racial, ethnic and national minorities, in particular African American persons, who are disproportionately represented at every stage of the criminal justice system. The Committee notes with particular concern that in some states, individuals remain disenfranchised even after the completion of their sentences (art. 5 (c)).

Taking into account the disproportionate impact that the implementation of disenfranchisement laws has on a large number of persons belonging to racial, ethnic and national minorities, in particular African American persons, the Committee recommends that the State Party adopt all appropriate measures to ensure that the denial of voting rights is used only with regard to persons convicted of the most serious crimes, and that the right to vote is in any case automatically restored after the completion of the criminal sentence.

28. The Committee regrets that despite the various measures adopted by the State party to enhance its legal and institutional mechanisms aimed at combating discrimination, workers belonging to racial, ethnic and national minorities, in particular women and undocumented migrant workers, continue to face discriminatory treatment and abuse in the workplace, and to be disproportionately represented in occupations characterized by long working hours, low wages, and unsafe or dangerous conditions of work. The Committee also notes with concern that recent judicial decisions of the U.S. Supreme Court – including *Hoffman Plastics Compound, Inc. v. NLRB* (2007), *Ledbetter v. Goodyear Tire and Rubber Co.* (2007) and *Long Island Care at Home, Ltd. v. Coke* (2007) – have further eroded the ability of workers belonging to racial, ethnic and national minorities to obtain legal protection and redress in cases of discriminatory treatment at the workplace, unpaid or withheld wages, or work-related injury or illnesses (arts. 5 (e) (i) and 6).

The Committee recommends that the State party take all appropriate measures, including increasing the use of “pattern and practice” investigations, to combat de facto discrimination in the workplace and ensure the equal and effective enjoyment by persons belonging to racial, ethnic and national minorities of their rights under article 5 (e) of the Convention. The Committee further recommends that the State party take effective measures, including the enactment of legislation, such as the proposed Civil Rights Act of 2008,– to ensure the right of workers belonging to racial, ethnic and national minorities, including undocumented migrant workers, to obtain effective protection and remedies in case of violation of their human rights by their employer.

29. The Committee is concerned about reports relating to activities, such as nuclear testing, toxic and dangerous waste storage, mining or logging, carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention (arts. 5 (d) (v), 5 (e) (iv) and 5 (e) (vi)).

The Committee recommends that the State party take all appropriate measures, in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedure, – to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention.

The Committee further recommends that the State party recognize the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans. While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party’s obligations under the Convention relating to indigenous peoples.

30. The Committee notes with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside the United States by transnational corporations registered in the State party on the right to land, health, living environment and the way of life of indigenous peoples living in these regions (arts. 2 (1) (d) and 5 (e)).

In light of article 2, paragraph 1 (d), and 5 (e) of the Convention and of its general recommendation No. 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United States. In

particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in the United States accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities of transnational corporations registered in the United States on indigenous peoples abroad and on any measures taken in this regard.

31. The Committee, while noting the efforts undertaken by the State party and civil society organizations to assist the persons displaced by Hurricane Katrina of 2005, remains concerned about the disparate impact that this natural disaster continues to have on low-income African American residents, many of whom continue to be displaced after more than two years after the hurricane (art. 5 (e) (iii)).

The Committee recommends that the State party increase its efforts in order to facilitate the return of persons displaced by Hurricane Katrina to their homes, if feasible, or to guarantee access to adequate and affordable housing, where possible in their place of habitual residence. In particular, the Committee calls upon the State party to ensure that every effort is made to ensure genuine consultation and participation of persons displaced by Hurricane Katrina in the design and implementation of all decisions affecting them.

32. While noting the wide range of measures and policies adopted by the State party to improve access to health insurance and adequate health-care and services, the Committee is concerned that a large number of persons belonging to racial, ethnic and national minorities still remain without health insurance and face numerous obstacles to access to adequate health care and services (art. 5 (e) (iv)).

The Committee recommends that the State party continue its efforts to address the persistent health disparities affecting persons belonging to racial, ethnic and national minorities, in particular by eliminating the obstacles that currently prevent or limit their access to adequate health care, such as lack of health insurance, unequal distribution of health-care resources, persistent racial discrimination in the provision of health care and poor quality of public health-care services. The Committee requests the State party to collect statistical data on health disparities affecting persons belonging to racial, ethnic and national minorities, disaggregated by age, gender, race, ethnic or national origin, and to include it in its next periodic report.

33. The Committee regrets that despite the efforts of the State party, wide racial disparities continue to exist in the field of sexual and reproductive health, particularly with regard to the high maternal and infant mortality rates among women and children belonging to racial, ethnic and national minorities, especially African Americans, the high incidence of unintended pregnancies and greater abortion rates affecting African American women, and the growing disparities in HIV infection rates for minority women (art. 5 (e) (iv)).

The Committee recommends that the State party continue its efforts to address persistent racial disparities in sexual and reproductive health, in particular by:

- (i) Improving access to maternal health care, family planning, pre- and post- natal care and emergency obstetric services, inter alia, through the reduction of eligibility barriers for Medicaid coverage;**
- (ii) Facilitating access to adequate contraceptive and family planning methods; and**
- (iii) Providing adequate sexual education aimed at the prevention of unintended pregnancies and sexually-transmitted infections.**

34. While welcoming the measures adopted by the State party to reduce the significant disparities in the field of education, including the adoption of the No Child Left Behind Act of 2001 (NCLB), the Committee remains concerned about the persistent “achievement gap” between students belonging to racial, ethnic or national minorities, including English Language Learner (“ELL”) students, and white students. The Committee also notes with concern that alleged racial disparities in suspension, expulsion and arrest rates in schools contribute to exacerbate the high dropout rate and the referral to the justice system of students belonging to racial, ethnic or national minorities (art.5 (e) (v)).

The Committee recommends that the State party adopt all appropriate measures,— including special measures in accordance with article 2, paragraph 2, of the Convention,— to reduce the persistent “achievement gap” between students belonging to racial, ethnic or national minorities and white students in the field of education, inter alia, by improving the quality of education provided to these students. The Committee also calls upon the State party to encourage school districts to review their “zero tolerance” school discipline policies, with a view to limiting the imposition of suspension or expulsion to the most serious cases of school misconduct, and to provide training opportunities for police officers deployed to patrol school hallways.

35. While welcoming the clarifications offered by the State party with regard to the burden of proof in racial discrimination claims under civil rights statutes, the Committee remains concerned that claims of racial discrimination under the Due Process Clause of the Fifth Amendment to the U.S. Constitution and the Equal Protection Clause of the Fourteenth Amendment must be accompanied by proof of intentional discrimination (arts. 1 (1) and 6).

The Committee recommends that the State party review its federal and state legislation and practice concerning the burden of proof in racial discrimination claims, with a view to allowing, in accordance with article 1, paragraph 1 of the Convention, a more balanced sharing of the burden of proof between the plaintiff, who must establish a, prima facie, case of discrimination, whether direct or based on a disparate impact, and the

defendant, who should provide evidence of an objective and reasonable justification for the differential treatment. The Committee calls in particular on the State Party to consider adoption of the Civil Rights Act of 2008.

36. The Committee regrets that despite the efforts made by the State party to provide training programmes and courses on anti-discrimination legislation adopted at the federal and state levels, no specific training programmes or courses have been provided to, inter alia, government officials, the judiciary, federal and state law enforcement officials, teachers, social workers and other public officials in order to raise their awareness about the Convention and its provisions. Similarly, the Committee notes with regret that information about the Convention and its provisions has not been brought to the attention of the public in general (art.7).

The Committee recommends that the State party organize public awareness and education programmes on the Convention and its provisions, and step up its efforts to make government officials, the judiciary, federal and state law enforcement officials, teachers, social workers and the public in general aware about the responsibilities of the State party under the Convention, as well as the mechanisms and procedures provided for by the Convention in the field of racial discrimination and intolerance.

37. The Committee requests the State party to provide, in its next periodic report, detailed information on the legislation applicable to refugees and asylum-seekers, and on the alleged mandatory and prolonged detention of a large number of non-citizens, including undocumented migrant workers, victims of trafficking, asylum-seekers and refugees, as well as members of their families (arts. 5 (b), 5 (e) (iv) and 6).

38. The Committee also requests the State party to provide, in its next periodic report, detailed information on the measures adopted to preserve and promote the culture and traditions of American Indian and Alaska Native (AIAN) and Native Hawaiian and Other Pacific Islander (NHPI) peoples. The Committee further requests the State party to provide information on the extent to which curricula and textbooks for primary and secondary schools reflect the multi-ethnic nature of the State party, and provide sufficient information on the history and culture of the different racial, ethnic and national groups living in its territory (art. 7).

39. The Committee is aware of the position of the State party with regard to the Durban Declaration and Programme of Action and its follow-up, but in view of the importance that such a process has for the achievement of the goals of the Convention, it calls upon the State party to consider participating in the preparatory process as well as in the Durban Review Conference itself.

40. The Committee notes that the State party has not made the optional declaration provided for in article 14 of the Convention and invites it to consider doing so.

41. The Committee recommends that the State party ratify the amendment to article 8, paragraph 6, of the Convention, adopted on 15 January 1992 at the fourteenth meeting of States parties to the Convention and endorsed by General Assembly resolution 47/111. In this connection, the Committee cites General Assembly resolution 61/148, in which the Assembly strongly urged States parties to accelerate their domestic ratification procedures with regard to the amendment and to notify the Secretary-General expeditiously in writing of their agreement to the amendment.

42. The Committee recommends that the State party's reports be made readily available to the public at the time of their submission, and that the observations of the Committee with respect to these reports be similarly publicised in the official and national languages.

43. The Committee recommends that the State party, in connection with the preparation of the next periodic report, consult widely with organizations of civil society working in the area of human rights protection, in particular in combating racial discrimination.

44. The Committee invites the State party to update its core document in accordance with the harmonised guidelines on reporting under the international human rights treaties, in particular those on the common core document, as adopted by the fifth inter-Committee meeting of the human rights treaty bodies held in June 2006 (HRI/GEN/2/Rev.4).

45. The State party should, within one year, provide information on the way it has followed up on the Committee's recommendations contained in paragraphs 14, 19, 21, 31 and 36, pursuant to paragraph 1 of rule 65 of the rules of procedure.

46. The Committee recommends that the State party submit its seventh, eighth and ninth periodic reports in a single document, due on 20 November 2011, and that the report be comprehensive and address all points raised in the present concluding observations.

- - - - -



DYETT HIGH SCHOOL & THE 3 DS OF CHICAGO SCHOOL REFORM: DESTABILIZATION | DISINVESTMENT | DISENFRANCHISEMENT

Walter H. Dyett High School sits in leafy Washington Park on Chicago's south side African American Bronzeville neighborhood. In February 2012, Chicago's mayor-appointed Board of Education voted to phase out Dyett for poor performance and send students to Phillips High School, an Academy of Urban School Leadership turnaround school 2 ½ miles away. However, Phillips is doing no better than Dyett on district performance measures. Dyett's story has been repeated in almost 100 public schools in Chicago's African American and Latino communities and in cities across the country where an increasing number of mainly urban school districts are using this new shock treatment on schools serving low-income students of color.

SCHOOL CLOSINGS, PHASE-OUTS, TURNAROUNDS, AND CONVERSIONS TO CHARTER SCHOOLS

Neighborhood public schools are closed or phased out, handed over to "turnaround" operators, or restarted as privately-run charter schools with selective admissions. School staff are displaced, children are sent to other schools, and already distressed communities face school churning. Chicago's African American and Latino students have been the test case for "school improvement."

These drastic actions have not created the sea change in low-performing schools that they have promised. Instead, the consequences have often been disastrous for African American, Latino, and other students of color with increases in violence, disruption of neighborhood schools and communities, loss of veteran teachers, and little academic improvement. Ninety-eight of the 100 school closings and phase-outs in Chicago since 2001 (documented by *Chicago Catalyst*) have been in schools with predominantly African American and Latino students.

Instead of supporting these schools with rich curriculum, smaller classes, equitable resources, and programs that work, *prior to closing them or turning them around*, Chicago Public Schools has actually sabotaged them. There is a history of CPS **destabilizing** and **disinvesting** in African American and Latino schools and **disenfranchising** the students, parents, and teachers – despite the energy parents and communities have put in to improve their schools and to propose research-based solutions. Meanwhile, CPS put a lot of resources into magnet schools (disproportionately white and middle class), turnarounds and charters.

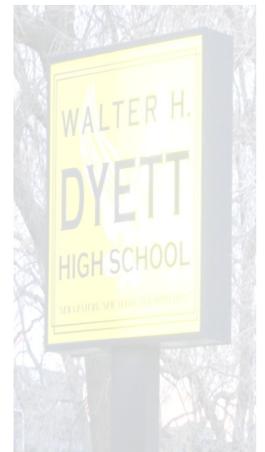
DYETT AND THE 3 DS OF CHICAGO REFORM

Since Arne Duncan, former CEO of Chicago Public Schools, was appointed to head the U.S. Department of Education in 2009, the Chicago model for top-down school reform has gone viral. An examination of CPS actions on Dyett over the years re-

veals an African American school under attack. Dyett's story is now a familiar one across many urban school districts of color and indicates what may be in store for others.

Destabilization Dyett has been in the center of a whirlwind of school churning. Since 2001, CPS has closed, turned around or converted to charter or selective enrollment 20 area schools near Dyett. Between 2005 and 2010, four high schools on the South Side near Dyett were closed. Students were sent from school to school, and schools that were community anchors closed, further destabilizing a community destabilized by destruction of public housing and gentrification. In 2006, Dyett was a receiving school for closed Englewood HS students, but received no additional resources for the influx of students. That year there was a spike in school violence. In its 12-year history as a high school, Dyett has had a revolving door of leaders, including 4 principals.

Disinvestment Dyett was set up for failure from the beginning. In 1999, CPS converted Dyett from a middle to high school but provided no high school resources. On opening day, there were just seven books in the library and unequipped science labs, yet the school was expected to meet district performance standards. In the same year, CPS invested \$24 million to convert nearby King High School into a selective-enrollment magnet school. Dyett has 25.6% special needs students, but has not received adequate resources to serve them. Especially in the last three years, CPS has starved Dyett of resources and forced cuts in crucial programs that help students graduate and attend college. In a school with low graduation and college attendance rates, CPS cut the important AVID college preparatory program and refused to fund Dyett's model Restorative Justice and *Education to Success* programs that doubled graduation



Dyett students protesting their school's phase-out at a CPS board meeting.

rates and raised college attendance by 41 percent. Due to CPS cuts, Dyett lost a counselor and assistant principal, a truancy prevention program that provided mentoring and a Saturday school, and an effective reading program. In 2011, Dyett had just one honors class, no AP classes, no art teacher—senior art was taught on-line.

Disenfranchisement Dyett’s students, parents, and community members have been stripped of their right to participate in decisions about their school. Like other African American and Latino schools closed by CPS, Dyett was subjected to a sham CPS hearing in which participants were restricted to two minutes to speak, decisions were made behind closed doors by an unelected school board, and paid protesters, recruited by pastors allied with the mayor, appeared to support Dyett closing. Throughout, CPS ignored the community-developed plan for school transformation. CPS dismissed it at Dyett’s phase-out hearing, and CPS CEO Brizard did not respond to it. Dyett supporters held a 4-day sit-in at Mayor Emanuel’s office, but he refused to meet with them about the plan and ordered police to remove chairs from senior citizens, forcing them to sit on the cement floor.

INVESTMENT BY THE DYETT COMMUNITY

In the face of CPS neglect, the Dyett school-community has worked tirelessly to enrich the students’ education and improve Dyett. They fought for a school library and building improvements, including finding external funders to renovate the athletic facilities. They have helped Dyett youth become leaders in Voices of Youth in Community Education (VOYCE), a youth organizing collaborative for education justice led by Chicago students of color. Community organizations and Dyett’s elected Local School Council developed an acclaimed Restorative Justice Program and *Education to Success* both hailed as models by CPS CEO Arne Duncan. A community collaboration created the Dyett-Washington Park Green Youth Farm that provides youth summer employment, after-school programs, and a community garden. In 2010, parents, teachers and the Kenwood Oakland Community Organization began developing the Bronzeville Global Village Achievers plan to transform Dyett and five feeder schools. CPS’s response to the community’s initiative was school abandonment and sabotage.

References available upon request.

Figure 1 Chicago Public School Actions and Community Investments Affecting Dyett High School

year	Destabilization	Disinvestment	Dyett Community Investment
1999	<ul style="list-style-type: none"> Einstein Elementary closed due to public housing teardown; students reassigned to Donoghue Public School Transition Center closed 	<ul style="list-style-type: none"> CPS converts Dyett from middle to high school; no honors or AP classes 1999-2005 leaking roof, dysfunctional heating, no air conditioning 1999-2011 inadequate athletic equipment 	
2001	<ul style="list-style-type: none"> Terrell Elementary closed, converted to charter 		
2002	<ul style="list-style-type: none"> Coleman Elementary closed Telsa Alternative School closed, becomes magnet 		
2003	<ul style="list-style-type: none"> Donoghue Elementary closed; students reassigned to Fuller Elementary Doolittle West Elementary closed, becomes selective enrollment 		
2005	<ul style="list-style-type: none"> Englewood HS closed, violence spikes at Dyett DuSable HS closed, becomes 3 small selective enrollment schools Farren Elementary consolidated Lindblom HS closed, becomes magnet Dyett principal change 		<ul style="list-style-type: none"> school-community led campaign for capital improvements
2006			<ul style="list-style-type: none"> LSC initiated IYMOD and LOVE student empowerment programs
2007	<ul style="list-style-type: none"> Johns Elementary closed 		<ul style="list-style-type: none"> Dyett students become youth leaders in VOYCE LSC initiated <i>Life After Dyett</i> program—career and college prep class
2008	<ul style="list-style-type: none"> Harper HS, CPS turnaround Princeton Elementary closed South Chicago Community Elementary closed 		<ul style="list-style-type: none"> Model Restorative Justice Program: Dyett Youth Justice Interns train schools nationally; <i>Education to Success</i> program
2009	<ul style="list-style-type: none"> Abbot Elementary closed/consolidated McCorkle Elementary closed Dyett principal change 	<ul style="list-style-type: none"> LOVE girls mentoring program and teacher cut drama club cut <i>Life After Dyett</i> program cut 	<ul style="list-style-type: none"> Dyett-Washington Park Green Youth Farm, with Chicago Botanical Garden & Chicago Park District
2010	<ul style="list-style-type: none"> Phillips HS AUSL turnaround 	<ul style="list-style-type: none"> AVID, college prep program cut IYMOD male empowerment program cut CPS cut Dyett funding for Restorative Justice and <i>Education to Success</i> programs 	<ul style="list-style-type: none"> Bronzeville Global Village Achievers started
2011	<ul style="list-style-type: none"> Woodson South Elementary closed/CPS turnaround 	<ul style="list-style-type: none"> assistant principal, counselor, and art teacher cut Dyett had only one honors class, AP teacher cut <i>Read 180 Program</i> and truancy program cut 	<ul style="list-style-type: none"> Bronzeville Global Village Achievers developed ESPN <i>Rise Up</i> & Chicago Bulls sponsor athletic facilities renovation
2012	<ul style="list-style-type: none"> Fuller Elementary becomes AUSL turnaround Dyett principal change (interim appointed) 		

FREEDOM SCHOOL CURRICULUM

MISSISSIPPI FREEDOM SUMMER, 1964

Edited and Introduced by

Kathy Emery, Sylvia Braselmann, and Linda Gold

Part 1:

Preface and Introduction

Supplementary Documents

The Curriculum

TABLE OF CONTENTS

PREFACE: EDITORS' COMMENTS	1
INTRODUCTION: FREEDOM SUMMER AND THE FREEDOM SCHOOLS	5
TEACHING MATERIAL: QUESTIONS AND ACTIVITIES	25
SUPPLEMENTARY DOCUMENTS.....	35
PROSPECTUS FOR THE MISSISSIPPI FREEDOM SUMMER.....	35
PROSPECTUS FOR A	40
SUMMER FREEDOM SCHOOL PROGRAM IN MISSISSIPPI.....	40
CURRICULUM CONFERENCE SUBGROUP REPORT	44
OUTLINE FOR CASE STUDIES.....	48
MEMORANDUM TO FREEDOM SCHOOL TEACHERS	50
OVERVIEW OF THE FREEDOM SCHOOLS—II.....	52
NOTES ON TEACHING IN MISSISSIPPI.....	53
NON-MATERIAL TEACHING SUGGESTIONS.....	59
PROFILES OF TYPICAL FREEDOM SCHOOLS	63
FREEDOM SCHOOL DATA	71
A REPORT, MAINLY ON RULEVILLE FREEDOM SCHOOL	76
FREEDOM SCHOOLS IN MISSISSIPPI, 1964	90
THE FREEDOM SCHOOLS.....	99
1964 PLATFORM OF THE MISSISSIPPI FREEDOM SCHOOL CONVENTION	104
FREEDOM SCHOOL CURRICULUM.....	109
TABLE OF CONTENTS AND A NOTE TO THE TEACHER.....	109
PART I: ACADEMIC CURRICULUM: READING AND WRITING.....	111
PART I: ACADEMIC CURRICULUM: MATHEMATICS.....	115
PART I: ACADEMIC CURRICULUM: SCIENCE	116
PART II: CITIZENSHIP CURRICULUM, UNIT I - VI	118
PART II: CITIZENSHIP CURRICULUM, UNIT VII—THE MOVEMENT	136

SOURCES

Preface, Introduction, and Question and Activities are by Kathy Emery, Sylvia Braselmann and Linda Gold. Copyright 2004

All photos are copyright Herbert Randall, and are used with kind permission of Herbert Randall. The photos were provided by the McCain Library and Archives, University of Southern Mississippi (<http://www.lib.usm.edu/~spcol/crda/>).

Most the documents used are from SNCC Papers.
The original SNCC papers are at the King Library and Archives,
The Martin Luther King Jr. Center for Nonviolent Social Change, Atlanta, GA.

We have used the Microfilm Edition: SNCC, The Student Nonviolent Coordinating Committee Papers, 1959-1972 (Sanford, NC: Microfilming Corporation of America, 1982)
We are citing the reel, file and first inclusive page number in the table below.

Some documents are from the Iris Greenberg Collection:
Iris Greenberg / Freedom Summer Collection, 1963-1964
Manuscripts, Archives, and Rare Books Division,
Schomburg Center for Research in Black Culture,
The New York Public Library;
Astor, Lenox and Tilden Foundations

Some case studies are papers written for SDS (Students for a Democratic Society)
The original SDS records are at the State Historical Society of Wisconsin.
We have use the Microfilm Edition: Papers, 1958-1970 / Students for a Democratic Society (U.S.) (Glen Rock, N.J.: Microfilming Corp. of America, 1978.)
We are citing the reel and file in the table below.

The article “The Freedom Schools; Concept and Organization” by Staughton Lynd was published in *Freedomways*, Second Quarter 1965, p302-309; and is reprinted with permission of the author.

The open letter to the President, “Triple Revolution” was published in *Liberation*, April 1964, p 9-15.

Two scenes from *In White America* by Martin Duberman; Boston: Houghton Mifflin, 1964. (First Scene: The Klan, p43-52; Second Scene: Little Rock, p 64-69.)
Reprinted with permission of the author.

The article “Rifle Squads or the Beloved Community” by A. J. Muste was published in *Liberation*, May 1964, p 7-12.

The case study “Behind the Cotton Curtain” is from the Ellin papers in the Digital Archives of the McCain Library and Archives, University of Southern Mississippi
(<http://anna.lib.usm.edu/uhtbin/cgiirsi/zUw9Mc1vK7/163340015/503/612>)

Prospectus for the Mississippi Freedom Summer	SNCC; 39, 190, 1039
COFO Flyer: Freedom Summer	Iris Greenberg Collection
COFO Flyer: MFDP	Iris Greenberg Collection
COFO Flyer: Freedom Registration	Iris Greenberg Collection
Prospectus for a Summer Freedom School Program	SNCC; 39, 165, 75
Curriculum Conference Subgroup Report	SNCC; 67, 340, 1000
Outline for Case Studies	SNCC; 67, 340, 999
Memo to Freedom School Teachers	SNCC; 67, 340, 1183
Overview of the Freedom Schools	SNCC; 67, 340, 864
Notes on Teaching in Mississippi	SNCC; 67, 340, 1178

Non-Material Teaching Suggestions (excerpt)	Iris Greenberg Collection
Profiles of Typical Freedom Schools	SNCC; 68, 364, 552
Mississippi Freedom Schools: New Houses of Liberty	SNCC; 68, 342, 93
Freedom School Data	SNCC; 67, 321, 2007
A Report, mainly on Ruleville	SNCC; 68, 367, 582
Mississippi Freedom Schools, 1964	SNCC; 68,346,224
Student Work: What the Summer Project has meant	Iris Greenberg Collection
Student Work: Palmers' Crossing Freedom News	SNCC; 39, 166, 0129
Student Work: Freedom Carrier	SNCC; 39, 166, 0127
Student Work: Freedom Star	SNCC; 67, 345, 1287
Platform of the Freedom School Convention	SNCC; 68, 346, 255
TOC and A Note to the Teacher	Iris Greenberg Collection
Academic Curriculum: Reading and Writing Skills	SNCC; 67, 340, 1002
Mathematics (Excerpt)	SNCC; 39, 165, 122
Science	SNCC; 67, 340, 761
Citizenship Curriculum Unit I - VI	SNCC; 67, 340, 830
Citizenship Curriculum Unit VII, part 1	SNCC; 67, 340, 902
Citizenship Curriculum Unit VII, part 2	SNCC; 67, 328, 346
Statistics on Education, Housing, Income, etc.	Iris Greenberg Collection
The South as an Underdeveloped Country	SDS; 36, 4B:46
The Poor in America	SNCC; 67, 340, 815
Chester, PA.—Community Organization in the Other America	SDS; 39, 4B:392
Guide to Negro History	SNCC; 67, 340
History addendum I	SNCC; 67, 337, 641
History addendum II	SNCC; 39, 166; 140
Negro History Study Questions	SNCC; 67, 340, 1081
Development of Negro Power since 1900	SNCC; 67, 340, 830
Mississippi Power Structure	SNCC; 67, 339, 746
Power of the Dixiecrats	SDS; 37, 4B:158
Nazi Germany	SNCC; 67, 340, 1052
Hazard, KY	SNCC; 68, 382, 824
Statements of Discipline of Nonviolent Movements	SNCC; 67, 340, 797
Readings in Nonviolence	Iris Greenberg Collection
Nonviolence in American History	SNCC; 67, 340, 365
Voter Registration Laws in Mississippi	SNCC; 67, 340, 783
Civil Rights Bill	SNCC; 67, 340, 788
Teaching Mat. Unit VII: Campaign Lit. on Mrs. Hamer	SNCC; 67, 340, 1187
Teaching Mat. Unit VII: Candidate biography	SNCC; 67, 336, 0906
Teaching Mat. Unit VII: Regular Voter Registration Form	SNCC; 39, 165, 0087
Teaching Mat. Unit VII: MFDP Voter Registration Form	SNCC; 67, 340, 1146
Teaching Mat. Unit VII: Sample Sections MS Constitution	SNCC; 67, 340,

PREFACE: EDITORS' COMMENTS

This manuscript contains all the curriculum material that was written for and during Mississippi Freedom Summer, as assembled on the curriculum part of the website www.educationanddemocracy.org. It includes also an introduction to put the curriculum and the schools in historical context. Embedded in the introduction are links to supporting documents about Freedom Summer and the schools.

The design for the curriculum was laid out at the curriculum planning conference in March of 1964, and the curriculum was assembled during the next few months. Some parts were written specifically for the Mississippi Freedom Schools, others were adapted for that purpose, and articles or papers from other organizations were added. Some of the sections of the curriculum were distributed directly to the Freedom School teachers, others were provided only to the local Freedom School coordinators or mailed out later during the summer. Therefore, the Freedom School curriculum has never existed in the format you find here on our website, which is probably the first attempt at collating and assembling all those materials in one place.

We think that we have been able to find nearly all of the documents, but at times we can only assume that what we have inserted was what was used. We have taken to heart Casey Hayden's advice to us, "Things changed pretty fast, and the various drafts which you have, and the papers which seem to have materialized out of previous lists, are probably beyond anyone's memory, and possibly beyond reason, so if you just make your best guesses about what turned into what on the lists, I feel pretty sure you will be providing the best guesses available" (personal correspondence with authors, 4/8/04).

During Freedom Summer, pieces of the curriculum were added in response to the need in the schools, and some of the teachers wrote their own material. One can argue that the curriculum's central premise, the importance of questioning and connecting the material to the student's life, challenged the concept of a written curriculum. The Freedom School curriculum encouraged—in fact, mandated—that the teacher improvise. Staughton Lynd suggested to "include any chunks of material that you can lay your hands on as items that were written for the Freedom Schools, and may have been used by at least some teachers" (personal communication with authors, 3/3/04). We followed that advice with one exception—we did not include the fairly extensive collections in the SNCC papers of material used in an English project in some schools.

In general, we have tried to recreate the curriculum as it was described in the *Table of Contents* on the cover page of the mimeographs distributed to the teachers. At the places that seemed appropriate to us, we have inserted curriculum material that arrived later, or was written during the summer. The "Introductory Documents" were chosen to give the reader an overview of Freedom Summer as well as the plan and concept behind the curriculum and the schools. We have also included some reports and work of students.

Our source for all documents and the curriculum itself are the SNCC and MFDP papers (located at the King Center, Atlanta, and available on Microfilm in many University Libraries); the Iris Greenberg Papers at the Schomburg Center for Research in Black Culture, New York; and the SDS papers (located at the State Historical Society of Wisconsin, and also available on Microfilm.) Every part of the curriculum is annotated exactly as to where it can be found in these collections. In retyping the documents, we have corrected obvious typing errors, but have otherwise left appearance and layout as close to the original as possible.

Although this collection of curriculum material is copyrighted by us we do not claim authorship of anything but the introduction. We encourage everyone to print any part of interest

and use it for teaching, research, or nonprofit use. We intend to provide a PDF version of the complete curriculum on this website (www.educationanddemocracy.org.)

Recommended resources:

We are publishing the Freedom School Curriculum because we think that it is a timeless example of a progressive curriculum successfully implemented. While a superb model, the curriculum was, nevertheless, a very specific response to a unique historical period out of which its aims were generated. We provide only the briefest outline of this context in our [introduction](#). We *strongly* recommend that you read more about Freedom Summer.

We are in the process of publishing two books about the Freedom Summer and the Freedom Schools (see “Books and Articles” on the Education and Democracy website). *Lessons of Freedom Summer* puts the Freedom Schools and the curriculum in the wider context of the civil rights movement, the history of alternative education, and the current context of high-stakes testing. Its target audiences are teachers and teacher educators, but it is relevant for all those who are interested in the different aspects of, and methods employed by, the civil rights movement, especially community organizers. *People of Freedom Summer* is a text and workbook for high school and junior college students. The purpose of this book is to connect the history of the civil rights movement with the life of the student and today’s social justice and equal rights issues through questions and activities.

Some of the websites recommended below have extensive bibliographies. For a quick overview we recommend the following resources:

Books:

1. Dittmer, John. *Local People: The Struggle for Civil Rights in Mississippi*. Chicago: University of Illinois Press, 1994. Dittmer’s book is a comprehensive story of the Mississippi civil rights movement and excellent in putting Freedom Summer into this context.
2. Sutherland Martinez, Elizabeth, ed. *Letters from Mississippi*. Brookline: Zephyr Press, 2002. This is a collection of letters sent by Freedom Summer volunteers, grouped and annotated by Elizabeth Sutherland Martinez, and a foreword by Julian Bond. It is a very good first person account of the events of Freedom Summer, seen through the eyes of the northern volunteers.

Articles A few articles have been written about the Freedom Schools specifically:

1. Perlstein, Daniel. “Teaching Freedom: SNCC and the Creation of the Mississippi Freedom Schools.” *History of Education Quarterly* 30 (Fall 1990): 297-324.
2. Chilcoat, George W., and Ligon, Jerry A. “Developing Democratic Citizens: The Mississippi Freedom Schools as a Model for Social Studies Instruction,” *Theory and Research in Social Education* (XXII:2, Spring 1994, 128-175).
3. Chilcoat, George W., and Ligon, Jerry A. “‘Helping to Make Democracy a Living Reality’: The Curriculum Conference of the Mississippi Freedom Schools,” *Journal of Curriculum and Supervision* (XV:1, Fall 1999, 43-68).
4. Chilcoat, George W., and Ligon, Jerry A. “We Will Teach What Democracy Really Means By Living Democratically Within Our Own Schools,” *Education and Culture* (XI:3, Spring 1995, 1-19).
5. Chilcoat, George W., and Ligon, Jerry A. “Theatre as an Emancipatory Tool: Classroom Drama in the Mississippi Freedom Schools,” *Journal of Curriculum Studies* (XXX:5, 1998, 515-543).

6. Rachal, John R. "We'll Never Turn Back: Adult Education and the Struggle for Citizenship in Mississippi's Freedom Summer." *Adult Education Quarterly* 40, no. 3 (May 2000): 166.

Websites:

1. Civil Rights Movement Veterans: <http://www.crmvet.org/>
This a great resource for bibliography, links, stories of people working in the southern civil rights movement, a list of speakers, and current announcements
2. University of Southern Mississippi Digital Archives: <http://www.lib.usm.edu/~spcol/crda/>
Under "Oral Histories" you will find, among others, those of Mississippi local people (e.g. Hamer, Moore, Henry, Blackwell, etc.,) of members of the white "power structure" (e.g. Hamilton, Harned, McDaniel, etc.,) of SNCC and CORE workers in Mississippi (e.g. Cobb, Watkins, Guyot, etc.,) and of Freedom Summer volunteers (e.g. Adickes, Handke, Rubin, Barber, etc.)
Under "Search the Digital Collections" (click on Digital Media Archive, then Hyperion Hierarchy, then Civil Rights in Mississippi Digital Archive) you will find, for example, Photographs of Freedom Summer and the Schools in "Randall Photographs"; and diaries of Freedom School teachers in "Shaw papers" "Adickes papers" and "Glass Diary"
3. "McComb, USA": <http://www.ed.uiuc.edu/courses/ci407ss/>
A play written by students at the McComb Freedom School in 1964.

Music:

1. Voices of the Civil Rights Movement: Black American Freedom Songs 1960-1966. Smithsonian Folkways CD SF 40084. Some of the volunteers have said what they remember most vividly of Freedom Summer is the singing. This two CD set (43 songs) contains recordings of mass meetings and of the many ensembles that were created during the Southern Civil Rights movement. The enclosed booklet, written by Bernice Johnson Reagon, provides an excellent introduction into the role of African American musical culture in the civil rights movement, and explains many of the songs.
2. Freedom is a Constant Struggle: Songs of the Mississippi Civil Rights Movement. Folk Era Records FE1419CD. During Freedom Summer, many folk singers participated in the Mississippi Caravan of Music and gave concerts in the Freedom Schools. This two CD set (40 songs) a project of the Cultural Center of Social Change (www.ccsocialchange.org) features those artists and their songs about the movement in Mississippi.

Photos:

Randall, Herbert. *Faces of Freedom Summer*. Tuscaloosa: University of Alabama Press, 2001.

Acknowledgements:

Lois Chaffee, co-chair of the Curriculum Planning Committee, has to be credited with the creation of this curriculum.
Staughton Lynd (statewide Freedom School Coordinator during Freedom Summer) and Liz Aaronsohn, (previously Liz Fusco, statewide Freedom School Coordinator for the two years after Freedom Summer) gave us permission to reprint articles they have written on the Freedom Schools.

Herbert Randall gave us permission to use some of his photos of Freedom Summer on this website; Howard Zinn and Martin Duberman gave us permission to reprint excerpts of their work.

Howard Romaine, Mitch Zimmermann and Chris Joslyn gave us legal advice.

Jan Hillegas provided access to her collection of Civil Rights documents, and many movement contacts.

Casey Hayden, Mendy Samstein, Jane Stembridge, Dave Dennis, Charlie Cobb, Aviva Futorian, Sandra Adickes, Chude Pam Parker Allen, Frances O'Brien, Helen Garvy, Tom Hayden, Connie Brown Egleson, and others answered questions about the curriculum and provided new information.

We were amazed at the amount of support and encouragement we received from these movement veterans. To us, a younger generation, it provided a glimpse of what the Beloved Community must have been like.

We thank George Chilcoat and Jerry Ligon for comments and support.

We also thank the librarians, Ms Cynthia Lewis at the King Center; Diana Lachatanere and Wayne Furman at the Schomburg Center; and Diane DeCesare Ross at the University of Southern Mississippi McCain Library and Archives, for their help.

Finally, we thank Shelley Adams for typing most of the documents, and John Pilgrim for designing the Freedom School Curriculum website: www.eduationanddemocracy.org.

Call for comments and corrections:

As mentioned above, we have not been able to locate all parts of the curriculum, and we hope that those who taught in the Freedom Schools in 1964 will be kind enough to make us aware of any mistakes we have made or can provide missing material. Where we could identify the authors of the individual parts of the curriculum, we have done so. We would appreciate any information as to the identity of the other authors. Also, we think we have not infringed on any copyright, but would appreciate notification if have accidentally done so.

Copyright 2004; Kathy Emery, Sylvia Braselmann, and Linda Gold

INTRODUCTION: FREEDOM SUMMER AND THE FREEDOM SCHOOLS

In the summer of 1964, forty-one Freedom Schools opened in the churches, on the back porches, and under the trees of Mississippi. The students were native Mississippians, averaging fifteen years of age, but often including small children who had not yet begun school to the elderly who had spent their lives laboring in the fields. Their teachers were volunteers, for the most part still students themselves. The task of this small group of students and teachers was daunting. They set out to replace the fear of nearly two hundred years of violent control with hope and organized action. Both students and teachers faced the possibility, and in some cases, the reality, of brutal retaliation from local whites. They had little money and few supplies. Yet the Freedom Schools set out to alter forever the state of Mississippi, the stronghold of the Southern way of life.

The schools were an integral part of the 1964 Mississippi Summer Project (later known as Freedom Summer). The Summer Project was designed by an umbrella organization called the Council of Federated Organizations. COFO was an organization coordinating the efforts of representatives from the four major civil rights groups. For example, the National Association for the Advancement of Colored People (NAACP) provided lawyers for those thrown in jail when they participated in voter registration drives and civil disobedience. The Congress on Racial Equality (CORE) helped organized community centers. The Southern Christian Leadership Conference (SCLC) had established the Citizen Education Program in Mississippi the year before Freedom Summer. The Student Non-Violent Coordinating Committee (SNCC, pronounced “snick”) provided the field workers that went to the most dangerous parts of Mississippi to register voters. Freedom Summer was also supported the National Council of Churches, and during the summer volunteers of the Medical Committee for Human Rights, and lawyers from a variety of groups worked in Mississippi. The long-term aim of Freedom Summer was to transform the power structure of Mississippi. The short-term aim of the summer project was to challenge the legitimacy of the all white Mississippi Democratic Party at the Democratic National Convention in Atlantic City in August of 1964. To do this, organizers needed to create a parallel state party that was truly representative of the people of Mississippi—both blacks and whites.

To create a truly representative political party, the vast majority of disempowered African Americans would need to develop the self confidence and organizational skills required of active citizens. Freedom Summer’s three programs, distinct yet reinforcing each other, were voter registration, Freedom Schools and Community Centers (see [Prospectus for the Mississippi Freedom Summer](#).) The Freedom Schools’ major contribution to that process was to implement a curriculum based on the asking of questions whose answers were sought within the lives of the students. As the curriculum itself states:

We are going to talk about a lot of things: about Negro people and white people, about rich people and poor people, about the South and about the North, about you and what you think and feel and want. . . . And we’re going to try to be honest with each other and say what we believe. . . . We’ll also ask some questions and try to find some answers. The first thing is to look around, right here, and see how we live in Mississippi.

From Introduction to Unit I of the
Citizenship Curriculum: *Comparison of
Students’ Realities with Others*

Under the direction of Staughton Lynd, professor at Spelman College, the schools were established to teach confidence, voter literacy and political organization skills as well as academic

skills. The curriculum was directly linked to the formation of the Mississippi Freedom Democratic Party. As Edwin King, who ran for Lieutenant Governor on the MFDP ticket, stated, “Our assumption was that the parents of the Freedom School children, when we met them at night, that the Freedom Democratic Party would be the PTA.”

Both the schools and the Summer Project set about to support black Mississippians in naming the reality of their lives and then in changing that reality. The classroom and voter registration became one; both began with the lives of the people of Mississippi and, for both, “questioning (was) the vital tool.” The questions raised struck at the most fundamental assumptions white Americans held about themselves and the institutions they had created. As SNCC’s James Forman stated:

In SNCC we had often wondered: How do you make more people in this country share our experiences, understand what it is to look in the face of death because you’re black, feel hatred for the federal government that always makes excuses for the brutality of Southern cops and state troopers?

We often wondered: How do you make a fat, rich country like the United States understand that it has starving people within its own boundaries, people without land, people working on Senator Eastland’s plantation for three dollars a day or less?

We often wondered: How can you make the people in the United States exercise their responsibility to rid themselves of racist politicians who fight every progressive measure introduced in the halls of Congress?

We often wondered: How can we find the strength to continue our work in the face of the poverty of the people, to do everything that shouts to be done in the absence of so many resources?

The Mississippi Summer Project was an attempt to answer those questions.

THE CIVIL RIGHTS MOVEMENT IN MISSISSIPPI

QUESTION: What is COFO?

ANSWER: COFO is the Council of Federated Organizations—a federation of all the national civil rights organizations active in Mississippi, local political and action groups and some fraternal and social organizations.

QUESTION: How did COFO get started?

ANSWER: COFO has evolved through three phases in its short history. The first phase of the organization was little more than an ad hoc committee called together after the Freedom Rides of 1961 in an effort to have a meeting with Governor Ross Barnett. This committee of Mississippi civil rights leaders proved a convenient vehicle for channeling the voter registration program of the Voter Education Project, a part of the Southern Regional Council, into Mississippi. With the funds of the Voter Education Project, COFO went into a second phase. In this period, beginning in February 1962, COFO became an umbrella for voter registration drives in the Mississippi Delta and other isolated cities in Mississippi. At this time COFO added a small full-

time staff, mostly SNCC and a few CORE workers, and developed a voter registration program. The staff worked with local NAACP leaders and SCLC citizenship teachers . . . as a committee with a staff and a program until the fall of 1963.

From Unit VII, Part 2 (I),
Freedom School Curriculum

The civil rights organizations working with COFO agreed to share resources in Mississippi. They understood that they needed to cooperate to have a chance to bring change to the bastion of the white power structure. Mississippi had long been the most repressive state in the union. In 1962, African Americans were forty two percent of the population of the state. Of the approximately 525,000 registered voters in Mississippi who were eligible to vote in 1960, about 95 percent were white, fewer than five percent were African American. Economic and physical repression was a constant threat for most black Mississippians. Black infants (under one-year old) died at twice the rate of white children of the same age. Forty-three percent of Mississippi high school students left before graduating (1962). Ninety percent of Mississippi's sharecropper force was African American.

The seeds of Freedom Summer were planted in 1961. During that year a member of a Mississippi NAACP branch office, Amzie Moore, invited Bob Moses of SNCC to come to the state to help organize a voter registration campaign. Over the next several years, Moses and other SNCC field secretaries and CORE volunteers tried to help blacks register to vote. Medgar Evers of the NAACP helped organize a boycott of white businesses in Jackson beginning in December of 1962. But retribution was swift and brutal. The efforts were met with beatings, threats of violence and economic reprisals by the white establishment. The very night she returned from an unsuccessful attempt to register to vote, Fannie Lou Hamer and her family was put off the plantation where she had lived and worked for eighteen years. Among others, Herbert Lee, a farmer who helped voter registration efforts, was murdered in 1962 and Medgar Evers was murdered in 1963.

COFO's strength was not just the cooperation between the major civil rights group, but a strong local leadership. Black Mississippians identified with COFO as their own organization.

The emergence of the Ruleville Citizenship Group, and the Holmes County Voters League, testified to the possibility of starting strong local groups. It was felt that COFO could be the organization through which horizontal ties could develop among these groups. . . . During this second phase we began to feel more and more that the Committee could be based in a network of local adult groups sprung from the Movement as we worked the state.

From Unit VII, Part 2 (I),
Freedom School Curriculum

In the summer of 1963, Al Lowenstein and Bob Moses came up with the idea of holding a mock election to show that blacks would indeed vote if allowed. This "Freedom Vote" officially began with a state-wide convention on October 6, 1963 at the Masonic Temple in Jackson. The delegates selected an integrated ticket of Aaron Henry (NAACP) for governor and Ed King (Tougaloo College chaplain) as his running mate. One hundred white students come down for several weeks in the fall to participate in "Freedom Registration." On election day in November, nearly 80,000 blacks voted.

The third phase representing the present functioning of the organization began in the fall of 1963 with the Freedom Vote for Governor. This marked the first state-wide effort and coincided with the establishment of a state-wide office in Jackson and a trunk line to reach into the Mississippi Delta and hill country. The staff has broadened to include more CORE and SNCC workers and more [SCLC] citizenship schools.

From Unit VII, Part 2 (I),
Freedom School Curriculum

The success of the Freedom Vote was achieved at great cost. The process was slow and dangerous. To maintain the momentum gained in 1963, Moses and others began to contemplate a summer project for the following year but with a large number of northern white volunteers in order to draw national attention—and federal protection—to Mississippi. This idea of a Freedom Summer project was not immediately embraced by all those who had worked on the Freedom Vote. During SNCC and COFO staff meetings many expressed concern about the effect the influx of many white northerners would have on the development of local leadership. There was also concern about racial tensions. These debates led to an agreement to use white volunteers but to have their roles clearly defined and limited. Once this and other issues were settled, the decision was made to launch the Move On Mississippi. The blueprint for Freedom Summer was approved at the January COFO meeting (see Prospectus for the Mississippi Freedom Summer).

FREEDOM SUMMER

QUESTION: What are the programs sponsored by COFO?

ANSWER: COFO works in two major areas. 1) Political, 2) Educational and social. The educational and social programs are the Freedom Schools, Federal Programs, Literacy, Work-study, Food and Clothing and Community Centers. Some of these are in operation; others are in the process of being developed.

Freedom Schools are planned for the summer of 1964. There are several things which hopefully will be accomplished by the Schools. 1) to provide remedial instruction in basic educational skills but more importantly 2) to implant habits of free thinking and ideas of how a free society works, and 3) to lay the groundwork for a statewide youth movement.

From Unit VII, Part 2(I),
Freedom School Curriculum

During the deliberations about a summer project and discussions about what such a project could look like, SNCC field secretary Charles Cobb proposed to take advantage of the presence of the summer volunteers to use them as teachers, and include the issue of education in the project. “Students as well as professional educators from some of the best Universities and colleges in the North will be coming to Mississippi to lend themselves to the movement. These are some of the best minds in the country, and their academic value ought to be recognized and used to advantage.” Drawing from the ideas of the SCLC citizen’s schools and the SNCC education project in Selma Alabama, Cobb formally proposed the formation of Freedom Schools in December of 1963 (see Prospectus for a Summer Freedom School Program in Mississippi).

Cobb understood that, in Mississippi, “schools as institutions were part of the apparatus of oppression.”¹ Every aspect of traditional Mississippi schools conveyed the state’s message of racial inferiority and of the need for black children to adjust to their “place.” In the cotton lands

of the Delta, schools were closed during picking season. Libraries with books discarded from the white schools and science labs without equipment were the rule. In order to keep their jobs, African American public school teachers were often silent on political issues. In “Notes on Teaching in Mississippi,” Cobb stated:

Here, an idea of your own is a subversion that must be squelched. . . . Learning here means learning to stay in your place. Your place is to be satisfied—a “good nigger.” They have learned the learning necessary for immediate survival: that silence is safest, so volunteer nothing; that the teacher is the state, and tell them only what they want to hear; that the law and learning are white man’s law and learning.

The Freedom School concept proposed by Cobb added the school to the institutions that SNCC had set out to challenge, to transform, or, if necessary, to replace. In addition to opening the minds of the students to questioning, the schools would be an effective tool for political organizing; in the classroom, students would be trained to become local civil rights workers. “The overall theme of the school,” Cobb wrote, “would be the student as a force for social change in Mississippi.”²

What if we showed what was possible in education? We had already been approaching this through ‘literacy workshops’ within the context of organizing for voter registration. And SNCC itself had created a ‘nonviolent high school’ during the 1961 protests in McComb. . . . But we hadn’t really tackled education as an approach to community organizing in and of itself. Significantly, the model for how to do this emerged from a specific political organization that also grew out of grassroots organizing: the Mississippi Freedom Democratic Party.³

In Mississippi, SNCC workers found the doors to the existing institutions closed. In the Freedom Schools, as they had in the Freedom Vote and the Mississippi Democratic Party, they set about creating an alternative.

Origins of the Curriculum: The Curriculum Conference

Once the decision for the summer project had been taken, a Summer Educational Program Committee was formed. The seven members of the committee, co-chaired by Lois Chaffee, a white English teacher from Tougaloo College and John O’Neal, SNCC field secretary and co-founder of the Free Southern Theatre, discussed curriculum strategy and set out to prepare a curriculum conference.

The National Council of Churches sponsored the curriculum conference on March 21-22, in New York. The organizers cast a wide net in their invitations to the conference, and the fifty three people that participated represented a wide range of educational, philosophical and civil rights expertise. The conference pulled together representatives of SNCC, CORE, SCLC, SDS (Students for a Democratic Society), the National Council of Churches, teachers unions and others. Among the participants were Ella Backer; Septima Clark, head of the SCLC citizen schools; Highlander’s Myles Horton; Noel Day, a junior-high school teacher who had organized a one-day program during the 1963 Boston school boycott; Norma Becker and Sandra Adickes, New York teachers and activist members of the United Federation of Teachers; and Staughton Lynd, political activist and professor of history at Spelman College, later state-wide director of the Freedom Schools.

The conference participants broke up into four subgroups to address the specific areas and to write curriculum (see Outline for Curriculum Planning). They were asked to keep in mind that the curriculum had to take into account the inexperience of the volunteers as teachers, their ignorance of what life was like in Mississippi, and the relative short time they would have for teaching. Thus, the curriculum had to be teacher friendly and immediately usable. The goal was a curriculum around questions and activities that would invite discussion and re-enforce the relationship between school and the life of the student.⁴

At the end of the two-day conference, the subgroups wrote reports that became the basis for the curriculum. Subgroup One, Leadership Training, broke up into two smaller committees. One committee developed a course in black history. Barbara Jones of SNCC's New York office wrote a Negro history outline, and Bea Young from Chicago submitted a study of the Amistad case. Staughton Lynd then used these two parts as the basis for the Guide to Negro History (see Guide to Negro History).⁵ The other committee submitted a citizenship curriculum, written by Noel Day and Peggy Damon-Day. Noel Day had written curriculum for a number of Freedom Schools around the country. His proposal was somewhat abridged and modified by Jane Stembridge, and became the first six Units of the Citizenship Curriculum (see Citizenship Curriculum).⁶

Subgroup two, Remedial Academic Curriculum, again divided into two smaller working committees. One committee discussed the role of testing, and in its short report summarized the decision that testing should not be used, since "traditional evaluation and testing methods were as oppressive as traditional teaching methods—both caused fear, submissiveness and loss of self-respect among students."⁷ The other committee report was submitted by Sandra Adickes, New York city teacher who had also taught in the summer schools in Prince Edwards county, Virginia, 1963. This report became the Reading and Writing part of the Academic Curriculum.

Subgroup four, Nonacademic Activities, recommended the use of student newspapers, drama, and creative writing, and leadership development through participation in voter registration activities. They also recommended that students should develop skills in student government and be given opportunities to meet in a state-wide convention to form networks.⁸

The majority of conference participants worked in subgroup three, Contemporary Issues. The group suggested to teach problem solving through a series of case studies that would relate classroom knowledge to the wider political, social and economic issues. In the first part of their report, they delineated the educational principles, and in the second part described a layout for 13 case studies to be written by conference participants and others (see Report of Contemporary Issues Subgroup of Curriculum Conference).

From the end of March to the beginning of the orientation on June 20, the curriculum committee, especially Lois Chaffee, worked furiously to collect all the promised material. Due to the short time, only some of the case studies suggested by the contemporary issues subgroup were completed. Some of those case studies included extensive lesson plans, for example the case study comparing the Nazi German power structure and the power structure of the South, which included teacher guidelines and suggestions for instructional strategies. Others merely provided information or analysis, but did not give suggestions on how to teach.

THE CURRICULUM

The curriculum conference had brought together people from different groups and backgrounds. Similarly, the final curriculum distributed to the teachers consisted of material from different

origins. The Academic Curriculum and Unit VII of the Citizenship Curriculum were written for the Freedom Schools, as well as some case studies (Mississippi Power Structure; Voter Registration Laws in Mississippi; Civil Rights Bill; Nazi Germany.) Units I to VI of the Citizenship Curriculum was based on curriculum written previously, but modified for the Mississippi Freedom Schools. In addition, supporting information and teaching material was provided. COFO staff put together collections (Statistics on Education, Housing, Income and Employment and Health; Statements of Discipline of Nonviolent Movements; Readings in Nonviolence.) Two reprints of *Liberation* magazine articles were included (Triple Revolution; Rifle Squads or the Beloved Community.) Finally, the coordinators of the schools received a copy of Martin Duberman's *In White America*, and six papers written by members of SDS, the Students for a Democratic Society (South as an Underdeveloped Area; Chester, PA; Cambridge, MD; NYC School crisis; Power of the Dixiecrats; Hazard, KY).

The Table of Contents of the curriculum assigned these supporting materials to units of the citizenship curriculum. An alternative approach of connecting and using the case studies planned by the Contemporary Issues subgroup was provided in the Outline for Case Studies that had been mailed to the teachers. That these approaches were complementary rather than exclusive is shown in the fact that the suggested case studies on Freedom Rides and Sit-Ins, and on COFO's political program, became part VII of the Citizenship Curriculum.

Part of the curriculum material was mailed to the teachers on May 16, and the rest was typed up by Alice Lynd and reproduced on a hectograph machine by the Lynds in their Atlanta apartment. Staughton Lynd and some volunteers drove the material up to the orientation in Ohio in the trunk of the Lynd's car.

The curriculum writing, however, was not over. Very quickly The Guide to Negro History became a favorite of the students, and the COFO office in Jackson sent out more teaching materials, including copies of different books on Negro History, and Robert Zangrando wrote two more papers covering the time after 1900 (see History Addendum I, History Addendum II, and Negro History Study Questions).⁹

The volunteer teachers did what the organizers had hoped, they drew upon the students' interests and ideas, taught what they knew and developed curriculum and wrote papers. Non-violence in American History was one response to the need they saw in the schools. Hattiesburg Freedom School teacher and Stanford Historian Otis Pease added material on The Development of Negro Power in American Politics Since 1900; and Brian Peterson in McComb wrote a discussion course "The American Negro in a World of Change."¹⁰

The materials that have since become known as the Freedom School Curriculum were intended to be used in conjunction with the knowledge and skills that the students brought to the schools in the form of their own experiences. The interaction of written curriculum with lived experiences took the form of discussion, debate, drama and ultimately political action.¹¹ All three sections of the Freedom School Curriculum—the Academic Curriculum, the Citizenship Curriculum, and a Recreational Curriculum—were intended to promote the following principles:

1. The school is an agent of social change.
2. Students must know their own history.
3. The curriculum should be linked to the student's experience.
4. Questions should be open-ended.
5. Developing academic skills is crucial.

The Academic Curriculum suggested reading, writing and verbal activities based on the students' experiences. The Citizenship Curriculum consisted of seven units that would be used to "encourage the asking of questions, and hope that society can be improved." Each of the seven units consisted of subject material (both secondary and primary), questions, readings, and activities. The introduction to the curriculum wished to "emphasize" that such materials were

only suggestions, and that individual teachers may interpret the concepts in different ways or substitute other methods. There is probably more in each unit than it will be possible to use, but it was included so that each teacher would have a range of material to choose from, and extra material if necessary.

As they studied the curriculum, teachers were told to discard it and to create, on the spot if necessary, activities and questions that responded to the needs of the students in front of them. The curriculum's central premise, the importance of questioning, challenged the concept of a written curriculum. The Freedom School curriculum encourages—in fact, mandated—that the teacher improvise. The mimeographed sheets taken by the teachers into the classroom were not intended to be memorized or "covered"; the curriculum served as a springboard to classroom activities that linked the suggested lessons to the lived experience of the students. Like the Mississippi Freedom Democratic Party, the Freedom Schools were radical; their purpose was to replace an existing social institution with an institution rooted in the lived experience of those who had been exploited, oppressed, and excluded by the original system.

A necessary step in this process was to make the old system visible to the students, to help them understand how the system gained its power, and to help them challenge the system's version of reality, a version of reality which appeared externally in social structures and internally in their view of themselves, their history, and the possibilities for their future. Before the students could learn, they had to un-learn the self-negation taught by Mississippi's segregated schools. One strategy to achieve this was to replace the negative images of African Americans created by the old system with positive images generated by reclaimed history. The curriculum intended that teacher would help the students learn to trust their own voices and their own experience.

The Academic Curriculum

The first part of the Academic curriculum consisted of "the presentation of conventional academic subjects." Teachers were advised to introduce these subjects "at the beginning of the school day, when students are fresh."¹² From the beginning, the Freedom Schools interpreted the teaching of skills as a political act. The failure of the Mississippi public schools to teach skills maintained racial boundaries and reinforced students' sense of their own inferiority. To challenge the power structure, the students needed to read, to write, and to master basic math; the Freedom Schools began the task of providing these skills. But the skills were not taught out of context; they were to be taught from an experiential and interdisciplinary approach.

If, for example, the group of students plan to canvass, the language arts phase of the program could concentrate on an appropriate verbal skill, the social studies area could be devoted to the study of the population to be canvassed in terms of economic, social, religious factors and the implications of those factors, the math area could be given over to statistical breakdowns, charts, etc.

The writers of the curriculum believed that the teachers needed to monitor the students' engagement and adjust the content and methodology to maintain the interest of the student. The student's interest depended a great deal on his and her ability to understand and learn the material. This in turn would be dependent upon:

1. developing positive relationships between teacher and student as well as among students;
2. not overwhelming the students with more information than they can learn at a given time;
3. switching activities whenever one is not engaging the students; and
4. as much as possible, using the students' own experiences as the content of the curriculum.

(See Non-Material Teaching Suggestions for Freedom Schools)

The Citizenship Curriculum

The second part of the curriculum, partly an adaptation by educator Noel Day from a curriculum he had created during the Boston school boycott, taught students to see themselves as initiators of social change. The curriculum contained exercises in naming the power structure and analyzing how it worked. They were also asked to name their own reality and to contrast their reality with reality of more privileged whites. This section contained two sets of guiding questions:

Basic Set of Questions:

1. *Why are we (students and teachers) in Freedom Schools?*
2. *What is the freedom movement?*
3. *What alternatives does the freedom movement offer us?*

Secondary Set of Questions:

1. *What does the majority culture have that we want?*
2. *What does the majority culture have that we don't want?*
3. *What do we have that we want to keep?*

These organizing questions were repeated throughout the seven units of Part II, the Citizenship Curriculum.

- Unit I: The Negro in Mississippi (comparison of the student's reality with that of others)
- Unit II: The Negro in the North
- Unit III: Myths about the Negro (examining the apparent reality)
- Unit IV: The Power Structure
- Unit V: Poor whites, poor Negroes, and their fears
- Unit VI: Soul Things and Material Things
- Unit VII: The Movement:
 - Part 1: Freedom Rides and Sit-Ins
 - Part 2: COFO's Political Program

The argument being presented in the Citizenship Curriculum was something like this: Your life can be better than it is right now (Unit I) but going north will not improve it (Unit II). You need

to stay in Mississippi and fight to improve the schools, housing, and hospitals that are available to you. This fight has not been waged in the past because Negroes have internalized the myths about them (Unit III) and face a white power structure that permeates all aspects of life (Unit IV). The rich white elites that control the power structure have been able to enlist poor whites by playing on their fears—poor whites are victims as well (Unit V). As long as poor Negroes and poor whites desire “material things” over “soul things,” they can be manipulated by fear and thus effectively deprived of both material and soul things (Unit VI). Direct action and political action are instruments of social change (Unit VII). At the end of the curriculum, students were encouraged to become actively involved in the process of social change.

Case Studies

The purpose of the case studies was to provide the teachers and students with documents and data supporting the content of the curriculum, and to provide lesson plans where possible. Their origin and quality was diverse, some were written or assembled specifically for the Freedom Schools, others were provided by different organizations. In the case studies, students were given a problem and were actively involved in the creation of a response. “Teachers were to focus not on teaching facts but on teaching students to draw upon their own experiences, to relate the case studies to current situations in Mississippi, and to derive suggestions to solving problems in their own area.”¹³

Guide to Negro History

Authored by historian and Freedom School Coordinator Staughton Lynd and based on Bea Young and Barbara Jones’ work, the Guide to Negro History presented to the students previously untold stories of resistance, accomplishment, and heroism. The Guide not only challenged the status of the white version of history, it provided models for action. For the first time, students heard stories of slave rebellions aboard the Amistad and in Haiti; the heroes of the Confederacy and the myths of the Old South were discarded and were replaced with new heroes and new stories.

Once the schools had started, the importance of African American history and the great desire of students to learn more about their own place in history became very obvious. The Freedom School in Jackson organized a special Negro History program in the second half of the summer, and wrote additional teaching material covering the 20th century (see History Addendum I, History Addendum II, and Negro History Study Questions).

Preparations for Teaching: The Orientation

The 280 Freedom Summer volunteers who were assigned to be teachers in the Freedom Schools took part in the second of two, one week-long orientation sessions held in June at Western College for Women in Oxford, Ohio. The volunteers, few of whom were professional teachers, received an introduction into the political and economic conditions of Mississippi, in the type of education their students would have received in the state’s segregated schools, and in techniques which might help open the minds of their students to new ideas and possibilities. Historian Howard Zinn described the advice the teachers were given at Oxford:

You’ll arrive in Ruleville, in the Delta. It will be 100 degrees, and you’ll be sweaty and dirty. You won’t be able to bathe often or sleep well or eat good food. The first day of school, there may be four teachers and three students. And the local Negro minister will phone to say you

can't use his church basement after all, because his life has been threatened. And the curriculum we've drawn up—Negro history and American government—may be something you know only a little about yourself. Well, you'll knock on doors all day in the hot sun to find students. You'll meet on someone's lawn under a tree. You'll tear up the curriculum and teach what you know.¹⁴

The dangers the teachers would face were communicated to them dramatically with the disappearance of CORE workers James Chaney and Michael Schwerner, and summer volunteer Andrew Goodman. The three had participated in the first orientation, Schwerner and Chaney as staff, and had left for Mississippi on the weekend before the volunteer teachers arrived for their orientation. They intended to investigate a church burning that had occurred after the congregation had voted to house a Freedom School. On their way back, they were arrested by the local sheriff, released in the late evening, and disappeared. The worry about the three civil rights workers hung over the week-long orientation, and on the last day of the orientation, Bob Moses announced that the SNCC staff was convinced that the three had been murdered. After this announcement, Staughton Lynd spent part of the evening counseling teachers who were reconsidering their decision to go to Mississippi. Kirsty Powell, as one of the volunteer teachers, questioned the emphasis at Oxford on the dangers of going (see [A Report, Mainly on Ruleville](#)). Writing after the summer was over, Powell reflected that

The main effect of Oxford (was it the main design?) was to bring each of us to the point of asking: "Do I really believe in this enough to go? Ought I go? Do I want to go? This was as it should have been, I think. At the time I felt that such emphasis was placed on preparing for the dangers . . . that we did scant justice to the job of preparing to teach or of understanding the meaning of the Freedom School concept. . . . The Freedom School sessions . . . could have been bettered. . . . The Curriculum was excellent, but . . . it was not used as well as it deserved . . . partly . . . because it wasn't really explored at Oxford. . . .¹⁵

The first Freedom School teachers arrived in Mississippi in late June, planning to open twenty schools with approximately one thousand students. Like SNCC field secretaries and other summer volunteers, the teachers stayed in the homes of local people. Classrooms were found anywhere the black community was willing to situate them—in churches, in basements, on porches, under trees. Attendance was entirely voluntary; part of a teacher's task was to canvass for students. Like voter registration workers, teachers knocked on doors, explained their purpose, and encouraged participation. Often, to establish their link with the community, they were accompanied by local teenagers who had showed up at the COFO office.

Word of the schools spread from one student to another, and gradually the classes began to fill. The anticipated enrollment of one thousand grew, day by day, student by student, to two thousand. Classes were attended not only by the teenagers for whom they were planned but by younger children and adults.

THE SCHOOLS IN PRACTICE

It is not our purpose to impose a particularly set of conclusions. Our purpose is to encourage the asking of questions, and hope that society can be improved.

Introduction,
Citizenship Curriculum

Like the Mississippi Freedom Democratic Party, the Freedom School was an alternative and not an imitation. Historically, Mississippi's schools for African American children had perpetuated the notion that whiteness was a norm from which all peoples of color deviated. The black child would have been at best invisible and at worst humiliated. An education which perpetuated self-rejection could not lead to significant change in the political status of African Americans. What good were the schools and libraries of Mississippi if within them the black child had no history, no voice, and no self-respect? In the Freedom School, the child was to be taught to question and to create.

Stokely Carmichael, veteran of the Freedom Rides and director of the COFO project in Greenwood, Mississippi, conducted a Freedom School class "like participatory democracy—in which leaders questioned, the mass of people guided, and any idea for change was regarded as a realistic possibility."¹⁶ Using language as a means of discussing racial divisions, Carmichael wrote four sentences on the left side of the board in local black dialect and, on the right side, four in standard English.

STOKELY: Will society reject you if you don't speak like on the right side of the board? Gladys said society would reject you.

GLADYS: You might as well face it, man! What we gotta do is go out and become middle class. If you can't speak good English, you don't have a car, a job, or anything.

STOKELY: If society rejects you because you don't speak good English, should you learn to speak good English?

CLASS: No!

ALMA: I'm tired of doing what society say. . . . People ought just to accept each other. . . . If I change for society, I wouldn't be free anyway. . . . If the majority speaks on the left, then a minority must rule society? Why do we have to change to be accepted by the minority group?

STOKELY: Let's think about two questions for next time: What is society? Who makes the rules for society?¹⁷

Everything about the Freedom schools was fluid in order to link the reality of the students' lives to the goal of social and economic justice for all. The teachers taught whatever was needed and requested by the students, from typing to French. They were encouraged to modify the curriculum as needed, but to stick with the question and answer method. "The paper curriculum that Alice and I had produced was for the most part set aside as teachers improvised: writing school newspapers, typing, French, and poetry were among the most popular subjects," wrote Lynd later.¹⁸ The actual experience of the Freedom Schools was created by students and teachers in active and often spontaneous collaboration. As lawyer and summer volunteer Len Holt stated:

From the beginning, the schools were a challenge to the insistent principle that everyone had talked about so much: flexibility. Where the initial plans had been for only the tenth, eleventh, and twelfth grades, one found sitting in the informal circles youngsters with the smooth black faces and wondering eyes of the impish faces of nine and ten who were mere fifth-graders. Flexibility. And there just behind teen-aged boys—with slender, cotton-picking muscles—were sets of gnarled hands and the care-chiseled faces of grandmothers, some of whom said they thought they were in the seventies (birth records for the old are almost non-existent). Flexibility.¹⁹

In Freedom School classes, the teachers used many of the methods—role playing, music, and open-ended discussion—that had been honed in the movement of which the schools were a crucial part. Students were taught to question, discuss and debate so they could begin to formulate their own thoughts, thoughts that would necessarily lead to action.²⁰ “The kind of teaching that was done in the Freedom Schools was, despite its departure from orthodoxy—or more likely, because of it—just about the best kind there is. . . . (The teachers) taught, not out of textbooks, but out of life, trying to link the daily headlines with the best and deepest of man’s intellectual tradition”²¹ (see Notes on Teaching in Mississippi).

Supervision and Finances

The compilers of the FSC believed that accountability needed to be incorporated into the program itself. The Basic and Secondary Questions that were to be “reintroduced periodically” were to “both permit an on-going evaluation of the effectiveness of the curriculum, and to provide students with recurring opportunities for perceiving their own growth in sophistication.”²² Assessment and evaluation occurred on the level and at the time that it could do the most good—both the student and teacher were the primary evaluators. A second-level evaluation occurred at the state organizational level in order to support the work at the site level. The Freedom Schools were instructed to write regular reports and send them to the COFO office in Jackson (see A Report, Mainly on Ruleville). These reports were used to create regular press releases and profiles (see Profiles of Typical Freedom Schools).

The teachers were expected not only to pay their own way but to assist in fundraising. But as much as possible, COFO attempted to fund the Freedom Schools in terms of food (for students,) rent, transportation, equipment, phone bills, if not salaries for the teachers. One early planning budget suggested (in 1964 dollars): Hattiesburg, \$2,000; Meridian, \$1,300; Holly Springs, \$1,000; Ruleville, \$700. The variety in budgets depended on the relative resources of the community as well as the money the COFO organizations were able to raise nationally. Some towns’ organizations could raise more money than others in order to pay for that which could not be acquired through donations. Some towns were able to have space and equipment donated.²³ In the end, the Freedom Schools ran on a shoestring budget; Staughton Lynd estimated that less than \$2000 passed through the Jackson office, and most of that was used for film rentals.²⁴

Many supplies, especially books for the libraries of the Community Centers, were collected before the summer began. A Jackson COFO memo sent out to “Everybody working with the Mississippi Freedom Summer Project” suggested appealing to manufacturers to donate equipment such as tape recorders and movie projectors. The memo asked “everybody” to solicit libraries across the country for donations based on the specific book list provided. A Community Center brochure indicated that national unions were raising money to buy books for the Community Centers.

The reality of the Freedom Schools seemed to conform to Staughton Lynd's image of a guerrilla army which “swims in the sea” of the people among whom it lives.²⁵

The Freedom School Classrooms

The actual schedule varied from school to school, depending on the needs of the students and the local public school schedule. The Ruleville Freedom School, for example, was scheduled as follows:

9:00-9:15 Civil rights songs

9:30-10:30	Core classes: Negro history and Citizenship curriculum
10:30-11:30	Choice of dance, drama, art, auto mechanics, guitar and folksinging, or sports
12:00-2:00	School closed
2:00-4:00	Classes in French, religion, crafts, music, playwriting, journalism
4:00	Seminar on non-violence ²⁶

Discussion

The Purpose of the freedom schools is to help [the students] begin to question

Notes on Teaching in Mississippi

At the center of the curriculum was education's most powerful tool: the question. The questions were not meant to be answered by the individual student, but by the group. The basic and secondary set of questions did not ask: "What alternatives does the Freedom Movement offer me?" or "What does the majority culture have that I want?" The questions asked: "What does it offer us?" And: ". . .that we want?" Group discussion was the tool that made this community building approach possible.

To students accustomed to memorization and rote learning, discussion was crucial in creating voice and teaching them to value themselves and their classmates. Chairs were arranged in a circle to alter the concept of the teacher as an authority who could not be challenged. Teachers began with introductory questions and then followed up with probing questions. Frequently the teachers asked the students, "How do you feel about this?" Students were encouraged to ask questions as well.

Anything could serve as the basis for a discussion—local events, history, personal experience. "The teachers asked questions and the students talked," wrote Len Holt. "The students could and did say what they thought to be important, and no idea was ridiculed or forbidden—an immeasurably traumatic joy for the souls of young black folk."²⁷ A teacher from the Vicksburg Freedom School wrote:

I read to them from Thomas Wolfe's Look Homeward Angel and from Martin Luther King's I Have a Dream, then had them write speeches as if they were Senators urging passage of the civil rights bill. I tried to extend the idea of oppression beyond race. If you pick on a small kid with glasses and beat him up, aren't you acting the same as the white segregationists? I asked them.²⁸

Another teacher helped his students define the word "skeptical." "We should feel free to think as we want, question whomever we like, whether it's our parents, our minister, our teachers, yes, me, right here. Don't take my word for things. Check up on them. Be *skeptical*."²⁹

Plays

The viewing and creation of plays was an important part of the experience of many Freedom School students. In attending a production of *In White America*, many students saw live theater for the first time. Martin Duberman's documents-based drama inspired students and teachers to dramatize African American history for themselves. At the Holly Springs Freedom School, students created a play based on the life and death of Medgar Evers. In a discussion of the events of Evers's life, one student remarked, "I don't think of him as really dead. I feel that from his grave is growing a huge tree which is spreading seeds of freedom all over."³⁰ The child's

metaphor became the title of the play: “Seeds of Freedom.” At the end of the drama, the narrator states:

And this is a play about freedom . . . about us! Yes, us, because every step we take along the freedom road, every time we act, every time we do something to move forward . . . we plant a seed. And seeds are blowing in the wind today.³¹

In Milestone, Mississippi, the Freedom School play was presented at the end of a local community meeting. The play dramatized events in African American history, from slavery to the present, and ended with an exhortation to the audience:

I am the American Negro.
 You have seen my past; you have known my past.
 And you have seen the trouble I've seen.
 Today we have seen many men die
 Because they stood for their rights.
 Today we have seen three men disappear
 For joining our fight.
 Tomorrow many more will die.
 And many more will suffer,
 But we've begun and we are not turning back
 And someday, somehow, we shall overcome!³²

The Ruleville Freedom School created a puppet play in which the knight Bob Moses fought a wicked witch named Segregation. In some schools, the students used their own experience as the basis for drama. At the Ruleville Freedom School, a play was created from a protest staged by the students; in Gulfport, students composed a short play entitled *Memories of Freedom School* (see Notes on Teaching, Noel Day, “Remarks about Method”).

Role Playing

Role playing was used not only to help students understand concepts but to prepare them for direct action. “Kids that age are natural actors,” explained a Freedom School teacher. “And it puts them in other people’s shoes. We don’t want to win easy arguments over straw foes. They have got to be tough thinkers, tough arguers.”³³ In one classroom, students debated the arguments against the Civil Rights bill offered by conservative presidential candidate Barry Goldwater. Goldwater’s arguments were listed on the board, and one student as Goldwater defended them against counter-arguments from the class. As it had been in the movement, role playing was also used to prepare students for the direct action of canvassing and picketing.

Music

As it was in the movement, music was a significant part of the curriculum in each of the Freedom School. Most schedules included a daily session of the singing of Freedom songs. The Mississippi Caravan of Music paid several visits to Freedom School classrooms; in these visits, folksingers like Pete Seeger introduced students to songs of the movement and linked the students’ experiences, through folk music, to the experiences of people in other countries. In Gulfport, the school day ended with the singing of “We Shall Overcome.”

There was one special song, a very solemn song. It requires everyone to gather in a circle and join hands for a time, each thinking in his own mind about the meaning of freedom and about people like Medgar Evers, Herbert Lee, and the three civil rights workers in Neshoba County, and all the others who have died fighting for freedom in Mississippi. . . . The song lets students and teachers know the pattern of their lives, that all the great number of years which comprise a life is not so many after all when there is freedom to be fought for.³⁴

Poetry

Poetry was seen as a crucial means of expression, a means by which students long silenced gave form and shape to their feelings and aspirations. A poem by a twelve-year-old girl in the Biloxi Freedom School was a response to the question “What is wrong?”

What is wrong with me everywhere I go
No one seems to look at me.
Sometimes I cry.

I walk through woods and sit on a stone.
I look at the stars and I sometimes wish.

Probably if my wish ever comes true,
Everyone will look at me.³⁵

The poetry, shared with the class, was part of the process of unsilencing, as well as a means of linking their personal pain to the oppression they faced as blacks in Mississippi. In Harmony, Mississippi, thirteen-year-old Ida Ruth Griffith, read a poem to a class held under the trees:

I am Mississippi-fed,
I am Mississippi-bred,
Nothing but a poor, black boy.

I am a Mississippi slave,
I shall be buried in a Mississippi grave,
Nothing but a poor, dead boy.

Some students angrily challenged the poet’s use of the word “slave”; others defended it. “She’s right,” one student argued. “We are. Can your poppa vote? Can mine? Can our folks eat anywhere they want to?”³⁶ Students also read the works of many other poets—Langston Hughes, Gertrude Stein, Robert Frost, and e. e. cummings, for example—and often used these works as models for their own.

Newspapers

Almost every one of the Freedom Schools published a newspaper. This action was in itself radical in a state whose press was controlled by the interests of the white power structure; in many communities, these student newspapers were the first alternative presses. Freedom School newspapers contained student poetry, announcements about political demonstrations, editorials, and reports of local events (see Excerpts of Student Work and Freedom School Data).

Political Action

The direct link between the classroom and the community encouraged by the Citizenship Curriculum often occurred in the Freedom School Classrooms. The Freedom School was in many cases literally a school without walls, and passers-by could be drawn into the discussions. “One day three Negro ladies trudged by, looking angry and forlorn, on their way back from the courthouse, where they had just learned that their applications for voter registration had been rejected. The teacher called them over to tell what had happened. Thus the students learned of the registration procedures and how to help their parents pass the exams.”³⁷ In Jackson, Mississippi, Freedom School students and teachers organized a response to an announcement that African American parents would be allowed to register their children at a previously all-white public school. In classroom discussions and role playing, students explored their apprehensions about the consequences for parents who registered to vote; a teacher and student volunteers visited over seventy families and encouraged them to attend a prayer meeting organized by local ministers to support registration. When only one mother attended the meeting, students returned to the seventy families to urge them to register. Eleven of the forty-three eligible children were registered; this number represented progress for Mississippi. After realizing that black public school teachers were afraid to jeopardize their jobs by registering to vote, students at the Ruleville Freedom School performed role plays to encourage their teachers to vote and practiced picketing. With the support of their teacher, students wrote a letter announcing their intention to the principal and faculty, and successfully picketed the local high school. In many Freedom Schools, students shared the work of the Mississippi Freedom Democratic Party. “It’s what the school was about—educating students for involvement in changing social conditions,” wrote teacher Pam Allen of the Holly Springs Freedom School. “[The] main work was registering people into the MFDP” (see Report, Mainly on Ruleville (excerpt) and New Houses of Liberty).

The Freedom School Convention

Throughout Freedom Summer, Freedom School students had been educated for political empowerment. While the voting-age adults attended the MFDP state convention in Jackson, the students held their own convention in Meridian on August 6-8, and addressed many of the same issues. The students held a parallel convention, rather than leaving politics to their elders. Just as the students were asked to do voter registration work, they participated in the convention process as well. Edwin King described the MFDP as the PTA of the Freedom Schools. The Freedom Schools and the MFDP were, in many ways, the same organization.

Freedom Schools—Final Report, 1964, suggested that the best way to evaluate the effectiveness of the Freedom Schools was to read the *Program* from the Freedom School Convention in Meridian. The *Report* wanted the reader to “Note particularly the proposal for a state-wide school boycott. School boycotts are already in progress in Shaw and Harmony. A boycott is about to begin in Indianola. There will be many such boycotts during the winter.” If the primary purpose of the Freedom Schools was to empower students to take direct action, the existence of school boycotts was evidence of the success of the curriculum.

In an article he wrote for *Freedomways* in 1965, Staughton Lynd proposed “If I were to start a Freedom School now (and we are about to start one in New Haven), I would suggest: Begin with a Freedom School Convention and let that provide your curriculum” (see The Freedom Schools: Concept and Organization). He began to come to this conclusion during the second day of the Freedom School Convention during which the students had begun to reject the advice of

the adults. They had discovered that they could do everything themselves. What came out of this convention was a political program. Lynd believed at that time that “it would have been better if the schools had begun with such a convention, and if the statewide program brought back to each school by its delegates had then become the curriculum for the summer.” Lynd worried that the Civil Rights movement was being “strangely neglectful of program.” The Freedom School Convention delegates, on the other hand, were not being so neglectful. Lynd anticipated that the Freedom Schools could provide future political candidates who would be able “to declare themselves intelligently on a variety of issues” if the Freedom School Platform became the new curriculum of the Freedom Schools (see Platform of the Freedom School Convention).

FREEDOM SCHOOLS BEYOND FREEDOM SUMMER

QUESTION: Even with all this, how can we hope to win in Mississippi?

ANSWER: We won't win, at least not for a very long time, unless the federal government throws its weight behind us.

QUESTION: What can we do to force the federal government to help us?

ANSWER: We can continue working constantly to show the world how horrible Mississippi is, and continue trying to change it.

From Unit VII, Part I,

The MFDP's attempt to challenge the seating of the regular Democrats at the Democratic National Convention was unsuccessful. However, the bitterness of defeat of at the convention was only the bitterness of losing a battle and not the war. Challenging the MDP in Atlantic City was only one of the goals of Freedom Summer. A sea change in consciousness was the other. And there was evidence that such a change had occurred, as Liz Fusco described in her report at the end of the summer (see Freedom Schools in Mississippi, 1964).

Many remained committed to continuing to work hard to change things in Mississippi. Freedom Schools continued to operate in the fall of 1964. The Mississippi Freedom Labor Union was organized in January of 1965 at a Freedom School Discussion. Federal funds became available through the federal Economic Opportunity Act of 1964. In 1965, a group of Freedom Summer workers used federal funding to establish day care centers for preschoolers and the FDP continued to register voters.

Once the summer ended, most volunteers returned to their homes but some stayed. Liz Fusco, who had been the head of the Indianola Freedom School, became coordinator for the fall program. In a report entitled “Freedom Centers—What's Happening,” dated September, 1964, Liz Fusco described some progress and some discouragement. Some Freedom Schools suspended daytime classes and held adult classes in the evening to support voter registration; other schools continued with daytime classes for children whose regular public school classes had been suspended for cotton picking. Many places maintained community centers which housed libraries and sponsored after-school tutoring. The Mississippi Student Union (MSU), an organization of teenagers, offered support for the continuing Freedom Schools. In Ruleville, “Kindergarten in the daytime, high school and adults in the evenings. Extensive use of library. . . . The adults meet two nights a week for reading and discussion. The MSU kids hold Sunday-afternoon meetings instead of Saturday-night dances, then refreshments.” In Cleveland, the “MSU is active in school, refusing by letter to raise money by the campus queen drive. Talking about eating in public places

and boycotting stores.” In Tchula, Fusco reported, “In process of building new community center. Freedom School staff mostly in jail” (see [Freedom School Data](#)).

Charles Cobb wrote that the Freedom School program, like the Movement, was “a victim of its success.” Freedom Summer had focused the attention of the country on Mississippi, and some change followed. “We had in one sense accomplished what we set out to do: a public accommodations law had been passed; a voting rights law seemed certain. Mississippi was now prominently on the political map. New organizations, like the Mississippi Child Development Group, with deeper financial pockets, were establishing themselves.” Federal programs like Head Start turned the problems of compensatory education over to government.

Cobb wrote, “Perhaps the fact that the schools existed at all was their greatest success. As Freedom School Director Staughton Lynd noted in a report to COFO that summer, the schools ‘helped to loosen the hard knot of fear and to organize the Negro community.’”³⁸ Lynd stated in a 1964 newspaper interview that the schools may have sown the seeds of future social change by briefly providing an alternative to Mississippi rigid caste system. “Mississippi is never going to be the same. There are 2,000 youngsters who now know that they can relate to whites on a basis of equality. These kids want to be educated; they reach out for it. If the Negro gets the vote, these are the people who will be in the legislature in future years.”³⁹

But the Freedom Schools were neither the beginning nor the end of the process of linking education to social change. Their antecedents were many: the Highlander Folk School, the Citizens Education Program of the SCLC, the classes in nonviolent resistance held by James Lawson in Nashville, the role plays in Montgomery churches in preparation for the bus boycott, and Nonviolent High, to name only a few examples. Certain principles of education for social transformation were embedded in the Freedom School Curricula:

- The creation of an honest and egalitarian relationship between teacher and student
- The valuing and naming of the students’ own experience
- The asking of open-ended questions
- The presentation to students of an authentic and empowering view of themselves and their history
- The vision of the arts as a transformative force
- The emphasis on skills necessary for action and effective participation in the world
- The establishment of a direct line from classroom to community

In applying these principles, the Freedom Schools experienced some success and some frustration. There were some immediate victories and other victories more subtle and impossible to measure. The experience of these small and determined groups of teachers and students raised as many questions as it answered. The questions raised by the Freedom Schools and their predecessors are profound. Are schools servants of the existing social system, no matter how unjust that system might be, and is the task of teachers to modify student aspiration to ensure their students a place in the world as it is? Or is the classroom a place for transformation?

After visiting the Freedom Schools in 1964, educator and historian Howard Zinn reflected about their importance beyond Mississippi.

The Freedom Schools’ challenge to the social structure of Mississippi was obvious from the start. Its challenge to American education as a whole is more subtle. There is, to begin with, the provocative suggestion that an entire school system can be created in any community outside the

official order and critical of its suppositions. But beyond that, other questions were posed by the Mississippi experiment. . . . Can we, somehow, bring teachers and students together, not through the artificial sieve of certification and examination but on the basis of their common attraction to an exciting social goal? Can we solve the old educational problem of teaching children crucial values, while avoiding a blanket imposition of the teacher's ideas? Can this be done by honestly accepting as an educational goal that we want better human beings in the rising generation than we had in the last, and that this requires a forthright declaration that the educational process cherishes equality, justice, compassion and world brotherhood? . . . And cannot the schools have a running, no-holds-barred exchange of views about alternative ways to these goals? . . . Would it be possible to declare boldly that the aim of the schools is to find solutions for poverty, for injustice, for race and national hatred, and to turn all educational efforts into a national striving for those solutions?

Perhaps people can begin, here and there (not waiting for the government, but leading it) to set up other pilot ventures, imperfect but suggestive, like the one last summer in Mississippi. Education can, and should, be dangerous.⁴⁰

Copyright 2004; Kathy Emery, Sylvia Braselmann, and Linda Gold

TEACHING MATERIAL: QUESTIONS AND ACTIVITIES

to be used with the Mississippi Freedom School Curriculum

By Kathy Emery and Linda Gold

Editors' Note: These questions and activities, taken together, are not intended to elicit a thorough understanding of the Curriculum. Our hope is that these suggestions give teachers and students some help in developing their own questions and activities.

Personal Writing (Journal writing, essays, autobiographies):

Items 1-3 can be used particularly for journal writing. As students read the Curriculum, they can write about what they are reading from a personal and non-structured fashion as the basis for more analytical writing or in preparation for discussion.

1. Select **quotations** from the curriculum and use it as a basis for reflecting on your own experience. Choose a quotation which moves you, for example, one with which you strongly agree or disagree.
2. For each "**Concept**" introduced by the Freedom School Curriculum, write a response, e.g., a personal reflection, related experience, idea for a new program or vision of . . .
3. Select "**Questions**" from the Curriculum and respond to them personally. For example, "To what extent do we confer power on others? To what extent is that power real? What wouldn't you sell?"
4. What is the relationship of ignorance to fear? guilt to fear? fear to hate? Use your own personal experiences to illustrate your answer (See Unit V).

Unit III Questions and Activities

1. What is assimilation? Do the three secondary questions advocate assimilation for African Americans? What is the difference between assimilation and integration. How do your answers to the questions in Unit III affect your position on the resegregation and unequal funding of US public schools today?
2. How can the Freedom School lesson on examining social myths be applied to your experience? (Select an advertisement, a newspaper article, a work of literature which you've read in school, or a lesson from your history text. Apply to it the questions raised by the Freedom School curriculum: What is taught in the schools and through other media? What are the myths of our society? What or whose purposes do these myths serve?)
3. "Concept. What education is." How would you answer the questions in this section if applied to you and your school? What do people learn in school besides reading, writing an arithmetic?"
4. Compare the "Mississippi Plan" (in Guide to Negro History, Part III, Reconstruction in Mississippi) to the situation in Mississippi the early 1960s. What are the essential

beliefs/tactics/ideas of the Mississippi Plan? Do you see any of these tactics in your interactions with authority?

5. Guide to Negro History: Are there any parallels between the presence of Federal Troops in Reconstruction and the presence of Federal Troops in the South during the Civil Rights era of the 1960s (e.g., Little Rock or Oxford)?

Historiography exercise I

The Guide to Negro History contains the following sections:

Brief Synopsis of the Amistad Incident

Part I: Origins of Prejudice

Part II: Negro Resistance to Oppression

Part III: Reconstruction and the Beginning of Segregation

Divide the class into four groups. Each group reads one section of the *Guide*. After reading one's section, look at the American History textbook (or curriculum) that is used by your school (if there are several, borrow copies of each one. If this is problematic, your local library should have copies of various textbooks). Compare the content, style and organization of the material in your section of the *Guide* with the comparable section in the American History text (or curriculum) used by your school. Write a report to present to the rest of the class (preferably with visual aids) that reveals the results of your comparative analysis. For example, if there is no mention of the Amistad Incident, is there mention of similar incidents? What kinds of slave revolts are mentioned in the text? What role are Presidents given by the textbook(s) in relationship to slavery? How is J.Q. Adams portrayed in general by the text? Van Buren? When does slavery appear in your textbook/curriculum? How would one's understanding of slavery be different if the *Guide* were incorporated into your textbook/curriculum?

Keep in mind the following issues when doing your research and analysis:

1. What are the criteria for selection of the details in both the *Guide* and the textbook used at your school? What does the *Guide* suggest the criteria may be?
2. What is the purpose of the textbook; according to its authors (read preface or intro); according to the teacher (interview teacher) who uses the text or, according to those responsible (interview these people) for selecting the textbook for use in your school.
3. Does the textbook version of history inspire political activity on your part, does it discourage it? How so?

Some considerations when doing a comparative analysis: What information is the same in each text? What information is in one but not in the other? Which text promotes the purposes of the Freedom School Curriculum the best? How does your comparative analysis suggest what might be the purposes of the curriculum as defined by the textbook?

Historiography exercise II

The Guide to Negro History suggests that teachers use the structure of the Amistad Lesson Plan as a guide. This lesson is structured thematically as opposed to many history lessons that are structured chronologically. The center of the lesson plan is a chronologically story of the specific incident that Spielberg has now made famous in his movie *Amistad*. But the lesson plan identifies several issues that “spin off” like spokes from the hub of a wheel. These issues – Slave Revolts, The Case in the Courts, Abolitionism, African Background and Slave Trade – become topics of study in their own right. The theory behind this part of the Freedom School Curriculum seems to be that the students’ interest in these topics is generated by the Amistad story.

1. Using the Amistad Unit as a model, construct a similar lesson plan for an historical incident of your choice. You may want to take a story from your own ethnic, religious, gender, national background or sexual orientation. For gays and lesbians, the story of Harvey Milk might come to mind. Try to pick a story that you are interested in. Then see what issues/topics can be “spun off” from it—i.e. issues and topics that are also of interest because of their connections to the “hub” issue.
2. Contrast the story/theme approach of the Amistad model with those experiences you have had in past history courses.
3. Do history textbooks in your school or in other schools use the story/theme approach? Can you make a guess as to why they do or don’t?
4. Why does the Freedom School Curriculum place such a high priority on “student interest”? Does your school place an equally high priority on student interest? Why or why not?

Unit IV

1. **Research/Activity:**

- a. Each student bring in at least one newspaper article concerning the global economy (anything that has to do with goods made in one country and sold in another, or about changes in one country affecting the economic condition of another).
- b. In class, in groups of 4 or 5, each student explains the contents of his or her articles to others. As each student explains or reads his or her article the rest of the group takes notes trying to answer the following questions: (1) Who are the winners? the losers? (2) How do they win? lose?
- c. After discussing and taking notes on all the articles, the group writes a joint paper guided by the following questions: (1) Who is making money off of the global economy? (2) What are the explanations for this? (3) Do the explanations justify the money making?

3. **Research:** After reading the Mississippi Power Structure, research comparable statistics for your state today. For example, what the major job categories and their pay scales in your state? Which racial/ethnic, sex and age groups dominate each category? Much of this can be found on the web.

4. Create a power chart of any of the following: school district, town, county, state, or nation Do you know anyone who has challenged authority? What happened to them when they did? Can you create a composite example from the real life examples that you know of people who have challenged authority? Does this composite example illustrate the power structure chart of your school? town/city? state? the nation?

5. Who were the Dixiecrats? What powers did they have? Does William Greider in *Who Will Tell the People ?* (PBS video or in book form) make an argument that a similar power structure operates today? What myths support such a power structure?

6. **Research Activity:** This unit includes the case study on Nazi Germany. One purpose of this study was to study the Nazi methods of control so they “might be applied to a comparative analysis of the Negro in the South in order to gain greater insight into . . . [the] means by which this system can be resisted successfully and overcome.” Does this differ from Alinsky’s following assertion?

In other words, use the Case study of *Nazi Germany* to evaluate Saul Alinsky’s claim that “Ghandi’s passive resistance would never had had a chance against a totalitarian state such as that of the Nazis . . . George Orwell, in his essay *Reflection on Gandhi*, made some pertinent observations on this point: ‘he believed in arousing the world, which is only possible if the world gets a change to hear what you are doing.’ It is difficult to see how Gandhi’s methods could be applied in a country where opponents of the regime disappear in the middle of the night and are never heard of again. Without a free press and the right of assembly it is impossible, not merely to appeal to outside opinion, but to bring a mass movement into being or even to make your intentions known to your adversary” (pp. 41-42, *Rules for Radicals*, Vintage Books, New York, 1972)

7. If you were a student in a Freedom School, how would you answer the “Secondary Questions” after having gone through Units I - IV? How would you answer them as a student today?

8. **Historiography:** Compare the descriptions in the Power of the Dixiecrats with comparable passages in the U. S. history texts used in your school. You may have to be a bit creative in your analysis. For example, if your school text has no mention of the 1948 Democratic nominating convention and the States Rights party, then look at the history of the Democratic Party from 1944-64 and compare that to the History section in the case study. You are looking for different versions or emphasis of the same events or what details are included what are left out. Do such differences lead to different interpretations of the past? What is the significance of these interpretations?

Unit V

1. Read A.S. Neill’s *Summerhill*. What role did fear play in Summerhill? What role does fear play in your school? What happened to those students who choose not to attend classes at Summerhill? Do you like to learn? Under what circumstances have you learned the best? If TV and cinemas didn’t exist, how might people spend their leisure time? What did students at Summerhill do when they become bored?

2. How do the purposes of this unit “train people to be active agents of change”? Are you and your fellow students being trained to be “active agents of social change? Do you think you should be?

3. **ACTIVITY.** As a class, re-enact the stick figure exercise. Is it an effective teaching technique? Write a stick figure exercise that would apply to your life today.

4. The truth shall make you free. How does Unit V support this statement. Are you persuaded?

Unit VI

1. What is the relationship between the structure of an organization and the behavior of people within that organization? (Does a town meeting political structure promote different behavior than one person rule?)

2. What is the relationship between values and behavior? Does one behave according to one’s values? Do we need help in behaving according to one’s values, according to how one believes he or she should act?

3. While this statistic varies depending on the definition of the terms of the statement, it is fair to say that the United States has 5 percent of the world’s population but consumes 30 percent of the world’s resources. Using the principles and concepts of Unit VI, what questions would you ask of this materially unequal situation? What questions can you ask that addresses a different and more just distribution of the world’s resources? Are the world’s resources (forests, minerals, drinking water) dwindling? Is the world’s population growing? How will the United States middle class maintain its material condition in the face of future changes in resources and population should it choose to do so?

4. What current evidence that material well being doesn’t guarantee spiritual well being? What is the evidence today that poverty undermines spiritual well being?

5. Is there an ethical system implicit or explicit in the Freedom School Curriculum (Is there a list of commandments that forbids or demands certain behavior of all human beings)?

6. After reading the Statements of Discipline of Nonviolent Movements, how would you answer the given questions?

Was “the movement the germ of a new society?”

“Would we want a whole society in which people related to each other as they do in the movement?”

Unit VII

Part I

1. Why is Part I of this unit organized differently from the other units? (What are the “basic concepts” of Part I?)

2. Create subcategories to Part I. Decide how many there are and what titles to give to each sub-categories.

3. What does Part I reveal about the theory behind “the movement”? the strategy? the tactics?

4. How does the movement define success? failure?

Part 2, I. COFO

5. How does a federation of organizations create “unity”, “continuity” and “identity”?

6. Do any of the projects of the COFO programs strike you as particularly radical or surprising? (What does “radical” mean?)

7. What are the four “phases” of the COFO program?

Part 2, II. Miss Hamer’s Campaign

8. Why should poor whites have voted for Fannie Lou Hamer and not Jamie Whitten?

9. Why is Hamer and not another MFDP candidate (e.g. Aaron Henry) featured by the curriculum?

10. Why did Hamer run for office if she and her supporters knew that they were going to lose?

Part 2, III. Other COFO Political Programs

11. Why is COFO encouraging blacks to participate in the Democratic Party’s precinct, county and district elections when COFO also plans to create a separate Freedom Democratic Party?

Part 2, IV. Voting in Mississippi

12. What is the purpose of precinct meetings? How are they democratic in theory but not democratic in practice?

13. At which level is the most power exercised - precinct, county, district, state convention, state primary, state general election, or the National nominating convention?

14. How can the voting laws so effectively discriminate while being so immune to legal accusations of discrimination?

15. Why might the degree of white violence against black voters in a county be proportionate to the ratio of whites to blacks in that county?

16. Were Freedom Days successful? effective? strategic?

Part 2, V. The Historical Development of white, one party politics

17. Why was the Compromise of 1877 a pivotal moment for black civil rights?
18. Why would “the small town rich man” contribute money to each of the opposing sides in an election?
19. Why might blacks benefit from the establishment of a Republican Party in the South. Why might they not benefit?

QUESTIONS for class discussion based on the author’s Introduction, the Curriculum and Supplemental Documents

1. “To train people to be active agents in bringing about social change.” This is a primary purpose of the Freedom School Curriculum. To what degree is your own study of this curriculum moving you to become an active agent of social change? What are the obstacles in the way of such a change? Must there be a “movement” for individuals to be agents of change? Do individuals start movements (how do movements start?)?
2. How did Kirsty Powell (A Report, mainly on Ruleville) alter the “on paper” version of the Freedom School Curriculum? To what degree did Kirsty Powell implement Noel Day’s advice (Notes on Teaching)? Emerson’s (Non Material Teaching Suggestions)? Did she follow each unit’s directives? To what degree was the “reality” of her experience in Ruleville responsible for this? What implications can be drawn from the difference between curriculum on paper and in practice?
3. Can Ruth Emerson’s teaching theory (Non Material Teaching Suggestions) be accurately described as process rather than goal oriented? Is her approach consistent with the purpose of the Freedom Schools? For example, if the students don’t complete the Citizenship Curriculum, will the students be as effective canvassers as they might be upon completion of the curriculum? Are Emerson and Stembridge (Notes on Teaching) in perfect agreement? fundamental agreement?
4. How does the dominant culture today and the Freedom School Curriculum differ in their use of the following terms: Question, Test, Discussion, Drama.
5. Explain the direct connection between the Freedom Schools and political action. Have you ever experienced this direct connection in your own education?
6. African American culture and traditions were maintained through an oral tradition. The oral tradition is characterized by:
- a strong sense of community, as community is the “library” of the oral tradition.
 - A respect for elders as containers of history and story.
 - An emphasis on gatherings or rituals as a means of affirming community and sharing stories.
 - An emphasis on the strongly felt, immediate experience.

e. An emphasis on song, music, and rhythm as a means of creating an immediate feeling of connection and of sharing history.

How does the Freedom School Curriculum use the strengths of the oral tradition? How are these strengths evident in the Freedom Movement in Mississippi? In the Civil Rights Movement in general?

ACTIVITIES BASED ON THE WEBSITE INTRODUCTION, SUPPLEMENTARY DOCUMENTS AND THE CURRICULUM

Debate Resolution: The basic and secondary questions of the Freedom School Curriculum provide the only effective means of evaluating the Curriculum. (see teaching materials in Howard Zinn's *People's History of the United States*, teaching edition, for a description of how to conduct debates)

For the teacher to share with his or her students: Compare your philosophy of teaching with that contained within the Freedom School Curriculum. Consider the following issues:

- How do people learn?
- What are optimal learning conditions?
- What are the external as well as internal constraints/obstacles that an individual teacher faces when trying to teach in a public or private school today?

Exercise A - Lesson Plans (research, analysis)

1. Identify where in your school's curriculum, if at all, the "concepts" of the Freedom School Curriculum are taught.
 - a. If taught in a course at your school, are there specific "lesson plans" devoted to the concept(s)?
 - b. If not taught specifically or explicitly at your school, why not? Does the school believe that such concepts are taught elsewhere? What is the evidence that they are or are not?
2. Write Lesson Plans with the "concepts" of the Freedom School Curriculum but replace the content with that which pertains to your life. Your lesson plan should include the following: statement of purpose; list of materials; introduction; questions; myths that the lesson will destroy. After choosing a concept, you might want to begin by thinking about myths associated with such a concept.
3. What conclusions can you draw about the role "curriculum" plays in the construction of your reality?

Exercise B - Teaching Empowerment (Drama, role-play)

1. Divide the class into groups of four.

2. Each group chooses two people from the following list of roles: a student at your school (present time); the principal of your school (present time); a teacher at your school (present time); a student's parent (present time); a poor white Mississippi 16 year old (1964); a 16 year old Freedom School student (1964); a white northern Freedom School teacher (1964); a black northern Freedom School teacher (1964); a black southern Freedom school teacher (1964); and the sheriff of Hattiesburg (1964).
3. The group writes an imagined dialogue about education and power between the two persons chosen from the list above. Some of the issues you may want to address in the dialogue are: empowerment; talking about one's feelings; class discussion; knowing how power is exercised; what should teachers know before they teach a class at your school; degree of freedom in asking questions; the kind of transformation that occurs when students are allowed to ask questions; connection of history to what is happening now; and role models in history class.
4. Each group chooses two of its members to act out the dialogue in front of the rest of the class. The entire class can discuss each presentation after it is made.

Exercise C - Guidelines for a New Teacher (research, analysis)

In groups or individually: Compose an introduction for a new teacher at a school.

1. Identify a school other than your own. Arrange permission to interview several students at that school.
2. Write an interview schedule in advance of the actual interviews. When writing the schedule (list of questions in the order you wish to ask them during the interview) keep the following in mind:
 - a. Avoid writing questions to which a "yes" or "no" answer may be given.
 - b. Have several follow up questions prepared to encourage your interviewee to elaborate upon his or her answers to your questions.
 - c. Ask questions that will elicit answers that can be used to fulfill your goal of writing "Notes" for new teachers entering that school. The topics that the interview schedule must address are the following: What are the students like? What do the students demand of their teachers? What are the conditions under which teachers teach?
3. Use the data collected (notes and recorded answers) to write Guidelines for New Teachers in the manner of Stembridge's "Introduction to the Summer" ([Notes on Teaching in Mississippi](#))
4. Ask the principal (or some administrator) of the school for which you wrote your "Introduction" to read it and give you his or her responses to what you wrote. Write up the principal's response.
5. Write an analysis of your experience in this exercise. Base your analysis on a comparison of the school you studied with that of the Freedom Schools in Mississippi in 1964. How and why

does your "Introduction" differ from Stembridge's? Was the principal's reaction to your "Introduction" predictable? Why or why not? Present results to your class.

Copyright 2004; Kathy Emery, Sylvia Braselmann, Linda Gold

SUPPLEMENTARY DOCUMENTS

PROSPECTIUS FOR THE MISSISSIPPI FREEDOM SUMMER

“It can be argued that in the history of the United States democracy has produced great leaders in great crises. Sad as it may be, the opposite has been true in Mississippi. As yet there is little evidence that the society of the closed mind will ever process the moral resources to reform itself, or the capacity for self-examination, or even the tolerance of self-examination.”

From *Mississippi: The Closed Society*

By James W. Silver

It has become evident to the civil rights groups involved in the struggle for freedom in Mississippi that political and social justice cannot be won without the massive aid of the country as a whole, backed by the power and authority of the federal government. Little hope exists that the political leaders of Mississippi will steer even a moderate course in the near future (Governor Johnson’s inaugural speech notwithstanding); in fact, the contrary seems true: as the winds of change grow stronger, the threatened political elite of Mississippi becomes more intransigent and fanatical in its support of the status quo. The closed society of Mississippi is, as Professor Silver asserts, without the moral resources to reform itself. And Negro efforts to win the right to vote cannot succeed against the extensive legal weapons and police powers of local and state officials without a nationwide mobilization of support.

A program is planned for this summer which will involve the massive participation of Americans dedicated to the elimination of racial oppression. Scores of college students, law students, medical students, teachers, professors, ministers, technicians, folk artists and lawyers from all over the country have already volunteered to work in Mississippi this summer—and hundreds more are being recruited.

Why a project of this size?

1. Projects of the size of those of the last three summers (100 to 150 workers) are rendered ineffective quickly by police threats and detention of members.
2. Previous projects have gotten no national publicity on the crucial issue of voting rights and, hence, have little national support either from public opinion or from the federal government. A large number of students from the North making the necessary sacrifices to go South would make abundantly clear to the government and the public that this is not a situation which can be ignored any longer, and would project an image of cooperation between Northern and white people and Southern Negro people to the nation which will reduce fears of an impending race war.
3. Because of the lack of numbers in the past, all workers in Mississippi have had to devote themselves to voter registration, leaving no manpower for stopgap community education projects which can reduce illiteracy as well as raise the level of education of Negroes. Both of these activities are, naturally, essential to the project’s emphasis on voting.
4. Bail money cannot be provided for jailed workers; hence, a large number of people going South would prevent the project from being halted in its initial stages by immediate arrests. Indeed, what will probably happen in some communities is the filling of jails with civil

rights workers to overflowing, forcing the community to realize that it cannot dispense with the problem of Negroes' attempting to register simply by jailing "outsiders".

Why this summer?

Mississippi at this juncture in the movement has received too little attention—that is, attention to what the state's attitude really is—and has presented COFO with a major policy decision. Either the civil rights struggle has to continue, as it has in the past few years, with small projects in selected communities with no real progress on any fronts, or there must be a task force of such a size as to force either the state and the municipal governments to change their social and legal structures, or the federal government to intervene on behalf of the constitutional rights of its citizens.

Since 1964 is an election year, the clear-cut issue of voting rights should be brought out in the open. Many SNCC and CORE workers in Mississippi hold the view that Negroes will never vote in large numbers until federal marshals intervene. At any rate, many Americans must be made to realize that the voting rights they so often take for granted involve considerable risk for Negroes in the South. In the larger context of the national civil rights movement, enough progress has been made during the last year that there can be no turning back. Major victories in Mississippi, recognized as the stronghold of racial intolerance in the South, would speed immeasurably the breaking down of legal and social discrimination in both North and South.

The project is seen as a response to the Washington March and an attempt to assure that in the Presidential election year of 1964 all American citizens are given the franchise. The people at work on the project are neither working at odds with the federal government nor at war with the State of Mississippi. The impetus is *not against* Mississippi but for the right to vote, the ability to read, the aspirations and the training to work.

Direction of the Project:

This summer's work in Mississippi is sponsored by COFO, the Council of Federated Organizations, which includes the Student Nonviolent Coordinating Committee (SNCC), the Southern Christian Leadership Conference (SCLC), the Congress of Racial Equality (CORE) and the NAACP, as well as Mississippi community groups. Within the state COFO has made extensive preparations since mid-January to develop structured programs which will put to creative use the talents and energies of the hundreds of expected summer volunteers.

Voter Registration: This will be the most concentrated level of activity. Voter registration workers will be involved in an intensive summer drive to encourage as many Negroes as possible to register. They will participate in COFO's Freedom Registration, launched in early February, to register over 400,000 Negroes on Freedom Registration books. These books will be set up in local Negro establishments and will have simplified standards of registration (literacy test and the requirement demanding an interpretation of a section of the Mississippi Constitution will be eliminated). Freedom Registration books will serve as the basis of a challenge of the official books of the state and the validity of "official" elections this fall. Finally, registration workers will assist in the campaigns of Freedom candidates, who are expected to run for seats in all five of the State's Congressional districts and for the seat of Senator John Stennis, who is up for re-election.

Freedom Schools:

1. *General Description.* About 25 Freedom Schools are planned, of two varieties: day schools in about 20-25 towns (commitments still pending in some communities) and one or two

boarding, or residential, schools on college campuses. Although the local communities can provide school buildings, some furnishings, and staff housing (and, for residential schools, student housing), all equipment, supplies and staff will have to come from outside. A nationwide recruitment program is underway to find and train the people and solicit the equipment needed. In the schools, the typical day will be hard study in the morning, an afternoon break (because it's too hot for an academic program) and less formal evening activities. Because the afternoons are free, students will have an opportunity to work with the COFO staff in other areas of the Mississippi Freedom Summer program, and the additional experience will enrich their contribution to the Freedom School sessions.

a. *Day Schools.* The day schools will accommodate about 50 students, with a staff of 15. There are 20 communities, located in all five Congressional districts of the state, where the people in the community have indicated that they want a Freedom School and are cooperating in finding facilities and housing. These are the towns of some size, where the local Negro communities can provide housing for the staff, and where a suitable building can be located and safely leased. The day schools will attract high-school students from the immediate area only, since there are no provisions planned for living in, but there will be organized contacts—exchanges, sports events, etc.—between day Freedom Schools across the State. The sessions will present similar but not identical material, so the students can profitably attend one or both sessions. This will allow some adjustment for students who must work during the cotton-picking season, and faculty people who are unable to stay six weeks.

b. *Boarding Schools.* The one or two boarding schools will accommodate 150 to 200 students apiece, in a college-campus atmosphere. There will be one six-week session of the boarding schools. The curriculum will be similar to that of the day schools, but on a more intensive level, and with an additional goal of bringing together and training high-quality student leadership. The boarding schools will recruit students who have displayed some leadership potential and can profit from the more intensive approach.

c. *Curriculum.* The aim of the Freedom Schools' curriculum will be to challenge the student's curiosity about the world, introduce him to his particularly "Negro" cultural background, and teach him basic literacy skills in one integrated problem. That is, the students will study problem areas in the world, such as the administration of justice or the relation between state and federal authority. Each problem area will be built around a specific episode which is close to the experience of Mississippi students. The whole question of the court system, and the place of law in our lives, with many relevant ramifications, can be dealt with in connection with the study of how one civil rights case went through the courts and was ultimately decided in favor of the defendant. The episode of Congressman Jamie Whitten's tractor deal, where Whitten quashed a federal program to train over 2,000 tractor drivers in the Mississippi Delta (because it would have been integrated), can lead one into the whole area of state and federal relations. The campaign of Mrs. Fannie Lou Hamer for Congress (running against Jamie Whitten) provides a basis for studying all the forces which are against her, and which have worked against a Negro's even attempting to run for Congress in Mississippi. Planning the COFO project to challenge the regular Mississippi delegation at the Democratic National Convention provides the starting-point for a study of the whole Presidential nomination and election procedures. These and other "case studies" which are used to explore larger problem areas in society will be offered to the students. The Negro history outline, as presently planned, will be divided into sections to be coordinated with the problem-area presentation. In this context, students will be given practice activities to improve their skills with reading and writing. Writing press releases, leaflets, etc., for the political

campaigns is one example. Writing affidavits and reports of arrests, demonstrations, trials, etc., which occur during the summer in their towns, will be another. Using the telephone as a campaign tool will both help the political candidates and help students to improve their techniques in speaking effectively in a somewhat formal situation. By using a multidimensional, integrated program, the curriculum can be more easily absorbed into the direct experience of the students.

d. *Students.* Students for the Freedom Schools will be recruited through established contacts with ministers, educators, and other organizational contacts in the state. Around a hundred applications have already been returned, and we do not anticipate that written applications will form the bulk of the students selected. A statewide student organization, the Mississippi Student Union, has recently been formed, and will be important to the recruitment of students. Students who have shown evidence of leadership potential will be encouraged to attend the state-wide boarding schools, to meet students from other parts of the state, and lay the foundation of a much broader student movement.

e. *Staff.* Both professional and nonprofessional teachers will participate in the staffing of the schools. Professional teachers will be sponsored by the professional teachers' associations, the National Council of Churches, the Presbyterian Church and other institutions with educational resources. The nonprofessional teachers will be selected from among the applicants for the summer project. A special delegation of Chicago high-school students, who have taught Negro history to other students their own age under the auspices of Chicago's Amistad Society, will work as student teachers in the Negro history program.

f. *Schedule.* The boarding-school staff and staff for the first session of the day schools will go through a general orientation program with the community center staff, probably held at Mt. Beulah. This orientation will run July 8-12. On July 13, the boarding schools and the first session of the day schools will receive students. Orientation for the teaching staff of the second session of the day schools will be held August 5-9. On August 10, the second session of the day schools will start classes. The sessions will end on August 22 for the boarding school and August 30 for the second-session day school.

Community Centers: The community centers program projects a network of community centers across the state. Conceived as along-range institution, these centers will provide a structure for a sweeping range of recreational and educational programs. In doing this, they will not only serve basic needs of Negro communities now ignored by the social service provisions of the State, but will form a dynamic focus for the development of community organization. The educational features of centers will include job-training programs for the unskilled and unemployed, literacy and remedial programs for adults as well as young people, public health programs such as prenatal and infant care, basic nutrition, etc., to alleviate some of the serious health problems of Negro Mississippians, adult education workshops which would deal with family relations, federal service programs, home improvement and other information vital to the needs of Negro communities, and also extracurricular programs for grade-school and high-school students to supplement educational deficiencies and provide opportunity for critical thought and creative expression. Each center would have a well-rounded library because Negroes in many communities now have no access to an adequate library.

Though the community centers program is primarily educational, some of each center's resources would be used to provide much-needed recreational facilities for the Negro community. In most communities in Mississippi the only recreation outside of taverns is the movies, and for Negroes this means segregated movies. If there is a movie theater in the Negro community, it is

old, run-down, and shows mostly out of date, third-rate Hollywood films. The film program of the centers will not only provide a more agreeable atmosphere for movies; it will bring films of serious content which are almost never shown in Mississippi, where ideas are rigidly controlled. Other recreational offerings will be music appreciation classes, arts and crafts workshops, drama groups, discussion clubs on current events, literature and Negro achievement, etc., pen-pal clubs, organized sports (where equipment allows), and occasional special performances by outside entertainers, such as folk festivals, jazz concerts, etc.; organized storytelling for young children will be entertaining, and will introduce them to the resources of the center's library and to reading for pleasure in general.

Special Projects:

a. Research Project—A number of summer workers will devote themselves to research on the economic and political life of Mississippi. Some of this work can be done outside the state, but much will need resources which can be found only in Mississippi. In addition, a number of people will be asked to live in white communities to survey attitudes and record reactions to summer happenings.

b. Legal Projects—A team of lawyers and at least 100 law students are expected to come to Mississippi to launch a massive legal offensive against the official tyranny of the State of Mississippi. Law students will be dispersed to projects around the State to serve as legal advisers to voter registration workers and to local people. Others will be concentrated in key areas where they will engage in legal research and begin to prepare suits against the State and local officials and to challenge every law that deprives Negroes of the freedom.

c. White Communities—Until now there has been no systematic attempt by people interested in the elimination of hate and bigotry to work within the white communities of the Deep South. It is the intention of the Mississippi Summer Projects to do just that. In the past year, a significant number of Southern white students have been drawn into the movement. Using students from upper Southern states such as Tennessee, and occasionally native Mississippians, SNCC hopes to develop programs within Mississippi's white community. These programs will deal directly with the problems of the white people. While almost all Negroes in Mississippi are denied the right to vote, statistics clearly indicate that a majority of whites are excluded as well. In addition, poverty and illiteracy can be found in abundance among Mississippi whites. There is in fact a clear area for Southern white students to work in, for in many ways Mississippi has imprisoned her white people along with her blacks. This project will be pilot and experimental and the results are unpredictable. But the effort to organize and educate whites in the direction of democracy and decency can no longer be delayed.

d. The Theater Project—Sponsored by the Tougaloo Drama Department, this summer will also mark the beginning of a repertory theater in Jackson, Mississippi. The actors will be Negro Mississippians; the plays will dramatize the experience of the Negro in Mississippi and in America; the stage will be the churches, community centers and fields of rural Mississippi.

Using the theater as an instrument of education as well as a source of entertainment, a new area of protest will be opened.

**PROSPECTUS FOR A
SUMMER FREEDOM SCHOOL PROGRAM IN MISSISSIPPI**

The Proposal (originally submitted by Charles Cobb, Dec 1963)

(Although this original proposal was submitted for the Mississippi Summer Project, it is relative to all Black Belt communities where the conditions are deplorably similar, and the prospectus is pertinent to the Freedom School programs that can operate all year round.)

It is, I think, just about universally recognized that Mississippi education, for black or white, is grossly inadequate in comparison with education around the country. Negro education in Mississippi is the most inadequate and inferior in the state. Mississippi's impoverished educational system is also burdened with virtually a complete absence of academic freedom, and students are forced to live in an environment that is geared to squash intellectual curiosity, and different thinking. University of Mississippi Professor James Silver, in a recent speech, talked of "social paralysis . . . where nonconformity is forbidden, where the white man is not free, where he does not dare express a deviating opinion without looking over his shoulder." This "social paralysis" is not limited to the white community, however. There are Negro students who have been thrown out of classes for asking about the freedom rides, or voting. Negro teachers have been fired for saying the wrong thing. The State of Mississippi destroys "smart niggers" and its classrooms remain intellectual waste lands.

In our work, we have several concerns oriented around Mississippi Negro students:

1. The need to get into the schools around the state and organize the students, with the possibility of a statewide coordinated student movement developing.
2. A student force to work with us in our efforts around the state.
3. The responsibility to fill an intellectual and creative vacuum in the lives of young Negro Mississippians, and to get them to articulate their own desires, demands and questions. More students need to stand up in classrooms around the state, and ask their teachers a real question.

As the summer program for Mississippi now shapes up, it seems as if hundreds of students as well as professional educators from some of the best universities and colleges in the North will be coming to Mississippi to lend themselves to the movement. These are some of the best minds in the country, and their academic value ought to be recognized, and taken advantage of.

I would like to propose summer Freedom Schools during the months of July and August, for tenth and eleventh-grade high school students, in order to:

1. supplement what they aren't learning in high schools around the state.
2. give them a broad intellectual and academic experience during the summer to bring back to fellow students in classrooms in the state, and
3. form the basis for statewide student action such as school boycotts, based on their increased awareness.

I emphasize tenth and eleventh-grade students, because of the need to be assured of having a working force that remains in the state high schools putting to use what it has learned.

The curriculum of this school would fall into several groupings:

1. supplementary education, such as basic grammar, reading, math, typing, history, etc.
- Some of the already-developed programmed educational materials might be used experimentally.

2. Cultural programs such as art and music appreciation, dance (both folk and modern), music (both folk and classical), drama, possibly creative writing workshops, for it is important that the art of effective communication through the written word be developed in Mississippi students.

3. Political and social science, relating their studies to their society. This should be a prominent part of the curriculum.

4. Literature

5. Film programs.

Special projects, such as a student newspaper, voicing student opinion, or the laying of plans for a statewide student conference, could play a vital role in the program. Special attention should be given to the development of a close student-teacher relationship. Four or five students to one teacher might be good, as it offers a chance of dialogue. The overall theme of the school would be the student as a force for social change in Mississippi.

If we are concerned with breaking the power structure, then we have to be concerned with building up our own institutions to replace the old, unjust, decadent ones which make up the existing power structure. Education in Mississippi is an institution which can be validly replaced, as much of the educational institutions in the state are not recognized around the country anyway.

The Program

1. General Description: About 25 Freedom Schools are planned, of two varieties: day schools in about 20 to 25 towns (commitment still pending) and one or two boarding, or residential, schools on college campuses. Although the local communities can provide schools buildings and staff housing, all equipment, supplies and staff will have to come from the outside. Students should have an opportunity to work with the staff in other areas of the project, so that the additional experience will enrich their contribution to the Freedom School sessions.

2. Curriculum: On the weekend of March 21, and 22, the National Council of Churches sponsored a conference in N.Y.C. to develop a curriculum for the Freedom Schools. This conference brought together a group of well-qualified educators and many of the more perceptive minds presently engaged in studying our society. The conference participants worked from a preliminary outline which laid out the basic skills which the students need to improve, divided into four areas:

I. Leadership development

a. to give students the perspective of being in a long line of protest and pressure for social and economic justice (i.e. to teach Negro history and the history of the movement.)

b. to educate students in the general goals of the movement, give them wider perspectives (enlarged social objectives, nonviolence, etc.)

c. to train students in the specific organizational skills that they need to develop Southern Negro communities:

1. public speaking

2. handling of press and publicity

3. getting other people to work

4. organizing mass meetings and workshops, getting speakers, etc.

5. keeping financial records, affidavits, reports, etc.
 6. developing skill in dealing with people in the community
 7. canvassing
 8. duplicating techniques, typing, etc.
- d. to plan with each other further action of the student movement.

II. Remedial Academic Program

- a. to improve comprehension in reading, fluency and expressiveness in writing.
- b. to improve mathematical skill (general arithmetic and basic algebra and geometry.)
- c. to fill the gaps in knowledge of basic history and sociology, especially American.
- d. to give a general picture of the American economic and political system.
- e. to introduce students to art, music and literature of various classical periods, emphasizing distinctive features of each style.
- f. to generate knowledge of and ability to use the scientific method.

III. Contemporary Issues

- a. to give students more sophisticated views of some current issues.
- b. to introduce students to thinking of local difficulties in a context of national problems.
- c. to acquaint students with procedures of investigating a problem-rudimentary research.

IV. Non-academic Curriculum

- a. to allow students to meet each other as completely as possible, in order to form a network of student leaders who know each other.
- b. to give students experience in organization and leadership
 1. field work— voter registration
 2. student publications
 3. student government
- c. to improve their ability to express themselves formally (through creative writing, drama, talent shows, semi-spontaneous discussions, etc.)

As a result of the curriculum conference, the curriculum planning took the following direction:

The aim of the Freedom School curriculum will be to challenge the student's curiosity about the world, introduce him to his particularly "Negro" cultural background, and teach him basic literacy skills in one integrated program. That is, the students will study problem areas in their world, such as the administration of justice, or the relation between state and federal authority. Each problem area will be built around a specific episode which is close to the experience of the students. The whole question of the court systems, and the place of law in our lives, with many relevant ramifications, can be dealt with in connection with the study of how one civil rights case went through the courts and was ultimately decided in favor of the defendant. The campaign of a Negro for Congress provides a basis for studying all the forces that which are against the Negro candidate, and which have worked against a Negro's even attempting to run for Congress. The challenge of the regular Mississippi delegation at the Democratic National Convention provides the starting-point for a study of the whole presidential nomination and the election procedure. These and other "case studies" which can be used to explore larger problem areas in the society will be offered to students. The Negro history outline, as presently planned, will be divided into

sections to be coordinated with the problem area presentation. In this context, students will be given practice activities to improve their skill with reading and writing. Writing press releases, leaflets, etc. for the political campaign is one example. Writing affidavits and reports of arrests, demonstrations, and trials, etc. which occur during the summer in their towns will be another. Using the telephone as a campaign tool will both help the political candidates and help students to improve their technique in speaking effectively in a somewhat formal situation. By using the multi-dimensional, integrated program, the curriculum can be more easily absorbed into the direct experience of the student, and thus overcome some of the academic problems of concentration and retention.

CURRICULUM CONFERENCE SUBGROUP REPORT

Report of a subgroup of the Leadership Development and Current Issues Committee at the Mississippi Summer Project Curriculum Conference. March 21-22

The group reporting dealt with political, economic, and social issues.

Approach: Problem-Solving through a series of case studies.

To develop in the future leaders of Mississippi an ability to deal with the problems of their state. Problem solving, as the committee views it, will be developed through a series of case studies dealing with the relevant political, economic, and social issues.

Advantages of approach:

1. Each problem or “case” will be related to the experiences and life situation of the students in Mississippi. It was felt that the academic disciplines of economics, politics, etc. could be best presented in the form that they present themselves in one’s life. For example, economics can be presented not as a graph but rather in the form of a loan not made or a job lost to a machine.

2. We will be able to enact new educational values by practicing more creative methods which will stimulate latent talents and interests that have been submerged too long. It is felt that one of the things which can be accomplished in such a short period of time is a “whetting of appetites” for further reading and educational experiences.

3. This approach allows for acquainting the participants with an awareness of the forces at work in our society and at the same time drawing on the experiences of the students and teachers involved. It demands very active participation from those who are to be introduced to new concepts. Most important, it seeks to draw on new kinds of creative abilities which are unfortunately not valued and remain untapped by the standard and presently accepted methods of teaching. These methods rely heavily upon tests and other methods of evaluation which are geared to particular cultural background.

4. The case study approach compensates for the obvious lack of training and standard cultural values of many of the teachers by focusing on those being taught and the method of teaching rather than the teacher himself.

5. We feel that such a curriculum will result in a creative experience for both the students and the teachers. It is hoped that both will come away with a new awareness of themselves and the movement. Perhaps, the children will be able to develop a new way of thinking and be awoken to their powers of analytic reasoning. In short we feel that the Freedom Schools can accomplish the vital task of causing high school youth in Mississippi to QUESTION.

6. The approach is not geared to a particular educational level but can be used successfully with any group since what happens in the classroom situation will be determined by the classes’ participation.

Preliminary working plan:

1. Fourteen “case-studies” or problems will be farmed out to various interested individuals to be researched.

2. Such research will require more imagination than diligence since we are not so interested in quantity of facts but concerned mainly with connections and associations which will be able to cross-cut the political, economic, and social elements of a given problem. We hope that the creativity of the class sessions will be mirrored by the creativity of the research as the students associate and pull incidents from their own experiences which are called to mind by the discussions which in turn, are centred around the case studies.

3. Perhaps the most imaginative part of the researchers work will be required as he devises audio and visual techniques for illustrating otherwise meaningless and unrelated facts. He will try to remember photographs and pictures, tapes and records, newspaper articles, movies, plays, songs and many more pertinent materials which are not usually thought of as educational tools.

Topics: The following will be a description of the cases with some suggestions as to the directions of the topics. These directions are only initial suggestions for it will be the task of the researcher to thoroughly work out all the implications of a given problem.

1. Issue: Jamie Whitten and the Tractors

Description: This involves a decision by Congressman Jamie Whitten of Mississippi to introduce a tractor training program into an area of the state. The program would have relied upon Negro laborers but since the political stakes were very high, the situation has become extremely involved.

Ramifications: Automation—Mrs. Hamer’s campaign (She is a Negro citizen of Miss. who is running against Mr. Whitten in the forthcoming congressional elections in the state)—political power and interest groups—intrastate politics—federal programs, their use and misuse.

Researcher: Robert Moses

2. Issue: Mrs. Hamer’s Campaign

Ramifications: National politics—Political parties and the National Conventions—The Miss. Delegations—Voter registration and Freedom Registration—COFO:—its development and value; its relationship to power in politics—Mrs. Hamer’s platform.

Researchers: Work-study group, Dona Richards Moses, Mendy Samstein, Jesse Morris

3. School Boycotts in Mississippi (Hattiesburg, Canton)

Ramifications: School boycotts in Northern cities—Techniques of the movement in the north i.e. rent strike—Chicago’s relationship to Miss.—Slum ghetto areas in the north i.e. how do the ghettos of Chicago compare with Miss.—evaluation of Miss. Schools and other segregated schools.

Materials: Textbooks covering the same topic can be compared (northern—southern): tapes are available from Haryou and Peggy and Noel Day in Boston.

Researcher: Rochelle Horowitz

4. Hattiesburg Demonstrations with respect to Communications and Public Relations

Ramifications: Press Releases: how to write them, where to send them—comparison of northern and southern account of the same incident—freedom of the press north and south:

what are its powers and how does it operate— what is the need for ministers and students from the north— what are the effects of these northerners upon demonstrations and police action.

Researcher: Sandy Leigh

5. How the Power Structure Works

Ramifications: Interlocking power—how the establishment gets established— sovereignty commission—corporate structure northern businesses and corporation in the south—the effect of northern sympathy demonstrations i.e. Wall St. Picket

Researcher: Jack Minnis (he has been doing research already in the area of corporate structure in the south, and should be able to choose an appropriate case study).

6. John Hardy's Case

Ramifications: Appeals and the Court—legal precedents—Intervention and the power of the federal government

Researcher : Tim Jenkins

7. Civil Rights Bill

Ramifications: Where do they originate, how do they get passed. Forces which produced the present bill—The effect of the bill for Mississippians if it is passed— comparison of speeches for the bill with speeches against the bill—What is the significance of the filibuster, a lobby, the cloture—What are the implications of Sen. Russell's Relocation Speech—What are the non-racial implications of the bill.

Researcher: Bill Higgs, Oscar Chase

8. Evaluation of the Freedom Rides and Sit-ins

Ramifications: Why were the Freedom Rides a failure in Mississippi: federal intervention and the ICC ruling.— Were the freedom rides successful anywhere? — Legal Defense Fund's project—the sit-in—philosophy of the sit-in—could they work in Miss. Early history of techniques and objectives of SNCC—The significance of economic pressure

Researcher: Jane Stenbridge

Materials: Records, Songs, pictures, personal accounts.

9. New Laws in Mississippi

Ramifications: Evaluation—Origins—Comparison with laws of South Africa— description and comparison of conditions in South Africa—practicality of non-violence in South Africa—Sharpeville incident—emergent nations: an evaluation.

Researcher: Bayard Rustin, Al Lowenstein

10. Hazard, Kentucky

Ramifications: The existence of poor whites—economic problems to all lower class people—Fayette County (Forman's participation) Miners interested in coming to the Delta—organized labor—the labor movement to be compared with the civil rights movement: the meaning of Freedom Songs and Union songs—Students Negro Youth Conference (see Freedomways)—Birmingham labor organization

Researcher: Michael Harrington, Miles Horton, Hamie Sinclair

11. News coverage of the racial incident such as Medgar Evers death or the Monroe “kissing case”

Ramifications: International implication of racial discrimination in this country by comparison of coverage of American and Foreign newspapers of the same incident— Adlai Stevenson’s speech and others who appeal to an end to racial discrimination on the grounds of concern for our image abroad—US failure to sign UN Genocide Pact (NY Times article)

Materials: Foreign and domestic newspapers, actual speeches, visiting foreigners

Researcher: Bobbi Yanci

12. Cassius Clay’s Attitude Towards the Movement

Ramifications: Nationalist movements: Garvey—Black Muslims—Implications of Brother Malcolm’s new move—criticism of philosophy of black nationalism— pragmatic value of black nationalism—conditions of black nationalism

Researcher:

13. Canton—Economic Boycott

Ramifications: Implicit economics—economics and power—dependency on whites—Mississippi financial situation—Delta Economy

Researchers: Jack Minnis and Jesse Morris

[Editors’ Note: Although the Preliminary Working Plan mentions plans for fourteen case studies, only thirteen are described. However, another version of the report does describe fourteen case studies.]

OUTLINE FOR CASE STUDIES**I. How the Power Structure works**

- A. Interlocking power—how the establishment gets established.
Political power and interest groups (White Citizen's Councils) Enforcement and perpetuation of power—police, sovereignty commission, etc. (briefly)
- B. Economic Basis
Corporate structure—Northern businesses and corporations in the South.
Dependence on whites of poorer Negroes (Delta sharecroppers, school teachers, etc.)
Mississippi financial situation—vulnerable point.
- C. Relationship with federal government
Rel. is often favorable (e.g. Eastland's committee—influence of federal judiciary)
Fed. power is frustrated if it does not act favorably (e.g. Jamie Whitten's tractor deal.)
Business of federal program in general.
Limits of such use of federal govt.
- D. Use of power to meet challenges (cf. South Africa and Nazi Germany)
 - Political:
 - new state laws
 - fight against the national civil rights bill
 - freedom rides and sit-ins—use of police power
 - Informal, social pressure (local white terror tactics)
 - McComb bus station
 - murder of Medgar Evers
 - shooting of Jimmy Travis, etc.
 - Economic
 - Fayette County
 - welfare
 - mass reprisals in canton

II. Study of the provisions of the Civil Rights bill—in view of the above, what are the prospects for it? What will its effects be in Miss.?

- Opposition to bill:
 - intrastate politics—Wallace's "presidential campaign"
 - Interest groups—Miss. Sovereignty Commission, Fundamental American Freedoms group.
 - Opposition in Congress itself—role of public opinion on that

III. COFO Political Programs—for study of political system

- A. COFO convention challenge—political parties, national conventions.
Platform—cf. Democratic and COFO platforms.
- B. Freedom Registration and Freedom Days—role and meaning of voting. Power of bloc voting.
- C. CR bill—whole legislative process—committee system, seniority system, party system, lobbies, rules (filibuster, cloture, etc.)
- D. Freedom candidates (Mrs. Hamer's campaign)—What politicians are like—how to tell a good one from a bad one (quotes from CR debate—excerpts from Miss.

Delegation speeches, Russell's relocation plan, etc.) cf. good congressmen and COFO Freedom Candidates.

IV John Hardy case—case for study of Court system

injustices in Miss. law enforcement
federal versus state courts—aspect of federal intervention
appellate processes
importance of precedent
What is legislation good for? What not?

V. Hazard, KY,—case for study of economic problems

Automation—two kinds (Hazard and the Miss. Delta)
Poverty—poor whites (Hazard) poor Southern rural Negroes (Fayette and delta),
Poor Northern urban dwellers (ghettoes). Chances of Coalition. Problem of other
minorities in cities.
Organized labor (Birmingham labor organization (?)) cf. CR and labor
movements—historical parallels, songs, etc.

VI. Education

A. Schools

School boycotts in Hattiesburg and Canton—segregated schools
Northern schools boycotts—problems of Northern ghettoes, de facto segregation,
etc. Chicago's relationship to Miss.—comparison
Evaluation of Mississippi schools—kid's own textbooks, example of Steptoe's
son (?)

B. Mass media—news coverage of the movement

Publicity skills—how bias works (Local and national press coverage of local
demonstrations)
Press releases—how to write, where to release
Freedom of the Press, north and south
Power of the Press. Importance of ministers and students from North
International implications of racial discrimination—Monroe “kissing case”,
Medgar Evers.

VII. Opposition to the Power structure—Movement stuff

MEMORANDUM TO FREEDOM SCHOOL TEACHERSMemorandum

COFO
 1017 Lynch St
 Jackson, Miss.
 May 5

To: MISSISSIPPI FREEDOM SCHOOL TEACHERS
 FROM: Miss. Summer Project Staff
 RE: SUBJECT: Overview of the Freedom Schools

The purpose of the Freedom schools is to provide an educational experience for students which will make it possible for them to challenge the myths of our society, to perceive more clearly its realities, and to find alternatives, and ultimately, new directions for action.

Just what forms this educational experience will take will vary from school to school and from teacher to teacher. We will not be able to provide all the facilities, materials and personnel we would like. This is a fact of our whole operation, and we are used to it. But we hope the curriculum will be flexible enough to overcome them.

The Freedom Schools will consist of from 5 to 15 teachers and 25 to 50 students. It does not now appear that we will be able to secure buildings for residential schools, so you will be working in day churches, store fronts, homes, etc.

The kinds of activities you will be developing will fall into three general areas: 1) academic work, 2) recreation and cultural activities, 3) leadership development. It is our hope that these three will be integrated into one learning experience, rather than being the kind of fragmented learning and living that characterizes much of contemporary education. How this integration can occur will be suggested by the materials we will be sending you and by the orientation period.

Since the students' academic experiences should relate directly to their real life in Mississippi, and since learning that involved real life experiences is, we think, most meaningful, we hope that the students will be involved in the political life of the communities. As the day's schedule below indicates, the students will work in various kinds of political activity in the evenings. The way students can participate in local voter registration should be worked out by the teachers and local COFO voter registration staff at a meeting before the opening of school. The teachers will be free to participate in these activities with the students, although you may need the time to prepare lessons, etc., and thus will want the local staff to supervise the students' canvassing, etc. It may also be the case that on some evenings the teachers or students will plan a special event and thus the students will not do political work that night. Or it may happen that the need for canvassing for a special event will cause local staff to ask for part of the students' day for this purpose. It is important that voter registration staff and teachers stay in close touch with each other so these things can be worked out. An average day's schedule might look like this: Early morning (7-9): Concentrated individual work on areas of the students' particular interest or need. Morning (9-12 or 1): Academic curriculum. Afternoon (2-4 or 5): Non-academic curriculum (recreation, cultural activities and some tutoring.) You will have to bear in mind that it is too hot in the afternoon for much concentrated work. Evening (7-9 or so): Work with voter registration activities, or special events (like a visiting folk singer) on evenings when no political work is needed.

The development of a weekly schedule and a daily lesson plan will be left to the teachers and students of the school. All teachers will be at their school's site at least a week before the schools

open July 7. This week should be used primarily for planning by the teaching group, as well as recruiting students and making community contacts. We will try to balance the schools' personnel so that various skills will be represented by different members of the teaching team.

The fact that you will do the actual development of a plan for each day means that you will have to be creative, resourceful and flexible. To aid you in your task, we will be supplying you with the following material, either in the mail or at orientation:

1. Curriculum Guide for Freedom Schools, by Noel Day. This document will be your basic teaching material. It contains six units of study centered around values and social change. Each unit contains suggested content materials and teaching methods. It will be possible for you to center some of the writing and reading teaching around the subject matter of the units, and discussion will help students grow in public speaking ability.

2. Case studies are being prepared by various people. Some of these will relate directly to the curriculum suggested by the Curriculum Guide, some can be used as supplementary material. The Case Study Outline will explain how to use these studies of various problems related to civil rights and political change.

3. Papers on the teaching of science, math and remedial reading and writing (also short papers on teaching arts and crafts, dramatics, etc.)

Science will not relate directly to the subject matter of the curriculum guide, but it is important that students receive both a feeling for what real science is (which they do not receive in school) and tutorial help in specific scientific areas of study if they show interest. Any teacher who know this area should come prepared to do some special work with a few students and to handle a class session or two on a general "Wonders of Science" theme. The paper you will receive will give you further ideas.

Math is an area of real difficulty for many students. Try to secure 11th and 12th (and earlier) math texts for use in tutoring. It will be difficult to develop class sessions around this subject, since students' abilities will vary greatly. The paper on teaching this subject will help you see an approach for a classroom situation.

Remedial reading and writing work will be needed by nearly all students. Reading aloud is suggested in the Curriculum Guide as are some theme topics. Students should be encouraged and guided in doing outside reading. Writing should be discussed with students individually with tutorial help directed toward writing improvement.

4. A paper on Leadership Development by Charlie Cobb will contain suggestions of the kinds of skills students should develop and suggest how these can be integrated into daily activities.

5. A paper suggesting recreational and cultural activities for students will be available.

IT IS ABSOLUTELY ESSENTIAL THAT YOU STUDY THESE MATERIALS CAREFULLY AND BRING THEM SOUTH WITH YOU. THEY WILL BE YOUR GUIDE FOR THE SUMMER. YOUR TIME HERE IS LIMITED AND YOU MUST PREPARE AHEAD OF TIME AS MUCH AS POSSIBLE. We will NOT be able to replace curriculum materials if you fail to bring them with you.

We are glad you will be with the Mississippi movement and hope that you share our excitement about the possibilities that the summer holds for real growth for you and Mississippi's young people.

[Editors' Note: 'Curriculum Guide for Freedom Schools' became the 'Citizenship Curriculum, Units I to VI']

OVERVIEW OF THE FREEDOM SCHOOLS—II

COFO

1017 Lynch – Jackson, Miss.

The purpose of the Freedom Schools is to create an educational experience for students which will make it possible for them to challenge the myths of our society, to perceive more clearly its realities, and to find alternatives—ultimately new directions for action.

The Freedom Schools will consist of from 5 to 15 teachers and 35 to 50 students. They will be informal day schools, meeting in churches, store fronts, homes, etc. They will avoid the “academic” classroom atmosphere which characterizes their regular schools, but the Freedom Schools will present an intensive curriculum designed to meet several different needs:

I. An academic curriculum which will, insofar as possible in 6 short weeks, sharpen the students’ abilities to read, write, work mathematical problems, etc., but will concentrate more on stimulating a student’s interest in learning, finding his special abilities, so that when he returns to the state schools in the fall he can take maximum advantage of the public education which is offered to him.

II. The Citizenship curriculum which will concentrate on a study of the social institutions which affect the students, and the background of the social system which has produced us all at this time. The various sections will be: the Negro in Mississippi, the Negro in the North, Myths about the Negro, the Power Structure, the Poor Negro and the Poor White, Material Things versus Soul Things, and the Movement. In these sections, the students will be encouraged to form opinions about the various social phenomena which touch him, to learn about his own particular heritage as a Negro, and to explore possible avenues for his future. Special attention at the end of the unit will be devoted to the civil rights Movement—the historical development to this point, the philosophical assumptions underlying pressure for social change, and the issues which are currently before the civil rights Movement.

III. Recreational and cultural curriculum, which will be a large part of the day will try to provide the students with relaxation from their more intensive studies and also an opportunity to express themselves in new ways. The program will include dancing and sports, arts and crafts, dramatics, music, etc.

The schools will run for six weeks, with a short break in the middle for orderly staff turnover and some student changes. The school day will concentrate on the morning and afternoon; in the evening the students will be free, and will be encouraged to join the local COFO project, helping with the Freedom Registration, voter registration, the precinct meetings, etc. The Freedom School teachers, too, will participate in these programs as far as their academic responsibilities allow them to. The Freedom School teachers and the COFO voter registrations workers should meet to plan together the most useful participation of the Freedom School students, so that the total program will contribute both intensive intellectual development and practical experience to make them better potential leaders of the community.

NOTES ON TEACHING IN MISSISSIPPI

FREEDOM SCHOOLS

COFO 1017 Lynch St., Jackson, Mississippi

INTRODUCTION TO THE SUMMER—Jane Stembridge

This is the situation: You will be teaching young people who have lived in Mississippi all their lives. That means that they have been deprived of decent education, from the first grade through high school. It means that they have been denied free expression and free thought. Most of all—it means that they have been denied the right to question.

The purpose of the Freedom Schools is to help them begin to question.

What will they be like? They will all be different—but they will have in common the scars of the system. Some will be cynical. Some will be distrustful. All of them will have a serious lack of preparation both with regard to academic subjects and contemporary issues—but all of them will have knowledge far beyond their years. This knowledge is the knowledge of how to survive in a society that is out to destroy you . . . and the knowledge of the extent of evil in the world.

Because these young people possess such knowledge, they will be ahead of you in many ways. But this knowledge is purely negative; it is only *half* of the picture and, so far as the Negro is concerned, it is the first half. It has, in a sense, already been lived through. The old institutions are crumbling and there is great reason to hope for the first time. You will help them to see there is hope and inspire them to go after it.

What will they demand of you? They will demand that you be honest. Honesty is an attitude toward life which is communicated by everything you do. Since you, too, will be in a learning situation—honesty means that you will *ask* questions as well as answer them. It means that if you don't know something you will say so. It means that you will not “act” a part in the attempt to compensate for all they've endured in Mississippi. You can't compensate for that, and they don't want you to try. It would not be *real*, and the greatest contribution that you can make to them is to be real.

Remember this: These young people have been taught by the system not to trust. You have to be *trust-worthy*. It's that simple. Secondly, there is very little if anything that you can teach them about prejudice and segregation. They know. What you can and must do is help them develop ideas and associations and tools with which they can do something *about* segregation and prejudice.

How? We can say that the key to your teaching will be honesty and creativity. We can prepare materials for you and suggest teaching methods. Beyond that, it is your classroom. We will be happy to assist whenever we can.

How? You will discover the way—because that is why you have come.

THIS IS THE SITUATION—Charlie Cobb

Repression is the law; oppression, a way of life—regimented by the judicial and executive branches of the state government, rigidly enforced by state police machinery, with veering from the path of “our way of life” not tolerated at all. Here, an idea of your own is a subversion that must be squelched; for each bit of intellectual initiative represents the threat of a probe into the why of denial. Learning here means only learning to stay in your place. Your place is to be satisfied—a “good nigger.”

They have learned the learning necessary for immediate survival: that silence is safest, so volunteer nothing; that the teacher is the state, and tell them only what they want to hear; that the law and learning are white man's law and learning.

There is hope and there is dissatisfaction—feebly articulated—both born out of the desperation of needed alternatives not given. This is the generation that has silently made the vow of no more raped mothers—no more castrated fathers; that looks for an alternative to a lifetime of bent, burnt and broken backs, minds, and souls. Where creativity must be molded from the rhythm of a muttered “white son-of-a-bitch”; from the roar of hunger-bloated belly; and from the stench of rain and mud washed shacks.

There is the waiting, not to be taught, but to reach out and meet and join together, and to change. The tiredness of being told it must be, ‘cause that’s white folks’ business, must be met with the insistence that it’s their business. They know that anyway. It’s because their parents didn’t make it their business that they’re being so systematically destroyed. What they must see is the link between a rotting shack and a rotting America.

PROBLEMS OF FREEDOM SCHOOL TEACHING—Mendy Samstein

The Freedom Schools will not operate out of schoolhouses. There will rarely be classrooms, certainly no bells, and blackboards only if they can be scrounged. Freedom Schools in Mississippi will be a low-cost operation since funds will be very limited. Furthermore, the community will have little to offer in the way of resources. In many places, particularly in rural towns, there are no really suitable facilities available either in the white or in the Negro communities. As a result, most Freedom Schools will have to be held in church basements, homes, back yards, etc.

In some towns in the state, the students are waiting with great excitement in anticipation of the Freedom Schools. In other areas, however, special interest will have to be created—the teachers themselves will have to recruit students before the Freedom Schools begin. In these places, you will find that you are almost the first civil rights worker to be there, and if you are white, you will almost certainly be the first white civil rights workers to come to the town to stay. You will need to deal with the problem of your novelty as well as with the educational challenge.

There will be some advantages which will, we hope, overcome some of the material shortcomings. If you go to a town where COFO has had an active project for some time, you will probably be greeted warmly because there is a great deal of support for the Freedom School program. However, even if you go to a relatively new place, you can count on some things: In no community will there be a Freedom School unless the people of that community have expressed a desire for one, have shown their support by finding housing for staff at low cost (typically \$10 a week for room and board), and have scouted out a place for a Freedom School.

The greatest advantage, however, will be the students and, we hope, your approach. In the final analysis, the effectiveness of the Freedom Schools this summer will depend upon the resourcefulness and honesty of the individual teachers—on their ability to relate sympathetically to the students, to discover their needs, and to create an exciting “learning” atmosphere. The informal surroundings, the lack of formal “school” trappings, will probably benefit the creation of this atmosphere more than the shortage of expensive equipment will discourage it. Attendance will not be required, so if the teacher is to have regular attendance from his students, he must offer them a program which continues to attract; this means that he must be a human and interesting person.

It is important to recognize that these communities are in the process of rapid social change and our Freedom School program, along with the rest of the summer activities, will be in the middle of this ferment. The students will be involved in a number of political activities which will be relatively new in Negro communities in Mississippi. They will be encouraging people to register to vote, organizing political rallies, campaigning for Negro candidates for high public offices, and preparing to challenge the Mississippi Democratic Party. These activities will be a large part of the experience which the students will bring to your classes. In most instances, we believe that this will help the Freedom School program and you should capitalize on these experiences by relating it to classroom work. You will need to know something about these experiences, so you will have the opportunity to share them by canvassing, campaigning, distributing leaflets, etc., with the students. You will define your role more precisely when you arrive by consulting with COFO voter registration people in the area. It will probably be important to the students that you show willingness to work with them but you will have to balance this against your own need to prepare for classes, recreation and tutoring.

In some communities, however, the situation may go beyond this. The community may embark upon more direct kinds of protest, resulting in mass demonstrations, jail, and any number of eventualities. We have no specific suggestions to make if this situation arises. You will have to play it by ear. We can only say that if you are teaching in a Freedom School in Mississippi, you *must* keep a sensitive ear to the ground so that if this should happen, you will be aware of what is happening in the community. You will have to decide if a continuing educational program is possible, and, if it is not, what modification of the program you can arrange to make this summer as constructive a period for the community as possible.

REMARKS TO THE FREEDOM SCHOOL TEACHERS ABOUT METHOD—Noel Day
TEACHING TECHNIQUES AND METHOD: The curriculum is flexible enough to provide for the use of a wide range of methods in transmitting the material. The basic suggested method is discussion (both as a class and in small groups) because of the opportunities this method provides for:

1. Encouraging expression.
2. Exposing feelings (bringing them into the open where they may be dealt with productively).
3. Permitting the participation of students on various levels.
4. Developing group loyalties and responsibility.
5. Permitting the sharing of strengths and weaknesses of individual group members.

However, presentation lectures, reading aloud (by students), the use of drama, art, and singing can be utilized in many sections of the curriculum. We recommend, however, that discussion be used as a follow up in each instance in order to make certain that the material has been learned.

TEACHING HINTS:

1. Material should be related whenever possible to the experience of students.
2. No expression of feelings (hostility, aggression, submission, etc.) should ever be passed over, no matter how uncomfortable the subject or the situation is. Both the students and the teacher can learn something about themselves and each other if it is dealt with honestly and with compassion.
3. The classroom atmosphere should not be formal (it is not a public school). Ways of accomplishing an informal atmosphere might be arrangement of seats in a circle, discussions with

individuals or small groups before and after sessions, use of first names between teachers and students, shared field-work experiences, letting students lead occasionally, etc.

4. Prepare ahead of time for each session.
5. When using visual materials, make certain they are easily visible to all students and large enough to be seen. (When smaller materials must be used, pass them around after pointing out significant details.)
6. Let students help develop visual materials wherever possible (perhaps after class for the next session).
7. At the end of each session, summarize what has been covered and indicate briefly what will be done in the next session.
8. At the beginning of each session, summarize the material that was covered the day before (or ask a student to do it).
9. Keep language simple.
10. Don't be too critical at first; hold criticism until a sound rapport has been established. Praise accomplishments wherever possible.
11. Give individual help to small groups, or when students are reading aloud or drawing.
12. A limit of one hour (an hour and a half at most) is probably desirable for any one session. This limit can be extended, however, by changing activities and methods within a session.

DISCUSSION-LEADING TECHNIQUES

1. The leader must always be aware of his role: that he is, on the one hand, only the leader and not the dominant participant, and, on the other hand, that he is in fact the leader and responsible for providing direction and keeping the discussion going.
2. The use of questions is probably the best way to start and keep a discussion going. The questions should be:
 - a. simple and clearly phrased
 - b. in language understood by the discussants.
 - c. not answerable by "yes" or "no".
3. The best types of questions fall into three categories:
 - a. Those investigating emotional response (e.g., how did you feel when? Or how would you feel if?)
 - b. Those investigating motivation (e.g., why did you feel that way? Why would you do that? Why do you think that?, etc.)
 - c. Those in response to others' reactions (e.g., what do you think about what Bob said?)
4. The physical arrangements can affect the quality of discussion. The best arrangement has everyone in view of everyone else. The leader then stands to introduce a visual aid so that it is visible to all.
5. The leader should be careful to be adroit at keeping the discussion on the track.
6. The leader should occasionally summarize what has been said:
 - a. to provide continued direction.
 - b. to provide smooth transitions from one major topic to another.
 - c. to emphasize important points (and by exclusion to de-emphasize irrelevant points).
 - d. to re-stimulate the group if discussion has lagged.
7. The leader should encourage participation by everyone. Some techniques for this are:
 - a. direct question to silent participants (do not press if they continue to be reticent).

- b. use of small groups with the usually silent members as reporters.
 - c. praise when the usually silent members participate.
 - d. relating topics to their personal interests and experiences.
 - e. re-stating inarticulate statements for them (e.g., Do you mean? etc.)
8. The leader should be sensitive to lagging interests and overextended attention spans. (The form of activity can be changed after a brief summary of the discussion to that point. A change of activity form is often restful—particularly when it requires some physical movement, such as breaking one large group into smaller groups scattered throughout the room, or putting review in the form of a TV quiz game, or asking that a particular point be dramatized, or a picture drawn, etc.)
9. The leader should have all resource materials, visual aids, etc., at hand.
10. The leader should always leave time for the students to ask him questions.
11. The leader should be willing to share his experiences and feelings, too.
12. The leader should not insist that words be pronounced in any particular way. Respect regional variations (e.g., Southern pronunciation of “bomb” is typically “bum”). The basic point is communication—if it gets the idea across it is good.
13. The leader should not be critical—particularly at the start. For many of the students, **JUST BEING ABLE TO VERBALIZE IN THIS SITUATION IS PROGRESS** that can easily be inhibited by a disapproving remark or facial expression.
14. Learn the students’ slang. It can often be used to ease tensions or to express tones of feeling and certain meanings more succinctly than more academic language.
15. Protect students from each other’s verbal attacks and downgrading (ranking, etc.)—particularly the slower or less articulate students.

USING DRAMA: Probably the best way of using the dramatic method is the extemporaneous approach. In this approach, learning lines in a formal way is avoided. A story is told, or a “let us suppose that” or a “Pretend that...” situation is structured, and then parts assigned. The actors are encouraged to use their own language to interpret the story or situation and some participants are assigned to act the part of nonhuman objects as well (e.g., trees, a table, a mirror, the wind, the sun, etc.). Each actor is asked to demonstrate how he thinks the character he is portraying looks, what expression, what kind of voice, how he walks, what body posture, etc. As soon as each actor has determined the characteristics of his part, the story outlined is reviewed again, and then dramatized. This method can permit the expression of a wide range of feelings by the students, involve their total selves, stimulate creativity, provide the teacher with insights about the students, and, at the same time get across the content material.

USING SPECIAL RESOURCE PEOPLE: there will be many talented people in Mississippi this summer. Some of them will be attached to projects in voter registration, community centers and freedom schools (you). There will be other professional people who will not be staying long enough to follow one project through from beginning to end, but they are eager to make what contribution they can. Included in this category are physicians, attorneys, ministers, and, most notably, entertainers. In the group of entertainers will be some very eminent folk singers and comedians. (Folk singers are being recruited on a formal basis. Lawyers are too. Physicians and ministers may or may not be attached to specific programs.) Whatever their formal status, these people will represent a great advantage to your program. You, however will have to make the best use of them. You should try to make their contribution as great, and as well-coordinated with the

regular program, as you and they can make it. This will require creative thinking and prior planning for both guests and the freedom school personnel.

NON-MATERIAL TEACHING SUGGESTIONS

(but plenty of paper and pencils) FOR FREEDOM SCHOOLS (excerpt)

My preference is for de-emphasizing the teaching of reading (spelling and grammar) as a separate skill unless a student, of his own volition, specially requests it. In general, a high school student will probably learn more from speaking, reading, and writing about his own thoughts or a particular subject he himself is interested in. Two students working together can often teach and learn more from each other than you can teach either of them separately. But you should always be available to answer questions (if you can) or act as umpire if needed. Specifically, a student or students might be asked to do any of the following:

1. Write up reactions to, or a summary of, a class discussion.
2. Report to the class on something he, or they, have studied on their own or worked on specially with you or a specialist (e.g. in math, science, art or politics).
3. teach games or reading, or anything needed, to younger children in a Community Center and report this in detail for the class.
4. Report for, and edit, a newspaper to exchange with other Freedom Schools.
5. Report or exchange information in any form on any subject that may occur to you or them (e.g. their work on Voter Reg.)

You will want to fit the form of the presentation to the particular student—a written report for him to read to the class, or which you or another student might read to the class, or an oral report to the class, with or without demonstration (or a scientific experiment, an artistic creation or anything else.)

I would suggest not correcting grammar or spelling for the first few days unless a student asks you to (and means it). Students will probably criticize each other on these mechanics, and this is better. You will have to judge which students need to be protected, by you, from too much fellow-student criticism too soon.

Some students will not be able to bring themselves to read aloud or speak before the class. You should judge when, if ever, it is time to push them a little to make a try at it. Try never to embarrass a student before his fellows.

Some students will be unable to express their thoughts adequately in writing if you insist upon proper spelling. Others will be uncomfortable if you do not enable them to spell everything properly as they write it down. For these students, you should be ever-present to furnish them with the words they need. Such a student might have a notebook in which he could copy and keep track of any word you furnished for him. (You could write it on a slip of paper as he asked for it.) Generally speaking, I would not say “Go look it up in the dictionary” if a student asks how to spell a word. (Try looking up a word like colosal? calosel? collasol? if you don’t know its spelling, and you’ll see what I mean.)

We are really more concerned with content and clarity of thought (in the student’s own meaningful language) than with grammar and spelling. I think this point has a particular importance in areas where the public school teachers have been hesitant to deal in ideas—because then there is a tendency for the teacher to fall back on stressing mechanics. (By the same token, if you are fresh from the halls of ivy, watch to keep yourself from falling back on jargon or vague, abstract terms when the ideas get hot or you’re not sure exactly what you want to say.)

If you feel that a particular student is free enough in expressing his ideas that you can afford to push him in the areas of spelling and grammar, the newspaper might be a good place for him to practice it. I think the newspaper would be one place where you can require precision in spelling

and grammar, and perhaps (?) a more formal style of writing. Students who were not up to this could write newspaper stories which could be edited by other students.

I think the rule of thumb for this whole area of written (and oral) expression might be: Help your student to use his language for clear communication, but hesitate to change matters of style—unless it's your student who's working on style.

READING MATERIALS AT VARIOUS LEVELS:

If you do not have reading material which matches your (each) student—and content is at least as important as reading level—I would suggest your having the students write their own material. Your labor is likely to bear more fruit if they, rather than you, do the writing. If you want to study a difficult novel, read it aloud to them, or have a student who enjoys reading aloud and does it well do part of the reading. As you read, encourage interruptions for questions and discussion. Then you can have a, some, or all students write summaries or critiques or whatever you want. Read then aloud in class (each his own, perhaps) and discuss content. If it turns out to be something great, you can have the students edit the material and perhaps exchange a volume with another freedom school. (It doesn't have to be mimeographed, it could be a single handwritten and illustrated volume.)

For non-literary subjects, it is usually much better if you study the material in advance and tell it rather than reading it to the students. Then go on with the writing and discussion, as above, if you want to. Your telling, with your own comments and asides, is a thousand times more captivating to a student than reading the material aloud.

You can modify the above for math as well as history, science, etc. Students making up math problems for other students to solve will often make up more difficult ones than you or the book would have dared—and if the problem-maker has gotten too fancy, you can always pull the dirty trick of making him solve his own! (But do it friendly-like!) These things need to be done by the whole class. Two or three students might do them separately or together—and if it turned out well they might present the results to the class.

All of this working over and over on the same material (talk, write, read, discuss, etc.) may seem hard to you at first, but I think you will not find it a waste of time. One of the very important parts of the process of learning is to approach the same material from many angles and in many media. You may not (will not, I should say) get through the whole of the citizenship curriculum if you work this way, but you'll leave your students with something real to hang onto when you're gone.

HOMEWORK: I'm against it—unless a student asks for it. These kids may be working at home or at a job or on voter registration. What they can't do in school hours is probably better left undone. And your own time is better spent in preparing particular material for a particular student, or for all your students, than in correcting old, dead homework. The beauty of in school work is that you can work over it with a student as he goes along and guide him or support him so he won't make mistakes.

TESTING: I'm against it—even if the students ask for it!! Naturally, nothing can be a flat rule, but testing, generally, is at best, a waste of time. At worst it is likely to discourage the very student who needs most to be encouraged. It is rarely a teaching device. In a class of 30 children, a teacher may be forced to resort to testing to find out how the students are progressing. But why use a second-class crutch when you have two good legs? With only five students, you will be able to work closely enough with each, that you will be able to know where he stands and

what the next steps should be. And you will know it with much more accuracy and detail than any written test can reveal.

IN GENERAL:

Try to give your students as much a feeling of power as you can—not the phony class-meeting type but power over materials, words, songs, thoughts. If you really let them choose what they want to learn, it will be a much more important lesson in freedom than the Civil Rights Bill or the Mississippi Power Structure. And your attitude of genuine respect for your students and their ideas will give them much more courage to stand up to a policeman, than any words you can say.

Cultivate this attitude of respect and real listening and honest answering right down to the bone. It's very hard to listen—practice it over the lunch table. But listen actively, not passively

If you ask a question, make it a real question, not an implied pressure or rebuke.

There is no need for fulsome praise if you can show real appreciation for each student at his level. Heavy praise may discourage someone else.

Don't do a lot of preparation on a subject until you find out what your students want to know. If you learn something special, you'll be burning to teach it and they may have to sit and politely listen the way they have to in regular school.

If possible, spend your time making the schoolroom full of the physical conditions for learning—reference books and materials in inviting and handy places—getting to know some of your students beforehand if possible so it won't be so hard to get things going the first day, perhaps finding out what some of your students have in mind to learn so you can begin thinking and preparing and scrounging materials and specialists, and don't forget the important constant dialogue with your fellow teachers and coordinators.

Teaching can be an exhausting job if it's properly done, so try yourself out on it before you volunteer for all sorts of other jobs in the evening. Many evenings you'll probably need to be preparing material for the next day or helping one of your students with something. Of course if voter registration is a big interest of your students, you will automatically be there with them, I guess, getting your life material ready for the next day.

Be frank and honest at all times, but remember that you are the adult and your students are your students. Don't impose your problems on them. It's your job to support them, and your satisfactions, and their respect for you, will come from that. You must be patient and reasonable and strong and good natured and sensitive and mature. The students don't have to be. If they will show you what really bothers them, you've achieved something, but what you must give in return is what will help them, not yourself.

ADDENDA: Another of the ways you can work over some of the material of the type on pp.1-2, above, is to act out parts of the material informally before writing about it but probably after some discussion.

As often as possible, provide an active learning situation where the students can do something and you will not have to do much talking.

Example: Instead of explaining Socratic method, let the class play the Socrates Game—

One student leaves the room and the others decide upon something they want to get him to say. When he returns to the room, they take turns asking questions and see how long it takes to get him to express the statement or point of view they are trying to elicit. (He should be fairly cooperative.)

SOME SIMPLE SPELLING CLUES:

. . . I hope you'll have a good dictionary in your classroom—to settle arguments between your students and to refer to generally. If a student picks you up on an exception or a mistake—let him prove it to you with the dictionary—and be glad. That particular spelling (or fact or whatever), he will remember—and in addition he will have begun to learn that the authorities (you, for the moment) are often wrong!

Despite all this stuff on spelling, let me remind us both that the more important things are the not-spelling ideas laid out on pp. 1-2.

If some or all of this has sounded like talking-down to you, please forgive me for not taking my own advice, and let that be a lesson to you!

Go Well,
Ruth Emerson

[Editors' Note: the complete document is in the Ellin Papers in the Digital Archive; see Preface.]

PROFILES OF TYPICAL FREEDOM SCHOOLS

COFO,
1017 Lynch St.
Jackson, Mississippi

I. Hattiesburg

Hattiesburg, Mississippi is a town of around 30,000—which makes it one of the five or six largest cities in Mississippi. It is near the gulf coast cities which are the “moderate” part of the state, but Hattiesburg itself is a deep-dyed conservative town. It is Governor Paul B. (Stand Tall with Paul) Johnson’s hometown. It is the site of Mississippi Southern University, whose law school faculty has engineered the so-far successful defiance of Ross Barnett in the James Meredith case (also acts as consultants for the State of Miss. In other civil rights cases). Mississippi Southern also is the school where Clyde Kennard, a Negro, applied in the late 1950’s. He was subsequently sent to Parchman penitentiary on a flimsy burglary conspiracy charge, contracted cancer in prison and died. Mississippi Southern has since rejected the application of another Negro, John Frazier, five times. Hattiesburg is the seat of Forrest County. Despite its large (by Mississippi standards) university and a fairly firm economic base in commerce and manufacturing, Hattiesburg “feels” like a small, agrarian-oriented community.

Hattiesburg has had a long, tough history of civil rights activity, primarily centered on the denial of the right to vote. The Circuit Clerk of the County (registrar of voters), one Theron Lynd, has made himself the test case for all recalcitrant Mississippi registrars. As early as 1961, the Department of Justice instituted proceedings against him, charging discrimination against Negroes. After much litigation, the federal government won its case and Lynd was ordered to register 43 persons whose applications a U.S. District Judge had processed and found acceptable. Lynd consistently refused to obey these court orders, was convicted of civil contempt and STILL would not register the persons in question. The Department of Justice then instituted criminal contempt proceedings against him which are still pending. At this point, however, the civil rights groups moved independently. On January 22, designated Freedom Day in Hattiesburg, COFO people from all over the state, national civil rights leaders, but mostly the people of Hattiesburg, started a picket line around the Forrest County courthouse which, with some interruptions, is still going on. This picket line represented a breakthrough for civil rights demonstrations in Mississippi, because it was the first to last more than 10 minutes—the police did not arrest everybody. Later, after the State legislature passed a special statute outlawing picketing of public buildings, the picketers were arrested, but that passed, too, and the picketing has resumed.

The COFO project in Hattiesburg is one of the largest and most active in the state, with a high proportion of adult participation and leadership. The town is organized, with 100 block captains, 15 citizenship teachers, and uncountable canvassers, picketers and ministers from outside the state. Two candidates for national office (one for Congress and one for Senate) have come out of the movement in Hattiesburg. The atmosphere is enthusiastic and the people work very hard.

Because the project is so active, there is a lot of demand for the Freedom Schools, and the Hattiesburg people have, therefore planned a series of Freedom Schools. The facilities are presently planned for Sunday School rooms in churches around town and in surrounding counties. Project leaders in Hattiesburg are especially interested in supplementary classes for local adults and staff members in basic literacy and current issues. The project has found housing for 110

summer workers (all of which will not work in the city of Hattiesburg, however). The project has also laid hands on a movie projector and a tape recorder for the summer project. Since the community is able to support the program better than in other areas of the state, the needs are not proportionately as great, even though it is a large Freedom School project. The main needs are for equipment and transportation to outlying schools and schools in other counties. The total budget is for \$2,000 to pay for food, transportation, equipment, and inescapable expenses such as phone bills.

II. Meridian

Meridian is a city of 50,000, the second largest in the state. It is the seat of Lauderdale county. It is in the eastern part of the state, near the Alabama border, and has a history of moderation on the racial issue. At the present time, the only Republican in the State Legislature is from Meridian. Registration is as easy as anywhere in the state, and there is an informal (and inactive) "biracial committee", which, if it qualifies, is the only one in the state.

Voter registration work in Meridian began in the summer of 1963 (for COFO staff people, that is), and by autumn, when Aaron Henry ran in the Freedom Vote for Governor campaign, there was a permanent staff of two people in the city. In January, 1964, Mike and Rita Schwerner, a married couple from New York City, started a community center. In Meridian's mild political climate, the community center there has functioned more smoothly than either of the two community centers which COFO has organized in tougher areas. The center has recreation programs for children and teenagers, a sewing class and citizenship classes. It also has a library of slightly over 10,000 volumes, and ambitious plans for expansion if more staff were available. The COFO staff in Meridian uses Meridian as a base for working six other adjoining counties.

The Freedom School planned for Meridian will have a fairly large facility, in contrast to most places in the state. The Baptist Seminary is a large, 3-story building with classroom capacity for 100 students and sleeping accommodations for staff up to about 20. Besides this, there is a ballpark available for recreation. The school has running water, blackboards and a telephone. The center has a movie projector and screen which it probably would lend. The library lends books to anyone for two-week periods. The question of rent has not been decided for the school. Even if there is no rent, however, we can count on a budget of around \$1300, for food for students, utilities, telephone and supplies.

III. Holly Springs

Holly Springs is a small town, the seat of Marshall County. The Methodist Negro College, Rust College, is located in the town. It's a very attractive campus, and the students and faculty have been very active recently (since it's a church-operated school, one can expect somewhat more cooperation of Rust than the state schools). Holly Springs is currently acting as the clearinghouse for all our library books and Freedom School materials. There has been no permanently-based COFO project with a full-time staff worker in Holly Springs; all the action has been the work of the local people. The roots in this community are somewhat recent, reflecting the fact that in the Northern, hilly part of the state, intensive civil rights work is just beginning.

In Holly Springs there are two houses available for a total of 75 students (and housing for 15 teachers). The rent will be \$400, a major expense. The houses will go if we can't raise the rent money. Besides rent, the normal expenses and food will make the project cost about \$1,000.

IV. Ruleville

Ruleville is a small Delta cotton town in Senator Eastland's home county (Sunflower County). The sheriff in Ruleville is the brother of the man believed to have killed little Emmett Till in 1954—a man with a great reputation in his own right for brutality toward Negroes. By any standard, Ruleville is a tough Delta Town. Its main attraction for us is that it is the home of Mrs. Fannie Lou Hamer, the Mississippi Freedom Democratic Party's candidate for Congress in the Second Congressional District. Mrs. Hamer's own history is typical of much of the harassment of Negroes in the Miss. Delta: When Mrs. Hamer tried to register to vote in 1962, she was fired from her job. She and her family were run off the plantation where they had worked for years. She persisted, and became one of the great leaders of the Mississippi movement, but in the meantime she was arrested, beaten, her home shot into, her husband fired.

Voter registration activity began in Ruleville in 1962. The project is well established in the community, even though the town is so small. Because it is an area of desperate poverty, even for the Delta, COFO has sponsored a food and clothing project in Ruleville for several months, with Mrs. Hamer and other local ladies in charge of the distribution.

For Freedom School project in Ruleville, the local people have found a house which can serve 40 students, and have housing for 8 teachers. For the rent, and a few necessary supplies, we estimate that this Freedom School needs \$200. Lunches for students would probably be another \$500, but this is a service which is needed in the area.

MISSISSIPPI FREEDOM SCHOOLS:*New Houses of Liberty*

I asked for your churches, and you turned me down,
 But I'll do my work if I have to do it on the ground,
 You will not speak for fear of being heard,
 So you crawl in your shell and say, "Do not disturb,"
 You've protected yourself for another day.

But tomorrow surely will come,
 And your enemy will still be there with the rising sun,
 He'll be there tomorrow as all tomorrows in the past,
 And he'll follow you into the future if you let him pass.

—from a poem by Joyce Brown, 16
 Freedom School pupil in McComb, Mississippi

This poem was written by a 16-year old Negro girl in McComb, Mississippi. She and approximately 1,825 other Negroes—children, teen-agers and adults—are attending the 39 Freedom Schools of the Mississippi Summer Project, sponsored by the council of Federated Organizations (COFO), a statewide organization of local groups aided by field secretaries of the Student Nonviolent Coordinating Committee (SNCC), CORE, NAACP, and the Southern Christian Leadership Conference.

These students—going to "school" in churches, private homes, and backyards—are learning Negro history, civics, American history, arts and crafts, drama, music, English, arithmetic, algebra and chemistry. They are being taught by 250 Negro and white summer volunteers from 40 states in schools which have been set up in every Mississippi city or town of considerable size, as well as in rural counties where Negroes have been shot to death for attempting to register to vote.

Project coordinators state that the Freedom School program is an unqualified success. Rev. Thomas Wahman, a coordinator of religious activities at New York University, and a Freedom School coordinator, terms the project a "completely unexpected phenomenon." Despite the fear which prevails in most Negro communities throughout the state, "several are demanding that COFO come in and set up schools," says Wahman.

Ralph Featherstone, a 25-year old Negro speech teacher from Washington, D.C., is director of the McComb Freedom School. Featherstone explains that the opening of the school was delayed for two weeks after three civil rights workers disappeared in Philadelphia, Mississippi and advance scouts prepared the way in the dangerous Southwest area of Mississippi.

But Featherstone found the students ready and waiting. In fact, Featherstone says, "they'd heard about the school and they felt left out because we didn't arrive on time."

Now the registration in McComb is up to 105, with a daily attendance of 75. Many of the students are the younger brothers and sisters of the 110 high school students who walked out of school when four of their number were arrested on a sit-in charge at the Greyhound bus station in 1961.

“I think the Freedom School is inspiring the people to lend a hand in the fight,” Featherstone reports. “The older people are looking to the young people, and their courage is rubbing off. The school makes the kids feel they haven’t been forgotten. It makes them feel that at last something is coming down to help them. They feel the school is for them.”

The McComb school started in the backyard of the SNCC Freedom House a week after it was bombed. For one week, students conducted classes in the blistering heat only yards away from the spot where three explosions ripped away one wall. Now they are in a church.

The Hattiesburg Freedom School system (there are five) has the highest registration and the most varied curricula in the state. Some 575 young people and adults attend morning and evening classes in the usual academic subjects, plus music programs, discussion groups, slide exhibitions, and art classes. Three of the five schools are putting out a newspaper, and Mrs. Carolyn Reese, a Negro Detroit school teacher and administrator of the Hattiesburg Freedom Schools, reports that the other two will begin putting theirs out soon.

To understand what the Freedom Schools mean to those attending them, it is first necessary to understand several facts about the regular system of education in Mississippi.

The Mississippi educational system is geared to teach the Mississippi Educational Way of Life: Dissent is heresy. Ignorance is safer than inquiry. Fear pervades the academic atmosphere.

Example: in the spring of 1961, a number of Negro students in Jackson were expelled from (Negro) high school because they stood up in their classrooms and inquired pointedly about the Freedom Rides and their significance.

Example: More than 800 students at Alcorn A & M College (Negro) in Southwest Mississippi were tossed out of school in the spring of 1964 by the college president because they protested social conditions on the campus. The President enlisted the aid of the much-feared Mississippi Highway patrol to load the students into buses so that they could be sent home without even the opportunity to collect their belongings.

Example: also during this spring, an issue of the student newspaper at the University of Southern Mississippi (white) was confiscated by campus police under the direction of the school president W.D. McCain because it carried an article about the school administration’s refusal to grant admission to a Negro applicant. (McCain is a strong supporter of the White Citizen’s Council, and an advisory board member of the Patriotic American Youth, a campus youth organization which shares space with the John Birch Society in a Jackson bookstore. He also received a special commendation from the state legislature for refusing admittance for the fifth time to John Frazier, a student at predominantly Negro Tougaloo College.)

There are many other such examples of suppression of student rights, and even of faculty rights, e.g., the constant persecution of Ole Miss Professor James W. Silver. However, what is even more chilling is the economy of school segregation in Mississippi.

Despite the fact that Alabama spends less per pupil, black and white, than any state in the nation, the expenditure in the Mississippi Delta is even less. More important, the disparity between funds spent per white student and funds spent per black student is even greater.

In Mississippi, the county appropriates funds for education—in addition to the funds contributed by the state. The following is the county appropriation, above the state minimum, for instruction per pupil in 1960-61:

North Pike County (43% non-white)*

(McComb)

white.....\$30.89

Negro..... .76

South Pike County

(Magnolia)

white.....\$59.55

Negro..... 1.35

Forrest County (28% non-white)*

white.....\$67.76

Negro..... 34.19

Hattiesburg Separate

white.....\$115.96

Negro..... 61.69

*U.S. Civil Rights Commission Report on Voting, 1960.

Whites who control Mississippi have little respect for education, but use it unscrupulously to prevent Negroes from obtaining the basic democratic right, the right to vote.

For instance, while the State Penitentiary Reform Bill was still in the Senate, Sen. Howard McDonnell of Biloxi proposed an amendment which would require that the Superintendent of the penitentiary have two years of college education. Foes of the amendment said the requirement would force the ouster of the present superintendent, C.E. Breazeale. The amendment failed. McDonnell then asked that the Superintendent be required to have a high school education. That amendment was also defeated.

In April, 1964 a bill was introduced into the Senate Education Committee which would have required a high school education for the members of the county boards of education. The bill was eventually sent back to committee where lobbying took place to exclude certain counties from the provisions of the bill.

Yet, the Mississippi legislature has established voter registration requirements which lawyers contend would be extremely difficult for anyone without a law degree to pass, if the tests are honestly administered.

The Freedom Schools are a war against this academic poverty. It is not just the courses provided, but the fact that the schools are a focal point for personal expression against the oppression, on the one hand, and for personal growth and creativity, on the other. The regular Mississippi schools are fundamentally opposed to this approach.

Mrs. Reese says, "The Freedom Schools mean an exposure to a totally new field of learning, new attitudes about people, new attitudes about self, and about the right to be dissatisfied with the status quo. The children have had no conception that Mississippi is a part of the United States; their view of American history is history with no Negroes in it. It's like making a cake with no butter."

Mrs. Reese explains that “Mississippi has sold itself short. There are many good minds here which are being used as sacrificial lambs. The children are alert and eager to learn. If they had something to learn, they’d be happy to learn it.”

Both Mrs. Reese and Featherstone find themselves faced with the unexpected problem of a pupil-teacher ratio which is growing too large. Mrs. Reese tells of one teacher who is so popular that her class has increased from 15 to 27 students—who come every day. Wahman is now recruiting an additional 100 teachers for the month of August, and expects that schools in five new communities will be opened then.

Both Featherstone and Wahman point to the Negro history curriculum as possibly the most valuable legacy of the Freedom Schools this summer. “The only thing our kids knew about Negro history,” Featherstone says, “is about Booker T. Washington and George Washington Carver and his peanuts.”

But subjects like chemistry and algebra are also popular. Featherstone was told by pupils in the McComb School that Negro children are taught algebra in high school, but white children begin the subject in the sixth grade. Wahman says that when the chemistry teacher left the Gulfport Freedom School, his 15 students also left in protest, and returned only when another was sent into the school.

Mrs. Reese gives an idea what the Hattiesburg schools are accomplishing: “The children are learning that somebody is supposed to listen to them. They are writing letters to the editor of Hattiesburg newspapers, and learning where to direct their complaints. At first, the children were somewhat awe-stricken with the white teachers, at their whiteness, their hair, but many are learning to appreciate them as human beings. When you get an appreciation of yourself, then you can put the other individual into his proper focus.”

But maybe Joyce Brown sums it up best:

THE HOUSE OF LIBERTY

I come not for fortune, nor for fame,
 I seek not to add glory to an unknown name,
 I did not come under the shadow of night,
 I came by day to fight for what’s right,
 I shan’t let fear, my monstrous foe,
 Conquer my soul with threat and woe,
 Here I have come and here I will stay,
 And no amount of fear my determination can sway.

I asked for your churches, and you turned me down,
 But I’ll do my work if I have to do it on the ground,
 You will not speak for fear of being heard,
 So you crawl in your shell and say, “Do not disturb,”
 You think because you’ve turned me away,
 You’ve protected yourself for another day.

But tomorrow surely will come,

And your enemy will still be there with the rising sun,
He'll be there tomorrow as all tomorrows in the past,
And he'll follow you into the future if you let him pass.

You've turned me down to humor him,
Ah! Your fate is sad and grim,
For even though your help I ask,
Even without it, I'll finish my task.

In a bombed house I have to teach school
Because I believe all men should live by the Golden Rule.
To a bombed house your children must come,
Because of your fear of a bomb,
And because you've let your fear conquer your soul,
In this bombed house these minds I must try to mold.
I must try to teach them to stand tall and be a man,
When you their parents have cowered down and refused to take a stand.

FREEDOM SCHOOL DATA

Council of Federated Organizations
1017 Lynch Street
Jackson, Mississippi
Press phone: 385-3276

a.) *Background on Freedom Schools:* the Freedom Schools were proposed late in 1963 by Charles Cobb, a Howard University student until he joined the SNCC staff and “a gifted creative writer,” according to Freedom School Director Professor Staughton Lynd. That “help from outside Mississippi is needed if the Negro youngster were to have any chance of access to a larger world” was an obvious fact, according to Lynd, after preliminary studies of the Mississippi educational system. In *Mississippi: The Closed Society*, James Silver noted that the per capita expenditure of the Mississippi local schools boards for the white child is almost four times the figure for the Negro child. More than the statistics, the limited subject matter available for study to Mississippi Negro students, the fear of dismissal that restrains their teachers from exploring controversial topics demonstrated that if Mississippi’s Negroes were to take part in an academic process it would have to be in a context supplemental to the schooling available through the state.

b.) *Freedom Schools Operation:* As of July 26, there were 41 functioning Freedom Schools in twenty communities across the state with an enrolment of 2,135 students—twice the figure projected in planning for the summer. There are approximately 175 teaching full-time in the Freedom Schools, with recruitment of 50 to 100 more in process.

The typical Freedom School has an enrollment of 25 to 100 and a staff of five to six teachers, and is held in a church basement or sometimes the church itself, often using the outdoor area as well. Typically, the morning will be taken up with a “core curriculum” build around Negro History and citizenship. The late morning or afternoon is taken up with special classes (such as French or typing—both very popular) or projects (such as drama or the school newspaper). In the evening classes are held for adults or teen-agers who work during the day.

The idea of the school is centered on discussion of the group. One suggested guide distributed by COFO to Freedom School teachers noted, “In the matter of classroom procedure, questioning is the vital tool. It is meaningless to flood the student with information he cannot understand; questioning is the path to enlightenment. It requires a great deal of skill and tact to pose the question that will stimulate but not offend, lead to unself-consciousness and the desire to express thought. . . . The value of the Freedom Schools will derive mainly from what the teachers are able to elicit from the students in terms of comprehension and expression of their experiences.”

At a time when the nation’s educators have become concerned—and stymied—by bringing to children of the non-verbal “culturally deprived” community the ability to formulate questions and articulate perceptions, the daily pedagogical revolutions that are the basis of any success in a Freedom School classroom become overwhelming upon considering that the students are Mississippi Negroes—possibly the single most deprived group in the nation—and the teachers are culturally alien products of the much-maligned liberal arts undergraduate education. An indication of what is happening among the students and their young teachers in the Freedom Schools is given by a single line of COFO advice given to the teachers: “The formal classroom approach is to be avoided; the teacher is encouraged to use all the resources of his imagination.”

According to Director Lynd, the Freedom Schools may be dealt with in the context of three general situations: a) rural areas; b) urban areas where the civil rights movement has been strong; c) urban areas where the movement has been weak. "In the first and third situations," analyzes Lynd, "the Freedom Schools have been most successful, not just in numbers, but in what is going on there."

In the rural areas where there is little recreation or diversion available to the Negro community, the Freedom School becomes the center of teen-age social activities, according to Lynd. Lynd draws upon the Holmes County and Carthage Freedom Schools as examples of this rural success. When the Freedom School staff arrived in Carthage, the entire Negro community was assembled at the church to greet them; when, two days later, the staff was evicted from its school, the community again appeared with pickup trucks to help move the library to a new school site. As this is being written, the Carthage Community, with the help of summer volunteers and a National Council of Churches minister, is building its own community center which will be staffed by civil rights workers and local volunteers.

An example of the second situation, the urban success, is the Hattiesburg Freedom School system, which Lynd refers to as the "Mecca of the Freedom School world." In Hattiesburg there are more than 600 students in five schools. Each teacher has been told to find a person from the community to be trained to take over his teaching job at the end of the summer. Much of the second session in Hattiesburg will be devoted to the training of local Freedom School teachers. "Here, as in Canton," states Lynd, "there can be no doubt that the success of the schools stemmed from the intensive civil rights campaign in the community during the months of late winter and spring."

In Gulfport and Greenville, urban environments with alternative attractions, the movement has not been strong enough in the past to counteract traditional time-passing activities. Lynd notes, however, that the generalization has exceptions. Holly Springs, an urban area in which the movement has not been strong in the past, has a highly successful Freedom School.

It should also be noted that in Holly Springs, Carthage, and Shaw, the Freedom Schools are competing against the regular public school which are currently in session as public schools close in early spring to allow students to chop cotton.

In Mississippi's stronghold of organized terror, the Southwest, the McComb Freedom School has proven the political value of the schools as an instrument for building confidence in the Negro community when canvassing is impractical. Lynd cites the instance of Miss Joyce Brown's poem concerning the Freedom School held at a bombed home which moved the community to provide a meeting place for the school. "Thus", notes Lynd, "the presence of a Freedom School helped to loosen the hard knot of fear and to organize the Negro community." There are 108 students at the McComb Freedom School.

c) *The Future of the Freedom Schools*: The Freedom Schools will continue beyond the end of the Summer Project in August. Freedom Schools in several areas are already running jointly with the regular public school session. The Freedom Schools offer subjects—such as foreign languages—not offered in the regular schools, and students are attracted to the informal questioning spirit of the Freedom Schools and academics based around their experiences as Mississippi Negroes. In situations like McComb, the Freedom School has proven its value to the over-all COFO political program as an organizing instrument. Also, among the various COFO programs, the Freedom School project is the one which holds out a particular hope of communication with the white community. In at least two situations, Vicksburg and Holly

Springs, white children have attended for short periods. Another factor in the decision to continue the Freedom Schools is the possibility-turned-probability that the Mississippi legislature will offer private school legislation designed to sidestep public school integration (already ordered for the fall of 1964 in Jackson, Biloxi, and Leake County). One is faced by situations such as that in Issaquena County, where there are no Negro public schools and children must be transported into other counties. The backwardness of Mississippi's educational system in the context of racial discrimination is demonstrated by the fact that in many areas the impact of the 1954 Supreme Court decision that separate cannot be equal was to have separate schools erected for the first time; the step previous to school segregation is concluding that Negro Children should be educated. The rural hard-core area of Issaquena County is an example of a prolonged holdout. A final but not secondary factor is the "widespread apprehension among Mississippi Negroes as to what will happen to them when the Summer Project volunteers leave." Staughton Lynd adds, "We want to be able to tell them that the program will *not* end, that momentum cumulated during the summer months will not be permitted to slack off."

The long-range Freedom School program will be carried on through evening classes in local community centers. "Already in many communities Freedom School and Community Center programs are combined and often in the same building," according to Lynd. One source of teachers for the continuing Freedom School program will be volunteers who decide to stay beyond the summer; if only one in five stayed, fifty teachers would remain in the state. Another source would be Southern Negro students coming in under the work-study program which provides them with a one-year scholarship to Tougaloo College after one year's full-time work for SNCC. Other teachers would come through the local communities, under programs of training such as that which has already begun in Hattiesburg. Teachers could also be provided from the ranks of full-time SNCC staff members; in areas such as McComb where the movement can't register American citizens as voters, civil rights workers can teach in Freedom Schools. There is no doubt but that, in Professor Lynd's words, "It is a political decision for any parent to let his child come to a Freedom School."

The Freedom School program can develop as an aid in enabling Mississippi Negro students to make the transition from a Mississippi Negro high school to higher education. Standardized tests will be administered to the most promising Freedom School students under the direction of the College Entrance Examination Board (CEEB) in mid-August. Evaluation of these scores and other data by the National Scholarship Service Fund for Negro Students will lead some of the Freedom School students to a program involving a) a transitional educational experience during the summer after high school, b) a reduced load during the freshman year at college, and c) financial aid. Others can be helped by the already-existing work-study program.

d) *Free Southern Theater*: As the second Freedom School session (August 3-21) begins, a tour of the Freedom Schools throughout the state is scheduled for the Free Southern theater production of *In White America*. The Free Southern Theater was organized early this year by SNCC with the assistance of COFO and Tougaloo College as an attempt to "stimulate thought and a new awareness among Negroes in the deep South," and "will work toward the establishment of permanent stock and repertory companies, with mobile touring units, in major population centers throughout the South, staging plays that reflect the struggles of the American Negro . . . before Negro and, in time, integrated audiences," according to a Free Southern Theater prospectus. An apprenticeship program is planned which will send a number of promising participants to New

York for more intensive study. The company will include both professional and amateur participants.

The development of the Free Southern Theater was sparked by the “cultural desert” resulting from the closed society’s restriction of the patterns of reflective and creative thought.

Each performance of *In White America* will be accompanied by theater workshops in the Freedom Schools designed to introduce students to the experience of theater through participation. As the classroom methods of the Freedom School are revolutionary in the context of traditional American patterns of education, so the Free Southern Theater brings a new concept of drama to these Mississippi students. Dr. Lynd comments that the aim of the Theater “is the creation of a fresh theatrical style which will combine the highest standards of craftsmanship with a more intimate audience rapport than modern theater usually achieves.”

Segregated school, controlled textbooks, lack of discussion of controversial topics, the nature of the mass media in Mississippi demand the development of a cultural program, to be viewed in the context of education, among an entire people.

Among the objectives listed for the Free Southern Theater by its originators are “to acquaint Southern peoples with a breadth of experience with the theater and related art forms; to liberate and explore the creative talent and potential that is here as well as to promote the production of art; to bring in artists from outside the state as well as to provide the opportunity for local people with creative ability to have experience with the theater; to emphasize the universality of the problems of the Negro people; to strengthen communication between Southern Negroes; to assert that self-knowledge and creativity are the foundations of human dignity.”

Among the sponsors of the Free Southern Theater are singer Harry Belafonte, authors James Baldwin and Langston Hughes, performers Ossie Davis, Ruby Dee, and Theodore Bikel, and Lincoln Kirstein, general director of the New York City Ballet.

The proposal for the Free Southern Theater originated with SNCC workers Doris Derby, Gilbert Moses, and John O’Neal, and Tougaloo drama instructor William Hutchinson.

e) Mississippi Summer Caravan of Music: Approximately 25 performing artists, including Pete Seeger, the Chad Mitchell Trio, Theodore Bikel, and SNCC’s Freedom Singers, will have toured the Mississippi Summer Project Freedom Schools and Community Centers before the close of the summer. During the day they will teach in Freedom School workshops, and perform in community concerts in the evening. Communities throughout the state have already been visited by the Caravan.

The Caravan is sponsored by the New York Council of Performing Artists (Gil Turner, Chairman) and is directed by Bob Cohen at the Mississippi Summer Project Headquarters.

f) *Excerpts from Freedom School Newspapers*: The first ones to insist upon connecting the Freedom Schools to the opening of the closed society of segregated Mississippi are the young students of the Freedom Schools. The average author of a Freedom School newspaper article is between 13 and 15 years of age.

The cover of the first issue of the McComb Freedom School’s “Freedom Journal” depicts a Negro in chains with a scroll below him reading, “Am I not a man and a brother?” One girl, in the same paper, remarks, “. . . too long others have done our speaking for us. . . .” Her mother is a domestic who fears for what will happen to the family due to her child’s attendance at the Freedom School. One 15-year-old student there remarked that the Freedom School “enables me to know that I can get along with the whites and they can get along with me without feeling inferior to each other.”

Two young students in the Holly Springs Freedom School describe their hometown: “The working conditions are bad. The wages are very low. The amount paid for plowing a tractor all day is three dollars. . . . The white man buys most of the supplies used for the annual crops, but the Negro contributes all the labor. In the fall of the year when the crop is harvested and the cotton is sold to market, the white man gives the Negro what he thinks he needs, without showing the Negro a record of the income the white man has collected from the year. This process of farming has become a custom. This way of livelihood is not much different from slavery.”

A student describes her life in the “Benton County Freedom Train:” “We work eight to nine hours each day and are paid daily after work is over. We get only \$3.00 per day . . . and . . . chop cotton 8 1/2 hours to 9 hours each day. . . . The man whom we worked for is responsible for having fresh cold water handy in the field for the workers to drink. The whites also fail to take us to the store in time to eat dinner. . . . When it’s harvest Negroes pick cotton by hand at \$2.00 for a hundred pounds and some places \$3.00 per hundred.”

In the Mt. Zion Freedom School’s “Freedom Press,” a girl states she comes to the Freedom School because “I want to become a part of history also.”

Joyce Brown, the 15-year-old author of “The House of Liberty” will be a senior next year at McComb’s Negro Burgland High School. When she was 12 years of age she was doing voter registration canvassing when Bob Moses, director of the Mississippi Summer Project, first began voter activities in Mississippi for SNCC in 1961.

A REPORT, MAINLY ON RULEVILLE FREEDOM SCHOOL

A Report, Mainly on Ruleville Freedom School, Summer Project, 1964

by Kirsty Powell

Orientation, Oxford Beginning June 21. The main effect of Oxford (Was it the main design?) was to bring each of us to the point of asking: “Do I really believe in this enough to go? Ought I to go? Do I want to go?” This was as it should have been, I think. At the time I felt that such emphasis was placed on preparing for the dangers, even in our local project group, that we did scant justice to the job of preparing to teach, or of understanding the meaning of the Freedom School concept. I still think this. I think we could have left Oxford with a much more positive understanding of what we were setting out to do, danger or no danger, than we did. I think the general sessions at Oxford were excellent and could hardly have been bettered. In the Freedom School sessions I think there were many useful things done—some of the sessions on reading, the Laubach session, the African songs, Negro History (I believe though I didn’t get to it)—but I think they could have been bettered. Next year I think it will be easier to use the history and experience of this summer to explore the Freedom School concept and I think it will be important to do this. It might even be interesting to discuss some profiles of 1964 Freedom Schools as case histories for criticism and evaluation. The curriculum was excellent, but, if Ruleville is typical it was not used as well as it deserved. This was partly because it was rather late (it would have been good to get it before Oxford) and also because it wasn’t really explored at Oxford, and perhaps because many people never really read it properly. I think most schools accepted the notion of a core curriculum of Citizenship and Negro history. If the content of this core had been gone into much more fully at Oxford in lectures and small group discussions, and if there had been some practice teaching to demonstrate different methods of teaching it, I think the schools would have benefited and we would have left Oxford with a much more positive idea of the role of a Freedom School. On the score of method, I’d make a special (if old fashioned!) plea that volunteers (who are, after all, mostly pretty academic types) be introduced to (and if possible given a chance to try out) the project or activity method. Essentially I think this means helping pupils to be active in various ways to do their own research for information, and to give expression actively and in various ways to what they have learned—art, writing, talks, plays, interviews etc., etc. — with the possibility of choice for the pupil.

First Week in Ruleville. We arrived on the Sunday—slight chill at our first view of police truck and dog—but for those of us working at the center, the fear went when we got on the job, and found Ruleville quiet. The center was at the back of an old house which contained two other occupied dwellings. It consisted of a yard, with trees for sitting under; porch, with bathroom at one end; a wide hallway which was to become an office; an incredible attic—beams reasonably sturdy, but floor/ceiling of cardboard—where we later stored unwanted books; and two small rooms about 12 x 12 which were to be library and everything else. The first job was to sort 7000 books and cull a library of about 4000, shelve it, and store the rest. We were lucky to have somewhere to store it! This was all we did thru’ Thursday, apart from volunteers’ meetings to plan school and center programmes. One night at the mass meeting we were asked when school would begin. We decided we’d never be “ready,” so we said we’d open for registration Friday, and for a brief introductory session. Regular school was in session in the mornings, so we decided

to have adults, with baby minding in the mornings, kids in the afternoons, and leave the evenings clear for individual tuition or special classes if called for.

Morning Program 8:30 – 11:00 (often 11:30)

Adults. The morning schedule remained the same for the whole summer. It was simple and effective.

1st Hour – Citizenship (Mon, Wed, Fri)

Health, etc. (Tues, Thurs.)

2nd Hour – Writing (or, infrequently, Math.)

3rd Hour – Reading

Citizenship. The lecture followed by discussion was the approach used throughout the summer. All the freedom school teachers gave at least one session each, and voter registration and research people, and visitors were also used. This was good for both teachers and listeners. The topics chosen were in three different series.

1st 3 weeks: 1. Harriet Tubman

2. Booker T. Washington and Du Bois

3. and 4. Negro in Mississippi and the South

5. Negro in the North

6. The White Southerner

7. and 8. The Movement

9. Non-Violence

4th week: - 1. The Freedom Rides

2. Power structure in Sunflower Country

3. A Journey Through India – and Gandhi.

4. Freedom Democratic Party

Last 3 weeks:- 1. African Background

2. Slavery

3. Background to Civil War

4. Lincoln

5. Reconstruction

6. Birth of Jim Crow (Reading only)

7. Booker T. Washington and Du Bois (Reading only)

8. George Washington Carver

9. NAACP (Reading only)

10. Important 20th Cent. Negroes

11. Montgomery, Birmingham, and M.L. King (Reading only)

12. Civil Rights Bill and the National Elections.

This Citizenship program worked well. Our adherence to the lecture method all the way was somewhat unimaginative but it's a bit difficult to think how else it might have been done. I'm not sure how successful "activity methods" would be with adults—might be worth trying. Discussion improved as the summer wore on. In fact, I think the sessions might have been improved if the lecture time had been greatly reduced, and then previously planned "questions for discussion" had then been thrashed out.

Health I don't know the schedule for this. It was done 2 days a week for 8 weeks by one teacher, and I think it might have been better shared out a bit more. I think the course might have been improved by adding some basic physiology—with plenty of pictures and diagrams—and by using more demonstrations for the teaching of first aid. There was certainly no doubt about the interest of the women in the subject. There were a couple of sessions on food, and a recipe sharing session which proved most successful and ended in the production of a collection of Freedom School recipes. One topic that was not discussed that might usefully have been, was buying and housekeeping—sort of thing you get in one of those paperback shoppers' guides. Another subject that was asked for that we never supplied was Sewing.

Writing. As with Citizenship and Health all the adults remained in one class for writing. Usually, this was about 12 to 15 students, numbers fluctuated somewhat between six and 30. The method used was to have three to six teachers on hand circulating while the writing was being done, to help and to answer questions and to correct. The topic usually arose out of the preceding citizenship session. Very little was done to structure it, the idea being simply to encourage them to put thoughts on paper as freely as possible. I think this unstructured approach was good and perhaps liberating in a way. Certainly it produced some very interesting, albeit weirdly punctuated and spelled genuine writing, most revealing of thoughts, feelings and experience.

Later in the summer, we did attempt to teach certain structures: form filling, the sentence and with it the period and the capital letter; personal letter; business letter; report of a meeting.

I think we were wise to leave this till the end of the summer. Though there is a great eagerness to learn the proper forms, I think that to have begun this way might have been rather inhibiting.

A few of the people who came were near illiterates and were in need of straight out handwriting practice. Even these, I think, benefited from the fairly free approach, provided they continued to come. I think we should probably have had a special class for them, and perhaps we'd have attracted more and held them.

At least the team teaching approach guaranteed fairly individual teaching of each person.

Reading. Practically all the adults were given an individual textbook test (sometimes called “informal reading inventory”) using a set of basal school readers. This test is familiar to all teachers of reading. The purpose of the test was to discover the instructional reading level of each student; i.e., the level at which over 100 running words, he makes 2%–5% errors in word recognition. On the basis of this testing we divided the students into 3 reading groups.

1. All below 3rd Grade went into a literacy class. These worked on the Gattengo “Words in Color” system and were taught by Linda Davis. I don't know what Linda's final judgment on the success of the course was. One of the advantages of the method is that it is useful in improving writing as well as reading. One woman, in particular, benefited from this, and made quite remarkable improvement not only in handwriting, but in composition. The success of the method depends on faithful attendance and a pretty high degree of concentration on the part of the student, and, with the exception of the one woman mentioned, the less literate students attended least faithfully. My own feeling was that the method postponed actual reading for such a long time that it tended to be a bit discouraging. But I am really very ignorant of the method and predisposed to be critical of highly phonetic approaches to the teaching of reading, so that it would be important to get Linda's own appraisal of the success both of the method and of this particular experience.

2. 3rd and 4th Grade were taught by Fred Miller, who used an easy reading newspaper (not Junior Scholastic, but something similar) which people seemed to enjoy reading. Only trouble was that the paper was rather expensive.

3. 5th Grade and above were my group and were, in fact, the largest group. We read materials on Negro history, most of them written by us especially for the purpose, because most available materials were too difficult even for this group. We began with the Ebony Emancipation issue, in which we found plenty of good material written in impossibly difficult and high flown language. We began with the “Ten Dramatic Moments” which when rewritten, proved excellent. We read also parts of the Sarah Patton Boyle and Frederick Douglass articles, the M.L.K. “I Have a Dream” speech, several issues of the local “Freedom Fighter,” the mimeod newspaper produced by the Center. In the last few weeks, we read materials written by all the teachers, following the last Citizenship syllabus (see page 2).

This group was really a delight to teach, and the readings always produced, if not discussion, at least very pertinent and often moving comments relating the thing read to the situation in Miss. today.

On two occasions we read poems: Margaret Burroughs “What Shall I tell My Children who are Black?” which produced really excellent participation, and Eve Merriam’s “Tomorrow’s Footsteps” and Naomi Madgett’s “Midway” which served to sum up and reinforce the thoughts of the summer in a very effective way. If a teacher likes poetry, and has a few simple clues about how to present it, I think it is often very much appreciated.

My own method for teaching reading—or rather, for reading something with a group who has some skill in reading—usually followed the standard procedure enshrined in most American basal reading systems. I find the procedure extremely helpful, so I set it out.

1. Introduce the piece to be read, arousing interest, supplying background, explaining new concepts. In the process of doing this introduce any words that you think are new or difficult, or perhaps merely basic to understanding the reading, and write them on the blackboard, as you use them.

2. Have the class read the passage silently section by section, posing a question to direct and motivate their reading before each section, and discussing the answers briefly at the end of each section read. How long each section to be read should be will depend on many things, notably the skill of the group. I found that a reading 3/4 page of typed quarto long, consisting of 3 or 4 paragraphs, was enough to do in one hour-long lesson, and we generally read it silently paragraph by paragraph.

3. Read the whole passage through orally—usually around the class in turn.

4. Discuss meaning of passage as whole.

Baby Minding At the first announcement of Freedom School at the mass meeting, we invited mothers to bring their children, and promised to have nursery care for them. There were times when we repented of this invitation, but, on balance, I think it was very good that we were able to provide this service, and that the beginnings of a kindergarten were, in fact, established over the summer. Looking after anything up to 15 kids, ages ranging between 15 months and 5 years was a far more formidable task than any of us realized. The people who bore the brunt of the work and worry were the 4 community center workers, though some of the freedom school teachers did help some of the time also. Aside from the abysmal lack of equipment with which we began, I think that what made the task hard was that all of us, those involved, and those not involved, tended to underrate its importance. It was important not just because it made the attendance of

mothers possible, but for its own sake, and because it paved the way for the permanent kindergarten that now exists. The “curriculum” included the usual games, walks, stories, songs etc. —but these tended to require too much discipline and concentration. Things were much better when we acquired some simple equipment—blocks, tinker toys, wagon toy phone—which made self directed free play possible. Especially considering the age range, this kind of equipment was absolutely essential. A mattress also roved essential, as there were always a few babies who spent the morning squealing, or gurgling, or sleeping on it.

I think if this is to be part of the program next year, it should be spoken about at Orientation, shown to be important, and, if kids are interested, they should be encouraged to prepare themselves for it.

Afternoon Program: Kids

The Ruleville Central High School was in session 7:30 AM to 1:30 so Freedom School met from 2:00 PM to 5:00 PM.

There were 6 teachers, so we divided into six different classes according to age group 10 to 12 year olds; 13 and 14 year olds; 15 and 16 yr. old boys; 15 and 16 year old girls; 17 year olds; 18 years and over.

We have no accurate record of numbers and attendance, but I think the total number as probably about 120, and our daily attendance between 50 and 80.

At the end of the 3rd week, we lost 3 teachers . . . as they went to Indianola to set up a Freedom School there. The three different schedules which we worked to during the summer reflect the staff changes.

Schedule I

1st Hour: in Age Groups for Citizenship, Reading, Writing.

2nd Hour: Electives—most met 2 days a week, some 1 day only

Typing	Reading	Art
French	African Culture	Biology
Music	Health	

The electives were taught not only by Freedom School teachers but by Community Center people also.

3rd Hour: Principally Recreation

Also some electives

Also canvassing—when needed.

One feature of this schedule was that we never met as a whole school together in a general session. I think this was a weakness. We did have one general session in the last week, when we sang a few freedom songs and then heard a talk about M.F.D.P., and then broke into age groups to discuss it. The kids liked this, and we had decided to do it once a week when we had to abandon Schedule I and devise a plan that would work with 3 teachers only.

Schedule I worked well, on the whole. Good relationships were built up between teacher and kids in classes that ranged in size from 6 to 20. One problem proved to be the numbers of hangers on and dropouts who wanted to hang around the center but were unwilling to join a class. There was some debate as to whether they should be told to go or allowed to hang around. I think in the end the former opinion won out, though it was never very rigidly enforced. My own approach is

that they should have been allowed to come and sit around, provided they were not a nuisance. I think that some arts of persuasion should have been used to enveigle them into classes, but I feel that there's always the chance that someone will come further in if he's given a welcome, allowed to hang around, and not badgered. I think a community center should be as free and permissive a place as possible. On the whole the younger kids came to classes more faithfully than the older ones, though some teachers managed to build up a very good relationship with their older kids.

Schedule 2 was designed to meet the conditions of the fourth week when there were only 3 Freedom School teachers (though 3 more expected the next week) and when we wanted to use community center personnel as much as possible. We decided also to draw on voter registration and research volunteers.

1st Hour: Mass Meeting or General Session, to begin with Freedom Songs, general announcements, contributions from the kids etc, followed by a talk by a special speaker, as follows: —

1. The Freedom Rides—Rabbi Levine
2. Sunflower County—in context of Federal, State, County, and Town systems of Governments; given by Jerry Techlin, Research.
3. The Party System—George Winter and Len Edwards.
4. Education in the U.S. —Jerry Tecklin
5. A Journey to India—Gandhi and Non-violence—Kirsty Powell
6. Book Review Session—in which a number of teachers and community center people took part. Books of various kinds were introduced—beginning reading (Seuss etc), Fairy Tales, Alice in W., Biography, Travel and Adventure, Novel (Huck Finn). After the session the library was open for checking out books. A most successful kind of session, I think.

2nd Hour: Expression Groups—Art, Role Playing, Writing

The whole school broke up into 3 groups, initially on the basis of preference, but we tried to insist that each child have one day in each group, and he was then free to go where he like. The resulting groups had a wide age range, but on the whole this did not prove as difficult as might have been expected—it was even, in some ways, rather interesting. The groups were large and in all of them we used team teaching. The aim was to find ways of expressing through writing, art, or role playing something of what had been spoken of in the speech. However, it so happened that the week we began working to Schedule 2 was also the week when the kids began working on a proposed picket of the Central High school for the purpose of urging teachers to vote. The result was that the role playing became geared almost entirely to role playing the picket, and some of the art work became directed to sign making.

Role Playing—this proved far and away the most popular, and there were sometimes as many as 30 or 40 in the group. In Role-playing the picket, great enthusiasm was developed, not only for the picket, but for role playing as such. As a result, in Schedule 3 a good drama group emerged, and role playing was used a good deal in the age groups, as part of ordinary class work.

Art—This group began with posters. It began to be exciting, however, when they were encouraged to do free, abstract works with paint, and then with charcoal and flat, not the tip of the pencil. Sometimes these were intended as emotional expressions.

Writing—The writing group did, generally, take the topic of the speech as its inspiration, and it often proved necessary to explore the ideas presented to it pretty thoroughly in discussion before writing was done, and this gave opportunity for useful review—but cut down on writing time. I think probably the freer approach that we used with the adults would have produced more creative results.

3rd Hour: Electives (same) and Recreation, and Canvassing

This schedule 2 had a great deal to commend it. When the speaker was dramatic like Rabbi Levine the meeting of the whole school was good, and the expression groups were really quite exciting and creative. I think they gave the kids a sense of freedom which engendered a good deal of enthusiasm. It was good, too, to be able to involve the community center and voter registration people in both the talks and the team teaching—in fact they were essential. In fact it seemed such a good scheme that there was some discussion about whether we should continue with it after the new teachers arrived. However in the end we decided that the advantages of intimate association with an age group were of even more value than the general excitement of the expression groups, so Schedule 3 ended up something of a compromise between the two previous schemes.

Schedule 3

1st hour—General Session with freedom songs, etc., and a talk on Negro history—topics same as for last 3 weeks of adult program. The 6 freedom school teachers took turns in giving the talks.

2nd hour—age groups. These were somewhat reformed

The 10-12 year group had become so big that it split into 2 classes

The 13-14 group remained the same, and the rest of the senior kids became one class, with 2 (sometimes 3) teachers working as a team with them.

3rd hour—Electives, recreation, canvassing

The Value of the general session came to be debated among the teachers. Very early in the piece it was decided that the 10 to 12 group should meet in their own class, because it was impossible to talk to them and to the 18 year olds at the same time. However, even for the older students it seemed too passive a method, with too little interchange between speaker and audience. As a result, in the second last week we decided to have a general session only once a week, and to have the first two hours in age groups. This places a great responsibility on the individual teacher—but if he accepts that, it makes possible a much more active learning situation.

Age Groups. The switch in teachers mid-stream meant the 10-12's and the 13 and 14's were the only one who continued as separate class groups with the one teacher all the way. This was a great advantage, and I think, it is the main reason why we didn't do as good a job with the older students as we might have. I don't have reports on all the classes, but it might be useful to report on the two that I have reports on: Lucia Guest's and my own.

10-12's This class showed great enthusiasm. By the beginning of Schedule 3 it had grown so much that we split it. It met on the steps of the Sanctified Church, and the high school teachers who lived in the houses opposite had a grandstand view of what went on. Lucia has never taught before, but she strikes me as a very good example of a naturally good teacher—creative,

inventive, full of enthusiasm. I quote from a letter in which she gives an account of what she did with her class.

Looking back and trying to say what I did with my classes, I realize how much time I misused or wasted. If I had it to do over again, I think I would shoot for more concrete efforts, perhaps more writing, more art work. As far as what I did do: I guess a great concentration on world geography. I.E. what are the continents, where are they, what are some of the key countries in each continent, and how do people live there? We did the world maps and the map of Australia (big maps which each kid colored and labeled). I spend time on Australia—pop., largest cities, states, etc.

We did maps of Africa, and all the readings on Africa which we prepared. I also spent some time on Egypt, using National Geographics. As far as Negro History—this is where I fell down, I'm afraid. We went from Africa to U.S. slave trade, to Slavery in U.S. and skipped to Civil War, and didn't get further. As for the Movement: we went through the M.L. King comic book, and learned about "Snick" and what SNCC stands for. As for Government and politics (American): I attempted to teach some idea of the relationship between, and what are the 4 governments—municipal, county, state, Federal, also the importance of the ballot and where it fits into the scheme of things. As far as how I taught this:

1. I learned the great value of the blackboard, and of pictures.
2. Role playing—towards the last, I attempted to translate everything I could into role-playing—even geography.

13–14's—my class. I took Negro History as a core, following roughly the adult course (p.2), but leaving out the more sociological topics (like the Negro in the North etc.) My method was to introduce a topic, like Harriet Tubman, for instance, by telling the story, talking about it, looking at pictures, reading about it. This generally took one day. Then for the next two or three days, the kids followed up on this topic in their own way. I brought all the books, magazines, mimeoed material, pictures, etc. I could find to class, and got kids to choose what they wanted to do, and use the resource materials to help them. Some did historical, some creative writing, some drew pictures, or copied poems, or copied historical documents like runaway slave notices, etc. At the end of the summer, we displayed the work on all the units, arranged chronologically, to present a kind of perspective on Negro history.

See page 9 for other classes.

Electives. These were popular, but difficult to organize. Things went better when we submitted to the inevitable and started banging a gong to induce people to change over on time. I think we were perhaps too ambitious in the number of electives we tried to run, and some kids never settled into one long enough to get somewhere. However, I think the idea of electives has a lot to commend itself.

Typing—perhaps the most popular—had to exclude the younger members for lack of room. Mustered 6 typewriters, and had two classes of 6 each afternoon.

Health—a small but faithful group continued the whole summer. Included First Aid Physiology, and even some dissection—frog!

French—Great interest in learning a foreign language—all simple conversation—unfortunately we lost the teacher who was doing this.

Music and African culture—both began and fizzled out, either because we lost the teacher at the end of the first 3 weeks, or because the teacher was drafted to another elective.

Art—really got under way after the impetus given under the 2nd schedule. Much enthusiasm—great ignorance of simplest techniques—need encouragement to be bold and free in their work

Dancing—very popular—did modern dancing, singing games, and occasionally the kids taught us the monkey etc. Only girls, except once or twice for singing games and fold dances.

Role Playing—became an elective in the last three weeks—emerged from the 2nd Schedule.

Devoted itself to preparing an unscripted play about the High School protest—cast of about 20, one hour long. Presented it at the Freedom Festival, last day of school, and it was a great success.

Reading—we tried hard to offer reading of various kinds as an elective, but on the whole we did not establish sufficient continuity to make a great success of it. The moral is, I think, that reading should not be an elective. Something was done however. Again we tried to test and group the kids, but the great variations in ability and the paucity of teachers made it hard to get kids reading in a group at their own level. In the end we established three groups that had a fairly continuous existence in the last three weeks: -

1. Seriously retarded readers. This group numbered 4 at its maximum. It used a new series of beginning readers based on Karl Fries Linguistic approach and written by Mrs. Rosemary Wilson for a new experimental reading program being conducted by the Board of Education in Philadelphia, PA. The set of readers remains in Ruleville and I think they're excellent (but reading is a field full of partisanship!). I think this group made progress (age range 12 to 20) but they scarcely got beyond the "alphabet book". Teaching beginning reading must have provision for a long term project to be useful.

2. 3rd Grade. This group read the Seuss books with great pleasure.

3. 3rd Grade and up. This group read the 4th grade basic reader together—but it was too difficult for some, too easy for others.

Once or twice I tried individual reading—and I think this would have been the answer if I had succeeded in getting it organized. Each child would then spend most of the lesson reading a book at his own level silently, coming to the teacher for 5 to 10 minutes of individual oral reading, questioning about comprehension, and word study.

*The other classes, 15's and up (continue from p.) The senior classes had great discontinuity of teachers. They concentrated exclusively on citizenship and history, using mainly discussion, with some (I suspect too little in most cases) reading and writing. I think senior students can also learn form more active methods.

Highlights of the School Program

1. Caravan of Music. We had about 6 visits from folk singers and these were all a great delight. Among those specially remembered will be the drummer who let everyone have a go at the drums one by one after the show, and Jackie Washington with his children's songs and Barbara Dane, who taught us "It isn't nice". It would have been good if there had been more attempt to teach songs.

2. The Visit of 13 of the Women from National Women's Organisations gave us all a boost. A great crowd turned up and we put on quite a program. They sat in on "baby minding" and on a

reading lesson. Then Mrs. Hamer, Mrs. MacDonald, Mrs. Johnson, and Mrs. Tucker told the story of the Movement in Ruleville, after which followed some very good discussion. Then they met volunteers and heard Jerry Tecklin talk about voter registration, research, and the law—then more discussion. In the afternoon, the kids took charge: told the story of the protest at school, and then did a role play performance of the picket.

3. Meridian Freedom School Convention. Three kids went from Ruleville armed with a program for Senator, Congressman etc worked out with other young people over a whole afternoon and a morning of strenuous discussion. They voted for Mr. MacDonald for Mayor of Ruleville and Martin Luther King superintendent of Education.

Ruleville made a good contribution to the Convention. The story of the school protest and the motion of Bobbie Cannon inspired plans for the state wide boycott. Ora Doss and Eddie Johnson both made enthusiastic reports back to the Freedom School. Both were impressed by how hard work it was. As Eddie said in his report, “It wasn’t fun!”

Actually I think that next year the program might include a bit more fun—a dance early in the program, and perhaps other recreation planned to help kids meet each other, or perhaps more highly organized communal meals to provide opportunity for kids to meet people from other places, or perhaps some discussion groups or study circles devoted not just to drafting motions, but to the task of studying and discussing something written specially for the purpose

4. In White America. This was a great success. It was done on the back porch, and the 200 or so people sat on benches in the sun or stood. Despite Gil Moses’ misgivings about an out-of doors daylight performance, I thought the setting was excellent. The audience almost became a part of the play. Small boys climbed on the porch to go to the bathroom in the middle of a scene, dogs and hens paraded in front of the stage and there was an intimacy and informality about the performance that underlined for me the impression that the play was woven out of the very stuff of these people’s lives.

5. Freedom Festival. The last day of school was given over to a Freedom Festival. In the morning the adults came for a tea party which somehow proved a bit stuffy and “middle class”. Conversation didn’t flow as freely as usual though I think people enjoyed it. In the library we had a display of kids’ writing and art work and maps. In the afternoon we had a programme presented mainly by the kids, but two adults also took part: some plays written by the kids, a puppet show about the valiant knight Bob Moses and the wicked witch, Segregation, some poems of Eve Merriam recited in chorus, three freedom songs written by the kids, and an excellent, long, rehearsed, unscripted play telling the whole story of the school protest. Finally, Mr. Macdonald presented each kid with a dictionary.

The School Protest

This story deserves setting out in detail some time, but here I’ll just give the main facts. The idea arose among the tiny group of kids active in the Ruleville Student Action Group which was stimulated into action when the volunteers came down. They began talking to the teachers about voting, and role played interviews with them in the meetings. Then, one meeting, after all the volunteers had gone they decided to announce a date to picket the school (August 5th) and to prepare for it they began having daily campus meetings at noon, and practiced role laying the picket during freedom school. They produced a leaflet setting out these plans, urging kids to come and join them, and urging the teachers to go down and register. That was the first phase.

Then, discussion with Charles MacLaurin and others threw doubt on the wisdom of having a picket, especially one whose date had already been announced. It was decided, as a kind of face saving device, to write a letter to the Principal and faculty, setting out a list of demands, and saying that if the demands were not met in reasonable time, they would take direct action. Besides asking teachers to go and register, the demands included such things as asking for an account of money earned cotton picking, for a student government and clubs, and for teachers to take the lead in demanding better, and integrated education. The letter was handed personally to each member of faculty on Monday morning. In addition, in Chapel two kids took advantage of a regular space in the program for student announcements, to make freedom speeches. Eddie Johnson expounded the letter, and Bobbie Cannon told teachers that there was “a new day” coming and they should be leading their people into it. The result was electric. The kids applauded and the faculty preserved a stony silence. That was the end of the second phase.

By the end of the morning, a notice had been handed to every student purporting to come from the Superintendent saying that any student who took part in any demonstration would be suspended. When M.C. Perry tore up this notice saying he didn't “want any of that trash”, he was immediately hauled off to the Principal and suspended. He tried to return to school next day; the Principal called the cops, and he was marched from the school at gunpoint. The Mayor then warned him that if he wished to return to school he would have to sign a statement that he would never again take part in civil rights activity. He went home to the plantation, and after a day, decided he would sign the statement. On the bus he learned that the kids of his class had staged a walkout the day before in protest against his suspension. School was pretty tense. The result was that the minute he got on campus the cops were again called. This time he was brought for trial, sentenced to 30 days and \$100 for disturbance of the peace, and it was 10 days before we bailed him out on appeal on \$500 bond. During this period things were happening at school, though I'm not very clear on the details. The kids generally agreed that they had missed the right moment for a demonstration by the whole school when they did not stage a wholesale walkout the day M.C. Perry was expelled. The kids had a meeting to discuss the letter and its demands; Mrs. Hamer had a meeting with the faculty; and the lawyer, David Godstick and I think Len Edwards met with the Principal. The kids brought their story to the meridian Freedom School Convention, and there plans were made for a statewide boycott. This was the end of the 3rd phase.

The Library

About 30 volunteers spent the first 4 days of the summer project doing nothing but sort the 7000 books piled in the Center, culling about 4000, and shelving them. We started lending books immediately using a check-out book. A group of kids volunteered to act as librarians, and worked on the issuing of books, and later on numbering and ordering them on the shelves. Eventually, we decided to use our very simple form of Dewey, using only the numbers for the main classes and a few other numbers within each class to apply to sections where we had many books. The system suited our purpose, and I think it worked pretty well. We had one shelf of “Book By and About Negroes” but otherwise there were no special displays— though I think they would be a good idea. The kids and I began work on a catalogue but we grew faint hearted, and decided it was better to concentrate on getting a good shelf plan first. We had a couple of book review sessions both for kids and for adults, and these were most successful and provoked a lot of borrowing of books. After the work day, when tables and benches were made for the library, we started to keep one room quiet for reading and studying. Before the regular school closed for picking, some kids

had already got into the habit of using the library to do homework, as well as to write letters and read.

During September, we tried hard to get the library to the point where the kids could run it themselves, and a chief librarian and group of assistants were doing a pretty good job, and were represented in the board.

As to the quality of the books, they included everything from Nancy Drew to Thomas Mann. Perhaps the Thomas Mann would be better in a college library, but I cling to the thought that Richard Wright might come out of Ruleville. And anyway, as long as the High School has no library to speak of, the Center Library must serve as a High School Library. The Literature and History sections of the library were quite good but it was pretty weak on Science and the Social Sciences.

Teachers

I think we were extraordinarily lucky in the high quality of teachers, and their genuineness. We began with 6 people, with Liz Fusco as co-ordinator. When Liz and 2 others went to Indianola, we got 3 new people. Out of all nine of these, 4 were graduates, and 2 professional teachers. I think it was fairly obvious though, that neither being a graduate, nor being a professional teacher had much to do with being a good Freedom School teacher. When we lost our co-ordinator, it was suggested that we agree among ourselves as to who should take her place, and this was how I took over. I think this was a good way to do it, and it seemed to work out happily.

Like most Freedom School staffs we had our problems of personal relations, but on the whole I think we worked well as a team, and this is one reason why the summer was a joyful experience for us, all other things notwithstanding. I think the most important relationship for the school is that between the co-ordinator and the rest of the teachers. In some ways it is a pity that orientation is not long enough for a co-ordinator to be the choice of the group. But in any case, I think that the more the co-ordinator can act as “mere co-ordinator” and not as head the better. I think the spirit of staff meetings should be thoroughly egalitarian, and everyone should be aware that he or she has equal responsibility. I think staff meetings are important and should be quite frequent—at least once a week. I think it’s important that schedule and curriculum be planned co-operatively by the whole staff, though I also think it’s important that each individual teacher have freedom to develop his own curriculum for his class. I don’t think these two things are necessarily contradictory.

Another problem which I think we shared with many schools was some difficulty in working out a good relationship with the community center staff. I think in the end we succeeded, partly because at the personal level we got along well and enjoyed each other—which was just lucky—partly because the Freedom School needed the community center people in order to function. Difficulties were, however, inherent in a situation in which Freedom School and Community Center functions overlapped and in which Community Center functions were much less clearly defined than were Freedom School functions. One difficulty, for instance was whether Freedom School or Community Center co-ordinator should lead joint staff meetings. In the end, we agreed that where the adult morning classes or the kids afternoon classes were concerned it should be rated Freedom School business, but all other business was Community Center business. This seemed to work out O.K. Most of the time the two staffs met separately, and the Freedom School simply used all the community center personnel as teachers.

I gather that in some projects there was a good deal of tension between voter registration and freedom school volunteers. On the whole I think we escaped this. I don't know why: perhaps partly because some of the Freedom School and Community Center people were as militant as any, and when arrests were made in Drew all three groups were involved. I do remember one argument when plans for the school protest were developing when someone in voter registration suggested that all the school program should now be geared to the picket, and I protested that if freedom schools were to retain their integrity they had to be centers of real education, not just of propaganda. In actual fact, I don't think this was disputed. Not only that, there was a lot of sharing of work at every level. Voter registration people gave talks in freedom school and freedom school people helped canvas and make out file cards, and everyone helped in the Community Center's work day, or in food and clothing distribution.

Community Center

Looking on, it seemed to me that in many ways the community center people had a hard time because it was not clear at the outset what their job was. They took on the responsibility for baby minding in the mornings. They organized a program for the under 10 year olds 2 afternoons a week. They accepted responsibility for the physical state of the center. They helped organize food and clothing distribution. They conducted a health survey. They planned and carried out a most successful Work Day when volunteers and local people made tables and benches, laid linoleum, and painted. All of these things were important but I think that sometimes Community Center people felt they were doing the jobs that were left over after others had done the "main jobs." Not only that, I think some community center talent was not perhaps used to its fullest extent, simply because at the beginning it was not clear enough what there was to be done.

Handing Over

When Linda Davis came back from the meeting in Jackson with the news that she was to stay at the center through the winter, she discussed with the few remaining volunteers a plan for having a Board of the Community Center elected by the Mass meeting. This was in line with the feeling often expressed during the summer that somehow the Center had to become the community's. The election of the Board was quite a milestone. In the last month I was down after the summer project proper was over there were many signs that the community was really claiming its own center. A team of kids helped man the radio. Another team of kids became librarians. A dozen or so 4 and 5 year olds began to come regularly to the kindergarten which Linda organized. Adults came 2 nights a week to reading classes. And the young people started to organize their own program with recreation and study and discussion concentrated in an organized way, mainly on Sunday afternoon. Perhaps more important, people, young and old began to drop in to the community center for various reasons: to borrow a book, to read or write in the library, to play Checkers or Monopoly, to talk, or dance, or listen to the radio, to meet before going to the courthouse to attempt to register, or before going to a county wide meeting on Sunday afternoon in Indianola, to talk over a problem, or to report some news, or to play basketball or football or croquet. If any confirmation were wanted of the need for community centers, this was it surely. In just 3 months this Ruleville Community Center had become a real center of community life in the Negro community. No one looked forward to the winter. But, as a

local person said to me—not a regular attender at the center—“We all know where we’ll be running if there’s trouble.”

FREEDOM SCHOOLS IN MISSISSIPPI, 1964

From the carbon copies of the spring's letters and reports I see what real apprehensions, as well as hopes, the people who dreamed of Freedom Schools had. Out of Charlie Cobb's idea of a situation in which there would be questioning, release from rigid squelching of initiative and expression—from Charlie Cobb's bitterness about the way the Negro has had to be silent in order to survive in white America, and his vision of the kid's articulateness and reaching for change, meaningful change, in Mississippi—out of his seeing that kids are ready to see “the link between a rotting shack and a rotting America”—came the original plan for Freedom Schools in Mississippi. That it could be an idea that people working desperately on voter registration and on keeping alive in the state could take seriously is perhaps evidence of the validity of Charlie Cobb's dream: Mississippi needed more, needs more, than that all Negroes 21 and over shall have the right to vote. The staff in Mississippi understood what Charlie was dreaming because they, too, were daring to dream that what could be done in Mississippi could be deeper, more fundamental, more far-reaching, more revolutionary than voter registration alone: more personal, and in a sense more transforming, than a political program.

The decision to have Freedom Schools in Mississippi then, seems to have been a decision to enter into every phase of the lives of the people of Mississippi. It seems to have been a decision to set the people free for politics in the only way that people really can become free, and that is totally. It was an important decision for the staff to be making, and so it is not surprising that the curriculum for the proposed schools become everyone's concern. I understand that Louis Chaffee, Dona Moses, Mendy Samstein, and Casey Hayden as well as Noel Day, Jane Stembridge, and Jack Minnis worked on and argued about what should be taught, and what the realities of Mississippi are, and how those realities affect the kids, and how to get the kids to discover themselves as human beings. And then, I understand, Staughton Lynd came in to impose a kind of beautiful order on the torment that the curriculum was becoming—torment because it was not just curriculum: it was each person on the staff in Mississippi painfully analyzing what the realities of his world were, and asking himself, with what pain I can only sense, what right he had to let the kids of Mississippi know the truth, and what right he had had to keep it from them until now. And because of these sessions, the whole concept of what could be done in Mississippi must have changed.

In a way, the Freedom Schools began to operate in those planning session. A section of the curriculum called “Poor whites, poor Negroes and their fears,” for example, considers the unity of experience between whites and Negroes, as well as the psychological and political barriers. And out of the discussions that produced this part of the curriculum came, perhaps, the idea of a “White Folks' Project,” and the intense economic orientation of what was begun in Research, and Federal Programs, also new projects. And out of work with the people day after day in the Freedom Schools emerged medical concerns, and farm league ideas, and the community building of community centers. It was because the people trying to change Mississippi were asking themselves the real questions about what is wrong with Mississippi that the Summer Project in effect touched every aspect of the lives of the Negroes in Mississippi, and started to touch the lives of the whites.

It was the asking of questions, as I see it, that made the Mississippi Summer Project different from other voter registration projects and other civil rights activities everywhere else in the South. And so it is reasonable that the transformations that occurred—and transformations did

occur—out of the Freedom School experience occurred because for the first time in their lives kids were asking questions.

The way the curriculum finally came out was that it was based on the asking of certain questions, questions which kept being asked through the summer, in connection with the kids' interest in their Freedom School teachers (mostly northern, mostly white, mostly still in college), in connection with Negro History, in connection with African culture, in connection even with the academic subjects, as well as in connection with the study of the realities of Mississippi in the light of Nazi Germany, 1935. The so-called "Citizenship Curriculum" set up two sets of questions. The primary set was: 1. why are we (teachers and students) in Freedom Schools? 2. what is the Freedom Movement? 3. what alternatives does the Freedom Movement offer us? What was called the secondary set of questions, but what seemed to me the more important, because more personal, set was: 1. what does the majority culture have that we want? 2. what does the majority culture have that we don't want? 3. what do we have that we want to keep?

The answering of these questions, and the continual raising of them in many contexts, may be said perhaps to be what the Freedom Schools were about. This was so because in order to answer anything out of what these questions suggest, it is necessary for the student to confront the question of who he is, and what his world is like, and how he fits into it or is alienated from it.

It was out of the experience of asking these questions that the transformations occurred. At the beginning of the summer, with rare amazing exceptions, the kids who were tentatively exploring us and the Freedom Schools were willing to express about themselves only one thing with honesty and passion, without the characteristic saying of the thing they think the white man wants to hear: that thing was that as soon as they could gather enough money for a ticket they were going off to Chicago, or to California! To leave the state was their ambition, and about it they were certain, even though they had not thought any further than that, even in terms of where the money was to come from, and certainly not in terms of what they would find there and what they would do there. Some sense of "go home to my Lord and be free"—some vague hope of a paradise beyond—seemed to inform their passion for the north, their programless passion.

But by the end of the summer almost all of these kids were planning to stay in Mississippi.

Within the flexible structure of the Freedom School it was natural that a confession of—an insistence on—the desire to race northward lead to a discussion of the condition of the Negro in the North, about which most of the teachers could tell specifically. And then came the news stories about Harlem, and Rochester, and Medford, Massachusetts, and the kids were interested, and worried. But it was not just because the truth about the North began to shatter their dream of it as a paradise that the kids changed their minds. The yearning for the North was, of course, the expression of a need to escape the intolerability of the situation in Mississippi. But the nature of their need to escape was that they really did not know what it was about Mississippi that they hated—or, rather, they felt that what was intolerable for them had somehow to do with the white man, somehow to do with getting only \$3.00 a day for 10 hours' work chopping a white man's cotton, somehow to do with the police—but they had not yet articulated, if they knew, the connections among all these things. And they had not, as well, articulated the connections of those things with their experiences of repression at home and in school. And so the very amorphous nature of the enemy was threatening to them.

The experience in the Freedom School was that patterns began to be seen, and patterns were real and could be dealt with. So the kids began to see two things at once: that the North was not real escape, and the South was not some vague white monster doomed irrationally to crush them. Simultaneously, they began to discover that they themselves could take action against the

injustices—the specific injustices and the condition of injustice—which kept them unhappy and impotent.

Through the study of Negro History they began to have a sense of themselves as a people who could produce heroes. They saw in the story of Joseph Cinque of the *Amistad* a parallel to kinds of revolts that the Movement, as they began to learn about it, represented. They saw that Joseph Cinque, in leading a mutiny on that slave ship instead of asserting his will to freedom by jumping off the ship into the shark-waiting waters, was saying that freedom is something that belongs to life, not to death, and that a man has responsibility for bringing all his people to freedom, not just for his own escaping. Connections between then and now kept being made—at first by the teachers, very soon by the students: who do you know that is like Joseph Cinque? How is Bob Moses like Moses in the Bible? How is he different? Why did Harriet Tubman go back into the South after she had gotten herself free into the North—and why so many times? And why doesn't Mrs. Hamer stay in the North once she gets there to speak, since she doesn't have a job on that man's plantation any more, and since her life is in so much danger? And what do you think about Fredrick Douglass's talking so straight to the President of the United States? And how does the picture of Jim Forman in the Emancipation Proclamation issue of *Ebony* suggest that same kind of straight talking? And who do you think the Movement is proving right—Booker T. Washington or W. E. B. DuBois? And why are the changes of gospel songs into Freedom Songs significant? What does “We Shall Overcome” really mean in terms of what we are doing, and what we can do?

Beginning to sense the real potency of organized Negroes in Mississippi, the kids in the Freedom Schools found an immediate area of concern in the Negro schools they attended or had dropped out of: the so-called “public” schools. They had grievances, but had, until drawn into the question asking, only been able to whine, or to accept passively, or to lash out by dropping out of school or getting themselves expelled. Within the Freedom Schools, especially by comparing the Freedom Schools with the regular schools, they began to become articulate about what was wrong, and the way things should be instead: Why don't they do this at our school? Was the first question asked, and then there began to be answers, which led to further questions, such as, Why don't our teachers register to vote, if they presume to teach us about citizenship? And why can't our principal make his own decisions instead of having to follow the orders of the white superintendent? And why do we have no student government, or why doesn't the administration take the existing student government seriously?

This was the main question, which came also out of why there are no art classes, no language classes, why there is no equipment in the science labs, why the library is inadequate and inaccessible, why the classes are overcrowded. The main question was **WHY ARE WE NOT TAKEN SERIOUSLY?**—which is of course the question that the adults were asking about the city and county and state, and the question the Freedom Democratic Party asked—and for which the party demanded an answer—at the Convention.

The students were taken seriously in the Freedom Schools. They were encouraged to talk, and their talking was listened to. They were assigned to write, and their writing was read with attention to idea and style as well as to grammar. They were encouraged to sing, to dance, to draw, to play, to laugh. They were encouraged to think. And all of this was painful as well as releasing because to be taken seriously requires confrontation. And so Freedom School was painful for the kids who grew the most.

Tangibly, what was set in motion out of this experience of joy and pain was the thing the Mississippi staff had hoped could happen in Mississippi, but could not totally form. In the spring

before the summer, SNCC in Mississippi had tried to organize a Mississippi Student Union, bringing together kids from all over the state. And there was good response, but not on the scale the MSU was soon to achieve out of the Freedom Schools. This summer the kids began to talk boycott of the schools, but to be able to discipline their thinking about boycott so that their action would not just be acting out their frustrations but careful, considered, programmed, revolutionary meaningful action along the lines of the Montgomery bus boycott and African revolutionary action. The kids were able to come together in the middle of the summer, in Meridian, and draw up a series of resolutions which said with terrible clarity what they felt about their world: what a house should be, what a school should be, what a job should be, what a city should be—even what the federal government should be. And they were able to ask why it was that the people did not have a voice, and to assert that their voices would be heard. The seriousness of their concern for a voice is reflected in the final statement of the list of grievances drawn up by the McComb Freedom School:

We are 12 Pike County high-school students. Until we are assured our parents will not suffer reprisals, until we are sure this list of grievances is met with serious consideration and good will, we will remain anonymous.

The McComb students are sounding this list of grievances to the school officials, the senators and the newspapers and the city officials and the President of the United States. Out into the world: look at me—I am no longer an invisible man.

And back again into themselves. Whoever the Freedom Schools touched they activated into confrontation, with themselves and with the world and back again. On one level, it was the white teacher saying to the Negro girl that nappy hair vs. “good hair” is not a valid distinction: that it is a white man’s distinction, and that the queens in Africa—in Senegal, Mali, Ghana—in Ethiopia—had nappy short hair! On another level, it was the Northern Negro student teacher saying to the kids yearning Northward that he himself had gone to an almost completely (or completely) segregated school, and that his home was in a ghetto. On another, it was a senior, suspended from the split-session summer school for participating in the movement and taking Freedom School academic courses (fully parallel) instead, saying of Robert Frost’s “The Road Not Taken” that the man took the road that needed him more: “because it was grassy/and wanted wear/ . . . and that has made all the difference.” On another level, it was the white and Negro Freedom School teachers sitting with the adults in the evening classes talking about what kids want and what kids deserve, and hearing the adults express some of their concern for their kids in the forming of a parents’ group to support the kids’ action against the schools. On still another, it was the junior-high-school kids in the community coming over in the evening to sit with the adults who were learning their alphabets, one kid to one adult, and both, and the staffs, crying with awe for the beauty and strangeness and naturalness of it. And on all levels, it was the whites, the northerners, listening to the Mississippi Negroes, reading what they wrote, taking them seriously, and learning from them.

Visible results of Freedom Summer include the kids’ drawings on the wall of Freedom Schools and COFO officers all over the state, as well as kids’ applications for scholarships (National Scholarship Service and Fund for Negro Students) and even more applications for the Tougaloo Work Study program, which commits them to staying to work in Mississippi. In addition, there is the real probability that the Negro teachers in the regular schools—the teachers who have to sign an oath not to participate in civil rights activities or try to vote—have, this first

week of school, begun to experience for the first time in their lives the challenge from a student that is not adolescent testing or insolent acting out but serious demanding that in truth there is freedom and that he will have the truth!

Most significantly, the result of the summer's Freedom Schools is seen in the continuation of the Freedom Schools into the fall, winter, spring, summer plans of the Mississippi Project. Some project directors, who had been in Mississippi since 1961 during the slow, sometimes depressing, always dangerous, serious, tiring work of voter registration, first thought of the Freedom Schools as a frill, detrimental to the basic effort. At best, they were a front for the real activity. But Freedom Schools were not just, as the same project directors came to concede, a place where kids could be inducted into the Movement, a convenient source of canvassers. They were something else, and in realizing this the dubious project directors were themselves transformed by the Freedom Schools. They were, instead of anything superficial, and will go on to be, the experience—not the place—in which people, because we needed them, emerged as discussion leaders, as teachers, as organizers, as speakers, as friends, as people. I know this is so because in leaving the Freedom School in Indianola, the county seat of Sunflower County where the Movement had been resisted for three years, and where, when we came in, the people did not know how to cross arm over arm to sing “We Shall Overcome,” I learned for the first time in my life that with kids you love to disconnect is to suffer. So the teachers were transformed, too.

The transformation of Mississippi is possible because the transformation of people has begun. And if it can happen in Mississippi, it can happen all over the South. The original hope of the Freedom School plan was that there would be about 1,000 students in the state coming to the informal discussion groups and other sessions. It turned out that by the end of the summer the number was closer to 3,000, and that the original age expectation of 16-17-18-year-olds had to be revised to include preschool children and all the way up to 70-year-old people, all anxious to learn about how to be Free. The subjects ranged from the originally anticipated Negro History, Mississippi Now, and black-white relations to include typing, foreign languages, and other forms of tutoring. In fact, these aspects of the program were so successful that the continuation of the Freedom Schools into the regular academic year will involve a full-scale program of tutorials and independent study as well as exploration in greater intensity of the problems raised in the summer sessions, and longer-range work with art, music, and drama.

To think of kids in Mississippi expressing emotion on paper with crayons and in abstract shapes rather than taking knives to each other; to think of their writing and performing plays about the Negro experience in America rather than just sitting in despairing lethargy within that experience; to think of their organizing and running all by themselves a Mississippi Student Union, whose program is not dances and fundraising but direct action to alleviate serious grievances; to think, even, of their being willing to come to school *after school*, day after day, when their whole association with school had been at least uncomfortable and dull and at worst tragically crippling—to think of these things is to think that a total transformation of the young people in an underdeveloped country can take place, and to dare to dream that it can happen all over the South. There are programs now, as well as dreams, and materials, and results to learn from. And it may well be that the very staffs of the Freedom Schools in Louisiana and Georgia, etc., will be the kids who were just this past summer students themselves in the Freedom Schools in Mississippi, and discovered themselves there.

Liz Fusco, Coordinator, COFO Freedom Schools
Reprinted with kind permission of Elizabeth Aaronsohn.

EXAMPLES OF STUDENT WORK

[Editors' Note: The following documents were written by Freedom School students. In retyping these documents for this text, no corrections were made in the spelling or grammar. The writing appears below as it was in the originals. The only change is the names of the students have been reduced to initials.]

Excerpts from the collection "What the Summer Project Has Meant"

What the Summer Project Has Meant by [ZH]

The Summer Project Ment So Much to Me. I Met New people.

They taught us New things about our people, things that we hadnt realized about. The life of famous colored people.

We also learned about writing different letter, that was a big help. What I liked very much was ~~the~~ learning the

meaning of lots of words. Words that I had been over but not nowing the real meaning.

The project ment much to me discussing health, food that prevent different diseases. And if you dont get enough of food containing these vitamins, you may come in conact with these diseases.

The Library means a great deal of help. We learn steps on how to use the library, which was very important.

All of the SNCC student was just what we needed. I pray that they come back again.

On Jobs by [LB]

Our problem today is un-employment.

I think the government should bring some kind of factory in the State of Mississippi and someone from the Northern Stats should opperate it. I think a rug factory would be fine for those not getting welfare assistance. We thats getting Welfare assistance cant get a job.

Excerpts from Freedom School Newspapers

PALMER'S CROSSING FREEDOM NEWS,

Priest's Creek July 23, 1964 number one St John's

The Darkness of the Negro Students

Some of the Negro students have been complaining about their teachers. They said their teachers do not give any information about the freeing of their people. The information given to them was false. They teach only what the white man wants us to hear. We have been taught that the white man was responsible for the abolishing of slavery, but that is false. What about the Negro abolitionists?

We have been taught that when the Negroes were free they were helpless. But this is false because they helped themselves by building houses and raising crops.

The reason for my coming out of darkness is by attending Freedom Schools. At this school both sides of the story are told.

[LC]

In Freedom Schools

I like to go to Freedom School. You would like it too. If you want to come and don't have a way, let us know.

I think we should all have our equal rights. We Negroes have been beaten, but we will never turn back until we get what belongs to us.

We just want what belongs to us. We don't want anything else. I think we as Negroes ought to have the right to vote for justice, equal rights, freedom, jobs, we need better books to read. In the stores uptown and down here we have to pay tax. That is a crying shame.

God is looking down on people now. We try to hid things form people, but we can't hide things from God. We pay tax. I think we should have a right to vote. All of our colored men are getting beaten and put in jail. This unfair I think, don't you?

[RMC] age 11.

DECLARATION OF INDEPENDENCE *By the*
Freedom School Students of
St. John's Methodist Church,
Palmer's Crossing, Hattiesburg, Miss.

In this course of human events, it has become necessary for the Negro people to break away from the customs which have made it very difficult for the Negro to get his God-given rights. We, as citizens of Mississippi, do hereby state that all people should have the right to petition, to assemble, and to use public places. We also have the right to life, liberty, and to seek happiness.

The government has no right to make or to change laws without the consent of the people. No government has the right to take the law into its own hands. All people as citizens have the right to impeach the government when their rights are being taken away.

All voters elect persons to the government. Everyone must vote to elect the person of his choice; so we hereby state that all persons of twenty-one years of age, whether back, white or yellow, have the right to elect the persons of their choice; and if theses persons do not carry out the will of the people, they have the right to alter or abolish the government.

The Negro does not have the right to petition the government for a redress of these grievances:

- For equal opportunity.
- For better schools and equipment.
- For better recreation facilities.
- For more public libraries.
- For schools for the mentally ill.
- For more and better senior colleges.
- For better roads in Negro communities.
- For training schools in the State of Mississippi.
- For more Negro policemen.

For more guarantee of a fair circuit clerk.
For integration in colleges and schools.

The government has made it possible for the white man to have a mock trial in the case of a Negro's death.

The government has refused to make laws for the public good.
The government has used police brutality.
The government has imposed taxes upon us without representation.
The government has refused to give Negroes the right to go into public places.
The government has marked our registration forms unfairly.

We, therefore, the Negroes of Mississippi assembled, appeal to the government of the state, that no man is free until all men are free. We do hereby declare independence from the unjust laws of Mississippi which conflict with the United States Constitution.

The FREEDOM CARRIER

Vol. I No. I Greenwood, Mississippi July 16, 1964

Greenwood Grumbles. Speaking of Freedom

By Editor C.T

We feel free when we can do as we please. We do not like it if anyone tries to stop us. Even a tiny baby will fly into a rage if his hands are held so that he cannot move them. This is not exactly love of freedom, for the baby has nothing in particular that he wants to do with his hands. It is more nearly hatred of restraint. But psychologists tell us that it is one of the few qualities found in all children from birth, and it is probably the basis for man's love of freedom.

Animals too often seem to want more freedom than they have. The dog strains at the leash to run free. The pet bird flies out of his cage when given the opportunity. Wild animals in zoos pace their cages hour by hour, ready to escape at the first chance. These animals are probably better cared for and fed than they would be if they were free. But animals, like men, crave the freedom to do as they choose.

The Negroes in Mississippi are fed up with the life here. We feel that it is time something was done to stop the killings or murders, the prejudice, the mistreatment of Negroes here. Freedom is a very precious thing to any race of people, but in a nation that is supposed to be free and where oppression still exists, something really has to be done. As our forefathers fought for this nation to be free, we also say to our oppressors "Give us freedom, or give us death."

July 23rd, Thursday

FREEDOM STAR

Published by the students of the Meridian Freedom School

I AM A NEGRO

I am a Negro and proud of its color too,
If you were a Negro wouldn't you?
I am glad of just what I am now
To be and to do things I know how.
I'm glad to be a Negro so happy and gay
To grow stronger day by day.
I am a Negro and I want to be free as any other child,
To wander about the house and the woods and be wild.
I want to be Free, Free, Free.

Rosalyn W.

HOW I SEE MYSELF AT "21" OR OVER

My aim in life is to be a lawyer. There are not enough Negro Lawyers in Mississippi defending their fellow brothers and sisters. Some people living in Mississippi leave after or before they finish school. I do not see myself in some fancy mansion nor do I see myself living in the scums of places. I just want to live in a decent home living in the neighborhood with people. When I say people I mean both black and white. I do not believe in Segregation. I want to help people. To stop this police brutality. I see myself as a decent, respectable citizen. I want to be a nice person. And I would like for people to treat me the same way. If I do be a lawyer or whatever my profession will be, I will not marry until I finish school, grade and law school, and have a job. I mean a good job. Not babysitting and house keeping.

No I do not plan to leave Mississippi. To help others. I want to look as well as be respectful. Although looks don't mean everything. It's what you know. It's the work that you do and your aim in life. If you lead a good clean life, people will respect you no matter how you look.

With this closing I will say that "I will strive to do the best that I can."

Anonymous

THE FREEDOM SCHOOLS

Concept and Organization

Staughton Lynd

Professor Staughton Lynd was formerly Chairman of the History Department at Spelman College in Atlanta. He directed the Freedom School project in Mississippi last summer and now is on the faculty at Yale.

People sometimes ask me how to start a Freedom School. This question seems almost funny. Few of us who planned the curriculum and administrative structure of the Mississippi Freedom Schools had any experience in Northern Freedom Schools. And in any case, our approach to curriculum was to have no curriculum and our approach to administrative structure was not to have any (I will explain this in a moment). So my answer to the question: "How do you start a Freedom School?" is, "I don't know." And if people ask, "What are the Freedom Schools like?" again I have to answer, "I don't know." I was an itinerant bureaucrat. I saw a play in Holly Springs, an adult class in Indianola, a preschool mass meeting in McComb, which were exciting. But who can presume to enclose in a few words what happened last summer when 2,500 youngsters from Mississippi and 250 youngsters from the North encountered each other, but not as students and teachers, in a learning experience that was not a school?

There was one educational experience for which I did most initial planning and which I took part in personally: the Freedom School Convention at Meridian on the weekend of August 7-9. Perhaps because this was the one "class" which I "taught", the Convention has loomed larger and larger in my mind as I have reflected on the summer. If I were to start a Freedom School now (and we are about to start one in New Haven), I would suggest: Begin with a Freedom School Convention and let that provide your curriculum.

The Freedom School Convention went a step beyond the thinking which took place before the summer in its implications for the administration and curriculum of a school "stayed on freedom." Originally, we planned to have two residential schools for high school students who in the judgment of COFO staff had most leadership potential, with a network of twenty day schools feeding into them. Sometime in April it became apparent that sites for residential schools would not be forthcoming, and if they did, there would be no money to rent them. And we realized, after a few painful days, that this was a good thing. It meant that teachers would live within Negro communities rather than on sequestered campuses. It meant that we would have to ask ministers for the use of church basements as schools. In short, it meant we would run a school system without buildings, equipment or money (which we did: less than \$2,000 passed through my office in Jackson in the course of the summer, about half of it for film rental).

It meant, too, that each school would be on its own, succeeding or failing by improvisation without much help from a central point. In my own mind the image which kept recurring was that of the guerrilla army which "swims in the sea" of the people among whom it lives. Clearly, whether we swam or drowned depended on the naked reaction of Negro children and their parents. No apparatus of compulsion or material things could shield us from their verdict. At the Oxford orientation, I kept repeating that when the Freedom School teachers got off the bus and found no place to sleep, despite previous assurances, and no place to teach, because the minister had gotten scared; when they were referred to an old lady of the local church for help in finding lodging, and to a youngster hanging around the COFO office for help in finding students—as they

did these things, they would be building their school, their teaching would have begun. After about a week we knew that somehow, some way it was working. We had expected 1,000 students at the most; I can remember the night when I wrote on a blackboard in the Jackson COFO office: "1,500 students in Freedom School. *Yippee!*"

The Freedom School Convention went a step beyond this. For once the Freedom School coordinators (our word for "principals") approved the idea of a young peoples' mock convention, coinciding with the statewide convention of the Mississippi Freedom Democratic Party, the young people took over. *They became the administrators.* About a dozen students from all over the state met in Jackson to plan the convention (out of this group, incidentally, came a new impetus for the Mississippi Student Union). The Meridian Freedom School agreed to play host to the Convention, partly because Michael Schwerner, James Chaney and Andrew Goodman had been killed attempting to start a Freedom School near Meridian, partly because Meridian possessed the palace of the Freedom School circuit, a three-story Baptist seminary which could easily house 100 delegates. Meridian young people, therefore, took on the complicated task of finding lodging and arranging transportation. The planning committee worked out a program. Essentially it was workshops each morning, plenary session each afternoon, and a Freedom School play Saturday night. Joyce Brown of McComb and Roscoe Jones of Meridian were chosen as the Convention's principal officers.

And not only did the youngsters plan the Convention. At the Convention, there was a noticeable change in tone between the first and second days. By Sunday, these teenagers were rejecting the advice of adults whether in workshops or plenary sessions, for they had discovered they could do it themselves. Beyond the convention one could discern still one more stage in the development of academic self-government. A resolution of the convention pledged the support of all the schools to a Freedom School in the Delta, planning to boycott the public school there. Here was a program not only executed by the youngsters, but initiated by them. The curriculum of next summer's Freedom Schools, it has been suggested, may be built around preparation for a statewide boycott.

Indeed the Freedom School Convention's implications for curriculum were more revolutionary than its implications for administration. The curriculum presented to the teachers at Oxford had been drafted by Noel Day. Essentially it was a series of questions, beginning with the students' most immediate experience of housing, employment, and education, and working out to such questions as: What is it like for Negroes who go North? What are the myths of society about the Negro's past? What in Mississippi keeps us from getting the things we want? Beyond this, teachers were given some fragmentary written material on Negro history, and the advice to emphasize oral rather than written instruction. We were afraid that as a predominantly white group of teachers we would be rejected. The fear was unnecessary; but it helped us to break away from the conventional paraphernalia of education, to remember that education is about a meeting between people. We said at Oxford: If you want to begin the summer by burning the curriculum we have given you, go ahead! We realized that our own education had been dry and irrelevant all too often, and we determined to teach as we ourselves wished we had been taught.

But ideas can run only a certain distance beyond experience; as in administration, so in curriculum, we had a lot to learn. We learned that *students can and should make their own curriculum.* How? Simple. Already in March at a curriculum planning conference in New York City it was my belief that the curriculum should be built around the political platform of COFO's Congressional candidates. Mississippi suggested something more. *Curriculum should be built around the political platform the students themselves create.* For this was what the Freedom

School Convention was. Our emphasis at this convention was not (like that of the FDP) on people, but on program. We sought to provide a model for how people can democratically put together a political platform. The students of each Freedom School asked: If we could elect a mayor (or a state legislator, or a senator) what laws would we ask him to pass? Having drawn up a program in this way, each school sent delegates to Meridian, where in eight workshops—on public accommodations, on housing, on education, etc.—they put together the twenty-odd platforms of the different schools, and reported the results to the plenary session.

I think now it would have been better if the schools had begun with such a convention, and if the statewide program brought back to each school by its delegates had then become the curriculum for the summer.

Before presenting the program of the Mississippi Freedom School convention, let me try to convey a little of the feel of the occasion. Delegates were to arrive in Meridian the evening of Friday, August 7. On Thursday I drove up from Jackson with Luis Perez, who was trying to start a Freedom School in Neshoba County, where the three men had been killed. The housing committee placed us in a home just across the street from the Meridian Freedom School. It had no bathroom of any kind. At one in the morning we were awakened by Mark and Betty Levy, the able and indefatigable coordinators of the school, and members of the student planning committee. This was the week that the bodies of the three missing men were found. The Negro community of Meridian, we learned, had planned a funeral Friday night for James Chaney. Groups of silent marchers would leave a number of churches at dusk and walk to the church where the service would be held. This was just the time when delegates to the Freedom School Convention would be arriving. There might very well be a riot in response to the funeral. In the shadowy office of the Freedom School we tried to decide what our responsibility was to the delegates and their parents. We decided that they should come and participate in the funeral if they wished.

They came. As I drove groups of late-arriving delegates from the bus station to the Freedom School, we passed the lines of silent marchers converging at the church. Some wore dark suits and ties. Some did not. It made no difference for all one noticed was their faces.

Saturday morning the Convention began. Over the front of the room was a large hand painted sign: "Freedom Is A Struggle." At one side was another neatly-lettered sign with the times and places of workshops and plenary sessions. At lunch we gathered around Roscoe Jones and sang and sang. That evening the Holly Springs Freedom School presented "Seeds of Freedom," a play based on the life of Medgar Evers. At the end, the girl playing Mrs. Evers said she would carry on her husband's struggle, and each member of the cast ("students" and "teachers") told why they had come to Freedom School. Then the Free Southern Theater, a group of professional quality, organized by SNCC's John O'Neal and Gilbert Moses (no relation to Bob), presented Martin Duberman's *In White America*. It too had an interpolated ending. Susan Wahman, wife of Tom Wahman who helped me with Freedom School administration, spoke the words which Rita Schwerner had said to President Johnson: "I want my husband."

Half a program had been adopted Saturday afternoon, the rest Sunday afternoon, after a second round of morning workshops. A. Philip Randolph addressed the youngsters on the need for economic as well as political programs, something their program showed that they already knew. Jim Forman, SNCC's Executive Secretary talked about the students of Africa who went on to higher education but came back to their people to put this education to work. Bob Moses, characteristically, asked the Convention questions. Did they want to carry on Freedom School in this winter? Why? Did they want Freedom School *after* public school, or *instead* of public

school? Why? What about the problem of graduating from an unaccredited school? Most of the delegates favored returning to public school and attempting to improve them (here was the seed of the idea of boycott).

At the end of Sunday afternoon all were exhausted, as always at conventions. We struggled on to the end of the program. With a joyful shout, the program was declared adopted. Then one young man asked for the floor. "Wait," he said, "I move that copies of this program be sent to every member of the Mississippi legislature, to President Johnson, and to the Secretary General of the United Nations [tumultuous applause], and—wait, wait—a copy to the Library of Congress for its permanent records [pandemonium]."

He was asking that the program of the Mississippi Freedom School Convention be taken seriously. I think it should be. The Civil Rights Movement has been strangely neglectful of program. Who remembers the specific demands of the March on Washington, for instance? What planks were advocated by the Mississippi Freedom Democratic Party? It is true enough that the central demand was in the one case for a civil rights bill, and in the other for seating at the Democratic Convention; and this was as it should have been. But in the not very distant future candidates running for Congressional office will be real, not mock, candidates, and will have to declare themselves intelligently on a variety of issues. These candidates may come out of Freedom Schools. If we do not take their program seriously, it means not taking their ideas seriously. If we do not take their ideas seriously, we should ask ourselves what the Schools are for.

Here, at any rate, are excerpts from the program of the Mississippi Freedom School Convention:

Meridian, Miss.
Aug. 8-9, 1964

PUBLIC ACCOMMODATIONS

1. *We resolve that the Public Accommodations and Public Facilities sections of the Civil Rights Act of 1964 be enforced.*
2. *We support the right of the Negro people and their white supporters to test the Civil Rights Act via demonstrations such as sit-ins. We are not urging a bloodbath through this means; we are simply demanding our Constitutional right to public assembly and seeking to test the federal government's position.*

HOUSING

1. *Be it resolved: That the federal government provide money for new housing developments in the state. Anyone could buy those houses with a down payment and low monthly rate. There must be absolutely no discrimination. The federal government should take action if this law is not complied with.*

EDUCATION

1. *Better facilities in all schools. These would include textbooks, laboratories, air-conditioning, heating, recreation, and lunch rooms.*
2. *Low-fee adult classes for better jobs.*
3. *That the school year consist of nine (9) consecutive months.*

4. *All schools be integrated and equal throughout the country.*
5. *Academic freedom for teachers and students.*
6. *Teachers be able to join any political organization to fight for civil rights without fear of being fired.*

HEALTH

1. *Each school should have fully developed health, first-aid, and physical education programs. These programs should be assisted by at least one registered nurse.*
2. *All medical facilities should have both integrated staff and integrated facilities for all patients.*
3. *Free medical care should be provided for all those who are not able to pay the cost of hospital bills.*

FOREIGN AFFAIRS

1. *Whereas the policy of apartheid in the Republic of South Africa is detrimental to all the people of that country and against the concepts of equality and justice, we ask that the United States impose economic sanctions in order to end this policy.*
2. *The United States should stop supporting dictatorships in other countries, and should support that government which the majority of the people want.*

THE PLANTATION SYSTEM

1. *The federal government should force plantation owners to build and maintain fair tenant housing.*
2. *In cases where the plantation farmers are not being adequately paid according to the Minimum Wage Law, the government should intervene on behalf of the farmers in a suit against the plantation owner.*

1964 PLATFORM OF THE MISSISSIPPI FREEDOM SCHOOL CONVENTION

AUGUST 6TH, 7TH, 8TH, MERIDIAN, MISSISSIPPI

PUBLIC ACCOMMODATIONS

1. We resolve that the Public Accommodations and Public Facilities sections of the Civil Rights Act of 1964 be enforced.
2. We demand new and better recreation facilities for all.
3. We support the right of the Negro people and their white supporters to test the Civil Rights Act via demonstrations such as sit-ins. We are not urging a blood-bath through this means; we are simply demanding our Constitutional right to public assembly and seeking to test the Federal government's position.
4. Conversion of public accommodations into private clubs should be treated as a violation of the Civil Rights Act of 1964.

HOUSING

The home, being the center of a child's life as well as the center of a family's, must have certain facilities in order for it to be a home and not just a building in which one eats, sleeps, and prepares to leave for the rest of the day. Therefore, be it resolved:

1. That there be an equal-opportunity-to-buy-law which permits all persons to purchase a home in any section of town in which he can afford to live.
2. That a rent control law be passed and that one should pay according to the condition of the house.
3. That a building code for home construction be established which includes the following minimum housing requirements:
 - a. A complete bathroom unit
 - b. A kitchen sink
 - c. A central heating system
 - d. Insulated walls and ceiling
 - e. A laundry room and pantry space
 - f. An adequate wiring system providing for at least three electrical outlets in the living room and kitchen, and at least two such outlets in the bedroom and bath
 - g. At least a quarter of an acre of land per building lot
 - h. A basement and attic.
4. That zoning regulations be enacted and enforced to keep undesirable and unsightly industries and commercial operations away from residential neighborhoods.
5. That slums be cleared, and a low cost federal housing project be established to house these people.
6. That federal aid be given for the improvement of houses, with long term low interest loans.
7. That the Federal government provide money for new housing developments in the state.

Anyone could buy these houses with a down payment and low monthly rate. There must be absolutely no discrimination. The federal government should take action if this law is not complied with.
8. That a federal law make sure that the projects are integrated and that they are run fairly.
9. That there be lower taxes on improvements in the houses so that more people will fix up their house.

10. That the federal government buy and sell land at low rates to people who want to build there.

EDUCATION

In an age where machines are rapidly replacing manual labor, job opportunities and economic security increasingly require higher levels of education. We therefore demand:

1. Better facilities in all schools. These would include textbooks, laboratories, air conditioning, heating, recreation, and lunch rooms.
2. A broader curriculum including vocational subjects and foreign languages.
3. Low fee adult classes for better jobs.
4. That the school year consist of nine (9) consecutive months.
5. Exchange programs and public kindergarten.
6. Better qualified teachers with salaries according to qualification.
7. Forced retirement (women 62, men 65).
8. Special schools for mentally retarded and treatment and care of cerebral palsy victims.
9. That taxpayers' money not be used to provide private schools.
10. That all schools be integrated and equal throughout the country.
11. Academic freedom for teachers and students.
12. That teachers be able to join any political organization to fight for Civil Rights without fear of being fired.
13. That teacher brutality be eliminated.

HEALTH

1. Each school should have fully developed health, first aid, and physical education programs. These programs should be assisted by at least one registered nurse.
2. Mobile units, chest x-rays semi-annually and a check-up at least once a year by licensed doctors, the local health department or a clinic should be provided by the local or state government.
3. All medical facilities should have both integrated staff and integrated facilities for all patients.
4. Mental health facilities should be integrated and better staffed.
5. Homes for the aged should be created.
6. Free medical care should be provided for all those who are not able to pay the cost of hospital bills.
7. We demand state and local government inspection of all health facilities.
8. All doctors should be paid by skill, not by race.
9. Titles should be given to the staff.
10. The federal government should help the organization pay the salaries of workers.
11. All patients should be addressed properly.
12. We actively seek the abolition of any sterilization act which serves as punishment, voluntary or involuntary, for any offense.
13. In a reasonable time we seek the establishment of a center for the treatment and care of cerebral palsy victims.

FOREIGN AFFAIRS

1. The United States should stop supporting dictatorships in other countries and should support that government which the majority of the people want.

2. Whereas the policy of apartheid in the Republic of South Africa is detrimental to all the people of that country and against the concepts of equality and justice, we ask that the United States impose economic sanctions in order to end this policy.
3. We ask that there be an equitable balance between the domestic and foreign economic and social support provided by our country.

FEDERAL AID

1. We demand that a Public Works Program be set up by the federal government to create jobs for the unemployed.
2. Because of discrimination in the past, we demand preferential treatment for the Negro in the granting of federal aid in education and training programs until integration is accomplished.
3. To help fight unemployment, we demand that federal funds be lent communities to set up industries and whole towns which shall be publicly owned by the communities, for example: textile and paper mills, stores, schools, job relocation programs for those put out of work by automation, job retraining, recreational facilities, banks, hospitals.
4. We demand that social security benefits should be given according to need, and not according to how much one earned previously. In addition, we demand guaranteed income of at least \$3,000.00 annually for every citizen.
5. The federal government should give aid to students who wish to study for the professions and who do not have the necessary funds.
6. We feel that federal aid in Mississippi is not being distributed equally among the people. Therefore we adopt Title VI of the Civil Rights Law which deals with federal aid. We demand federal agents appointed to Mississippi expressly for this purpose. We demand that action be taken against the state of Mississippi so that this aid may be distributed fairly.
7. We demand that the federal government divert part of the funds now used for defense into additional federal aid appropriations.
8. We demand that the federal government refuse to contract with corporations that employ non-union labor, engage in unfair labor practices, or practice racial discrimination.

JOB DISCRIMINATION

1. We demand that the federal government immediately open to Negroes all employment opportunities and recruitment programs under their auspices, such as in post offices, Veterans Hospitals, and defense bases.
2. The fair employment section (Title VII) of the 1964 Civil Rights law be immediately and fully enforced.
3. The guarantee of fair employment be extended fully to all aspects of labor, particularly training programs.
4. We encourage the establishment of more unions in Mississippi, to attract more industry to the state.
5. We will encourage and support more strikes for better jobs and adequate pay. During the strikes the employers should be enjoined from having others replace the striking workers.
6. Vocational institutions must be established for high school graduates and dropouts.
7. The federal Minimum Wage law be extended to include all workers especially agriculture and domestic workers.
8. Cotton planting allotments to be made on the basis of family size.
9. We want an extension of the Manpower Retraining Program.

10. Whenever a factory is automated, management must find new jobs for the workers.
11. Workers should be paid in accordance with their qualifications and the type of work done.

THE PLANTATION SYSTEM

1. The federal government should force plantation owners to build and maintain fair tenant housing.
2. In cases where the plantation farmers are not being adequately paid according to the Minimum Wage Law, the government should intervene on behalf of the farmers in suit against the plantation owner.

CIVIL LIBERTIES

1. Citizens of Mississippi should be entitled to employ out-of-state lawyers.
2. Section Two of the Fourteenth Amendment should be enforced, specifically in Mississippi and other Southern States, until the voter registration practices are changed.
3. The citizens should have the privilege of exercising their Constitutional rights
 - a. to assemble,
 - b. to petition,
 - c. to freedom of the press,
 - d. to freedom of speechin such ways as picketing, passing out leaflets and demonstrations. We oppose all laws that deprive citizens of the above rights.
4. We want the abolition of the House Unamerican Activities Committee because it deprives citizens of their Constitutional rights.
5. We resolve that the Freedom Movement should accept people regardless of religion, race, political views or national origin if they comply with the rules of the movement.

LAW ENFORCEMENT

1. We want qualified Negroes appointed to the police force in large numbers. We want them to be able to arrest anyone breaking the law, regardless of race, creed or color.
2. All police must possess warrants when they demand to enter a house and search the premises. In the absence of a search warrant, the police must give a reasonable explanation of what they are looking for. In any case, with or without a warrant, no damage should be done unnecessarily to property, and if damage is done, it should be paid for.
3. A national committee should be set up to check police procedures, to insure the safety of people in jail: their food, sleeping and health facilities; to protect them from mobs, and to see that no violence is done to them.
4. All cases against law enforcement agencies or involving civil rights should be tried in federal courts.
5. Law enforcement officers should provide protection against such hate groups as the KKK. Police and public officials should not belong to any group that encourages or practices violence.

CITY MAINTENANCE

1. The city should finance paving and widening of the streets and installing of drain systems in them.
2. Sidewalks must be placed along all streets.

3. A better system of garbage disposal, including more frequent pickups, must be devised.
4. Streets should be adequately lighted.
5. We oppose nuclear testing in residential areas.

VOTING

1. The poll tax must be eliminated.
2. Writing and interpreting of the Constitution is to be eliminated.
3. We demand further that registration procedures be administered without discrimination, and that all intimidation of prospective voters be ended through federal supervision and investigation by the FBI and Justice Department.
4. We want guards posted at ballot boxes during counting of votes.
5. The minimum age for voting should be lowered to 18 years.
6. We seek for legislation to require the county registrar or one of his deputies to keep the voter registration books open five days a week except during holidays, and open noon hours and early evening so that they would be accessible to day workers. Registrars should be required by law to treat all people seeking to register equally.

DIRECT ACTION

1. To support Ruleville, we call for a state-wide school demonstration, urging teachers to vote, and asking for better, integrated schools.
2. We support nonviolence, picketing and demonstrations.

FREEDOM SCHOOL CURRICULUM

TABLE OF CONTENTS AND A NOTE TO THE TEACHER

Because material trickled in until the very last moment, the actual contents of the curriculum do not correspond exactly with the “materials” listed at the beginning of each unit in the citizenship curriculum. The following Table of Contents describes what is actually in the curriculum. You can make corrections of the “materials” lists if you wish. . . . Items marked (P) are included only in the coordinators’ copies of the curriculum.

Table of Contents

A Note to the Teacher

Part I: Academic Curriculum

Reading and Writing Skills,

Mathematics

[Inserted by Editors:] Science

Part II: Citizenship Curriculum

Unit I The Negro in Mississippi

Case studies: Statistics on education, housing, income and employment and health
The South as an Underdeveloped Country (P)

[Inserted by Editors:] The Poor in America

Unit II The Negro in the North

Case studies: Triple Revolution
Chester, PA; Cambridge, MD; NYC School crisis (P)

Unit III Myths about the Negro

Case studies: Guide to Negro History
In White America (P)

[Inserted by Editors:] Negro History Addendum I

[Inserted by Editors:] Negro History Addendum II

[Inserted by Editors:] Negro History Study Questions

[Inserted by Editors:] Development of Negro Power

Unit IV The Power Structure

Case studies: Mississippi Power Structure
Power of the Dixiecrats (P)

[Inserted by Editors:] Nazi Germany

Unit V Poor whites, poor Negroes and their fears

Case studies: Hazard, KY (P)

Unit VI Soul Things and Material Things

Case studies: Statements of Discipline of Nonviolent Movements

Unit VII The Movement Part 1, Freedom rides and sit-ins;

Part 2, COFO's Political Program

Case studies: Readings in Nonviolence
Rifle Squads or the Beloved Community
Voter registration Laws in Mississippi
Civil Rights Bill

[*Inserted by Editors:*] Charles Remsberg, "Behind the Cotton Curtain"

[*Inserted by Editors:*] Nonviolence in American History

[*Inserted by Editors:*] Teaching Material for Unit VII, Part 2

Part III: Recreational and Artistic Curriculum

A NOTE TO THE TEACHER

As you know, you will be teaching in a non-academic sort of setting; probably the basement of a church. Your students will be involved in voter registration activity after school. They may not come to school regularly. We will be able to provide some books, hopefully, some films, certainly some interesting guest speakers—yet other than these things you will have few materials apart from those you and your fellow teachers have brought.

In such a setting a "curriculum" must necessarily be flexible. We cannot provide lesson plans. All we can do is give you some models and suggestions which you can fall back on when you wish. You, your colleagues, and your students are urged to shape your own curriculum in the light of the teachers' skills, the students' interests, and the resources of the particular community in which your school is located.

The curriculum suggestions which follow fall into three parts, corresponding to three blocks of time into which you may wish to divide your school day. First come some ideas about the presentation of conventional academic subjects: English, mathematics, and the like.

We think such instruction is likely to be most fruitful at the beginning of the school day, when students are fresh. But we urge you, whenever possible, to use as materials for instruction in these subjects the actual problems of communication and analysis which the student encounters in his daily life, e.g. how to write a leaflet, how to calculate the number of eligible voters in a community.

Most of the material in this curriculum belongs to the citizenship curriculum, which you may want to present during the second half of the morning on a typical day. We assume that in this, as in all other phases of your teaching, you will use an informal, question-and-answer method. Hence, you will find that the material on citizenship is divided into seven units, each of which springs from a question, and each of which leads on to another question, which forms the next unit.

A large number of case studies have been provided to help you make the citizenship curriculum as concrete and vivid as possible. Many people, in many organizations, have taken part in preparing these case studies. If you disagree with the viewpoint of a particular case study, or of some part of the citizenship curriculum, please feel free to approach the problem in your own way.

Finally, we have some suggestions about the artistic, recreational and cultural activities which we think you may want to schedule in the afternoon, when it's hot. Don't neglect this phase of the curriculum. The comradeship formed on the ball field or in the group singing may be the basis of your relationship with a student.

PART I: ACADEMIC CURRICULUM: READING AND WRITING

Introduction

It would seem advisable that, considering the special conditions under which the Freedom Schools will operate, some form of the team approach be adopted, to divide responsibility, yet retain an integrated educational approach to the student. The teachers should plan the activities together, so that each subject area correlates and reinforces the others. If, for example, the group of students plan to canvass, the language arts phase of the program could concentrate on an appropriate verbal skill, the social studies area could be devoted to the study of the population to be canvassed in terms of economic, social, religious factors and the implications of those factors, the math area could be given over to statistical breakdowns, charts, etc. (This example is a little advanced.) Or, if the students were to publicize a mass meeting, the language arts phase could study the considerations involved in writing persuasive material, the arts and crafts programs could make posters and leaflets, etc. One other advantage of the team approach is that, since students are first of all individuals, a group of teachers working in concert can serve their separate, special needs better. It is not likely that there will be sufficient time or variety of personnel to organize the staff in a detailed manner, but some version of the team concept could probably be implemented.

It is very important that there be cohesiveness and cooperation among the Freedom School personnel. Hopefully, before the opening of each school (there will probably be a week to prepare), the staff can make plans and agree on overall aims and apportion individual responsibilities. Frequent planning conferences after school begins are essential.

The value of the Freedom Schools will derive mainly from what the teachers are able to elicit from the students in terms of comprehension and expression of their experience. The curriculum should derive from the students' background, and all aspects of classroom activity should be an outgrowth of their experiences. The classroom groups will be small; the social interaction between teacher and students will be as important as academic instruction. The following list of procedures is designed to serve as a guideline, not proposed as any rigid formula. The formal classroom approach is to be avoided; the teacher is encouraged to use all the resources of his imagination.

Reading and Writing Skills

A. VERBAL ACTIVITIES

1. Getting acquainted. It is perhaps better if the teacher initiates this activity by introducing himself to the class. The students may be reluctant to discuss themselves in a group and the teacher could arrange for private interviews.

2. Informal discussion. The students could report events, summarize the day's activities, discuss issues. The teacher should encourage the expression of conflicting points of view.

3. Oral reading. This could be tape recorded and played back. The teacher can make a brief and factual explanation of dialect differences by pointing out that his pronunciation is different from the students' (if it is) and that speech variations also include Boston (Kennedy), British, etc.

4. Development of competence in real life verbal situations. Skill in asking directions, giving instructions, using the telephone should be developed. The telephone company could be contacted for tele-trainer material (two model telephones) so that the students could practice the social and practical uses of the telephone. The telephone directory provides an opportunity to develop skill in alphabetizing.

5. Presenting material in several different ways. For example, saying the same thought in a: 1) formal, 2) informal, and 3) slangy manner.

6. Improvisations. This is usually presented in terms of a real life situation where each participant is trying to achieve a specific goal, to get something from the others.

B. WRITING ACTIVITIES

1. Writing summaries of discussions. This can entail instruction in spelling, usage, sentence structure, punctuation, capitalization; it can provide an opportunity for vocabulary development. Teach attentiveness to which are the main points, which details can be omitted and which are important (such as date, time, and place for a future meeting), accuracy.

2. Writing from dictation. This develops critical listening ability as well as providing an opportunity for instruction in all skills mentioned above.

3. Writing reports of experiences, such as voter registration activities.

4. Writing endings to stories. The teachers could read part of a story, stop before the conclusion is given and ask students to write an ending. Other methods would be to give plot details and ask students to compose a story or to read the complete story and ask for alternative endings.

5. Writing poetry. A number of stimuli are necessary for poetry or creative prose. This activity could follow the reading of poetry to the class. Other incentives are natural surroundings, pictures, recorded music, sounds. (The students could close their eyes, for example, while the teacher crumples cellophane or paper. The students could be asked to “think with their imaginations” and to describe what the sound suggests to them.)

6. Writing reports for newspapers. This involves the accurate reporting of facts and develops the ability to see significant details. There is also an opportunity here to demonstrate the difference between fact and opinion, objective reporting and propaganda.

7. Writing persuasive material, such as a handbill. This could follow a verbal activity where one student had to persuade another student. The activity could begin on a personal level—i.e., one student could ask another for a pencil or a dime—and build up to the point where the student has to persuade his antagonist to accept a different belief about an issue. This kind of activity develops the ability to “think on the feet.”

8. Filling out forms such as applications, social security, voter registration forms, etc.

9. Writing social and business letters.

C. SUGGESTED READING ACTIVITIES

1. Reading newspaper reports, magazines, short stories, etc., for comprehension and evaluation.

2. Reading and summaries of activities. New words can be introduced by taking words from the selection and substituting words of similar meaning. This can involve the use of the dictionary. Reading comprehension skills can be employed by having a student derive the meaning of a word from the context of the sentence.

D. RELATED ACTIVITIES

1. Drawing pictures to illustrate poems, stories, and experiences.

2. Listening to poems and stories, listening to each other, role playing and activities where students can teach others, problem-solving discussion.

3. Following instructions—a recipe, for example, where the student also has the opportunity to see the importance of weights and measurements in something as specific as cooking (how to double a recipe), or following instructions for a sewing pattern or make-your-own construction.

4. Drawing and reading maps, interpreting tables; using indexes, tables of contents, glossaries, etc.

5. Homework. Simple, easily completed assignments should be made so that the students gain an opportunity to realize his responsibility for his education. Hopefully, this will stimulate independent investigation.

6. Testing. While this is not necessarily endorsed as an educational tool, it is one means of evaluating progress. Also, it is a fact of life—testing is a key factor in the voter registration situation and is something that college students have to deal with constantly. It should be presented in that context. Teach how to approach a test question—what is being asked? Which answers are only partially true, or although true, may be irrelevant to the question.

7. Relaxation activities. The teachers will probably want to teach more than anyone can learn in a six-week period. There will be a danger of making class sessions too concentrated for the students. On the other hand, the teachers may decide that a particular session is going badly and is, frankly, dull for the students. If attention lags for either reason, the teacher should switch to another kind of activity. These activities can continue the teacher's basic educational purpose if they are well-planned and well-selected, and still be reinvigorating for the class. Some ideas are drawing, breaking up for smaller discussion groups, and informal games.

Some ideas for games which can develop verbal skills in students are:

1. Twenty-five. Each youngster draws on a piece of paper a square of twenty-five boxes. Everyone calls a letter in turn. The object is to create words either across or down the columns. (I have found that teen-agers take a strong liking to this game, even those who can't spell well. Many points are scored simply by accident.)

2. Rogues' Gallery. Players must guess the names of people in pictures cut out from newspapers and magazines. A careful selection of pictures results in an interesting learning situation.

3. Observation. Players must list objects which they have seen and are then covered up.

4. Words and Pictures. Words, sentences, or paragraphs must be clipped from magazines of newspapers so as to write a story about a picture taken from a magazine. These words get pasted on a piece of paper. No words are to be written.

5. Sight Unseen. Teams of two. One person describes an object. The other person must draw the unnamed and unseen object as well as he can.

6. Hall of Fame. A letter is suggested (or can be elaborately chosen by the class), time is kept, and everybody puts down as many names, first or last, beginning with that letter as he can remember. Use a general list or else concentrate on certain categories.

7. Word Relations. Each player lists words by association; then the field is reversed. Winner is a person who makes least mistakes when order is reversed.

8. Letter Dice. (Individual game) Five dice marked with letters rather than numbers are thrown and from the letters appearing on the five surfaces the student must make a word.

9. TV Quiz Game. Adaptations of such games as Twenty Questions, Password, Concentration, etc. can be used to bring out points made in discussion, summarize class activities, etc.—or just make a break if a session gets dull.

E. SUMMARY

The resourcefulness of the teacher is a tremendously important element. As material will not be at hand, the teacher will most likely have to proceed on a day-to-day basis—using the xerograph, if available. In the matter of classroom procedure, questioning is the vital tool. It is meaningless to flood the student with information he cannot understand; questioning is the path to enlightenment. It requires a great deal of skill and tact to pose the question that will stimulate but not offend, lead to un-self-consciousness and the desire to express thought.

Classroom activities should not be dealt with as fragmented, isolated parts of a program; one activity should flow naturally from another (speaking and listening preceding reading and writing) with the students' experience as the source for the learning material. The relationship between school and life should be reinforced constantly.

[Editors' Note: This part of the Academic Curriculum is, with minor modifications, the report of the Curriculum Conference Report of the subgroup 2, Remedial Academic Program. The report was written by Sandra Adickes.]

PART I: ACADEMIC CURRICULUM: MATHEMATICS

(excerpt)

Note to Freedom School teachers:

This diagnostic is rather important in the summer curriculum. Your students will demonstrate a wide variety of levels of mathematical knowledge and we wish to satisfy individual needs as much as possible. This tests should help you find just what each student needs. Administer the test in the manner you think best. Some students will only be able to solve a few of the arithmetic problems, if that. Let them go when they feel they can do no more. I would suggest a very liberal time allowance. Most likely few of the students have seen any set theory but, given time, many could solve that section. Perhaps you'll want to break the test up into two parts. Perhaps it would be best for some students if you sat down with them and went through the test problem by problem, offering hints when necessary. Those students who are able to work the test will want something new. Suggestions are analytic geometry, probability theory, or the binary number system. But you are invited and encouraged to use your imagination in inventing a course for them. One word of advice. The standard method of teaching math in Mississippi is through routine drill, and more routine drill. If your course tends to seem routine, like regular school, the students will tend to lose interest and you may lose them. Be creative. Experiment. The kids will love it.

. . . .

[Editors' Note: The test that follows consists of four pages of increasingly difficult problems in Arithmetic, Algebra, Set Theory, and Geometry]

Supplementary Lectures

Note to the teachers: these lectures are intended to give a bit of mathematics from a different point of view. You may alter or add to this as you like. (Actually, these are only a couple of ideas of how a teacher can show his students something new and different. You will need to amplify what is written here.) Feel free to write up your own lectures.

Lecture 1, Geometric Computation.

The point of this lecture is to demonstrate methods of addition, subtraction, multiplication, division, and the taking of square roots by geometric methods. Recall that the square root of a number Y is the number Z such that Z times Z equals Y . The square root of 9 is 3 because 3 times 3 equals 9.

Addition and subtraction are rather easy. First draw a horizontal line. Call it an axis and find a point on it which we call the "origin." Open the compass to a given unit length. Let's add 2 and 3. First place the point of the compass on the origin and mark off a unit length on the axis to the right of the origin. Then place the point of the compass on the new point and mark off another point to the right which will be a unit length's distant. This gives us our two. Mark off three more places to the right. Now we have added 2 and 3 and are 5 units to the right of the origin which illustrates that $2 + 3 = 5$.

Subtraction is similar. . . .

[Editors' Note: the lecture continues over 4 pages, including graphics and examples, with increasing difficulty and ending with vector addition. The SNCC papers contain more Mathematics addenda.]

PART I: ACADEMIC CURRICULUM: SCIENCE

(Enclosed are my suggestions for science curricula for the Freedom Schools. These are merely outlines; I could not do any more than this since I do not know what the general education level is, what equipment is available, how many people will be able to teach science, etc. The outline may seem somewhat advanced in level; however, what I have in mind is to keep most of the work qualitative, i.e. descriptive rather than mathematical. In this way, a broad range of scientific material can be introduced and the students' interest will not be lost in too many details, and physical or biological principles can be emphasized. . . .

Walter E. Gross)

PHYSICS AND CHEMISTRY

1. Mechanics.

Motion. How we describe it. Speed. Velocity (speed and direction of motion.) Acceleration. Forces. What a force is. Different kinds of forces, e.g. pulls and pushes, gravity springs. Force causes acceleration.

Application of these principles. Projectiles. Motion in a circle.

2. Heat and gas laws.

What a temperature is. What heat is. Difference between the two. Effects of heat: boiling, evaporation, expansion, contraction.

Pressure.

Gas laws: relationships between temperature, volume, and pressure for a gas.

3. Atomic physics and chemistry.

Matter is composed of atoms: why we believe this and how this was discovered. The great experiments that led up to this.

Combination of atoms into molecules. Elements and compounds.

What an atom is made of: neutrons, protons, electrons. The nucleus.

How atoms hold together: electric forces between the protons and the electrons.

Periodic Table of the elements.

The Nucleus: composed of protons and neutrons. Properties of these particles: Mass, charge, spin. Mass and energy as equivalent. Nuclear energy.

4. Electricity.

Forces between charges. Electric field between stationary charges. Magnetic field when charges move.

Electrons in metals. Become free of atoms, and move; called currents.

Applications of electricity: magnets; motors; generators.

5. Optics.

What light is. 2 theories: wave or particles. Evidence for each.

Speed of light.

Intensity.

Mirrors.

Refraction: lenses.

Optical instruments: telescope, microscope; the eye.

ASTRONOMY

1. The Solar System.

The 9 planets: How they were discovered; Sizes; surface features; atmospheres.

Moons of each planet. Similarities and difference to the earth's moon.

How we know that the planets go around the sun, even though it seems that they—and the sun—go around the earth.

2. Outside the solar system

Galaxies, i.e. systems of stars. Our own galaxy the “Milky Way”. Distances.

Well-known stars; constellations. The North star. Sirius, the nearest star. How to measure distances: the light year.

How stars are made up; the sun.

3. Space travel.

Work that has already been done. Satellites and rockets.

Landing on the moon; the first stage.

Traveling to the planets; what might be learned.

BIOLOGY

1. The cell. Why we believe living things are composed of cells.

How a cell is made—general features.

One celled animals and plants.

More complicated cells. Cells specialize and perform one function only: e.g. blood cells, nerve cells, fat cells.

Simple features of heredity: genes and chromosomes.

2. Plants.

Photosynthesis. Mechanism; importance in producing food for all living things.

3. Animals. Simple animals.

Vertebrae; evolution—how it was discovered and what its significance was. Description of the various kinds of animals throughout evolution.

4. Present research in biology.

Application of chemical techniques (biochemistry)

Application of physical techniques (biophysics)

PART II: CITIZENSHIP CURRICULUM, UNIT I - VI**Introduction**

One of the purposes of the Freedom Schools is to train people to be active agents in bringing about social change. We have attempted to design a developmental curriculum that begins on the level of the students' everyday lives and those things in their environment that they have either already experienced or can readily perceive, and builds up to a more realistic perception of American society, themselves, the conditions of their oppression, and alternatives offered by the Freedom Movement.

It is not our purpose to impose a particularly set of conclusions. Our purpose is to encourage the asking of questions, and hope that society can be improved.

The curriculum is divided into seven units:

1. Comparison of student's reality with others (the way the students live and the way others live)
2. North to Freedom? (the Negro in the North)
3. Examining the apparent reality (the "better lives" that whites live)
4. Introducing the power structure
5. The poor Negro and the poor white
6. Material things versus soul things
7. The movement

Each unit develops concepts that are needed for those that follow.

Physically, the content (suggested questions and concepts) is on the right side of each page with suggested case studies and visual aid material listed opposite. [Note by Emery and Gold: in this printing, the content of the curriculum is printed as normal text, the suggested case studies etc. are in italics, and inserted as documents where available.]

The suggested questions and concepts in the content portion of each page constitute the teaching guide. It should be emphasized that these are only suggestions, and that individual teachers may interpret the concepts in different ways or substitute other methods. There is probably more in each unit than it will be possible to use, but it was included so that each teacher would have a range of material to choose from, and extra material if necessary.

There are two additional sets of questions **THAT ARE TO BE REINTRODUCED PERIODICALLY**, both permit an on-going evaluation of the effectiveness of the curriculum, and to provide students with recurring opportunities for perceiving their own growth in sophistication.

The **BASIC SET OF QUESTIONS** is:

1. Why are we (students and teachers) in Freedom Schools?
2. What is the freedom movement?
3. What alternatives does the freedom movement offer us?

The **SECONDARY SET OF QUESTIONS** is:

1. What does the majority culture have that we want?
2. What does the majority culture have that we don't want?
3. What do we have that we want to keep?

Unit I—Comparison of Students' Realities with Others

Purpose: To create an awareness that there are alternatives

Materials: Statistical data on education, housing, etc.
 “The South as an Underdeveloped Country”
[Inserted by Editors:] The Poor in America

Introduction: *Student, teacher each tell about themselves.* We are not here to teach you. We are here to help you learn and to learn together. We are going to talk about a lot of things: about Negro people and white people, about rich people and poor people, about the South and about the North, about you and what you think and feel and want, and about me.

And we're going to try to be honest with each other and say what we believe.

We'll also ask some questions and try to find some answers. The first thing is to look around, right here, and see how we live in Mississippi.

SCHOOLS—CONDITIONS IN NEGRO SCHOOLS

1. What kind of school is it [Negro School]? Sample questions: How many grades does it have? How many classrooms? What is it made of, wood or brick? Do you have textbooks, new or old? Do you have a library, movies, maps, charts, electric lights, a gymnasium? How many teachers, white or Negro? Laboratory space and equipment, desks, blackboards, etc.? Do you have history, geography, science, foreign language, etc.?
2. What do you learn there? Sample questions: How many go to college? Are there trade or vocational schools? What kinds of jobs are you prepared for? What about current events— who do you learn is good, who do you learn is bad, what do you learn about the South, about the North, about Negroes, about whites, about Kennedy, Johnson, Eastland, Castro etc. What do you learn about voting and citizenship?
3. Where do you learn about these things? Radio, newspapers, TV, etc.
4. Is this good or bad? Can you think of anything that you would like to see changed? How could your school be made better?

SCHOOLS—CONDITIONS IN THE WHITE SCHOOLS

Where do the white children go to school? What are their schools like? Compare Negro schools with white schools.

Visual Aids (pictures of school, laboratories, school libraries, school rooms, gymnasiums.)

Here are some pictures of other schools in other states besides Mississippi (or some in Mississippi, too.)

Sample questions: Do you like these schools in the pictures? Are they like your school? How are they different? Why would you like to have better schools? What do you see in the pictures that is different from you and your school? Why do these differences exist?

HOUSING—CONDITIONS FOR NEGROES

Sample questions: Where do you live? How many rooms are there? How many people live with you? How many beds do you have? Is your house made of wood or stone or bricks? What color is it? Is it painted? Is there water, electricity, bathroom indoors? What kind of stove— wood, gas, kerosene, electric? Do you have heat in the winter? What kind? Furniture? What kind, how

much? Can you think of any kind of changes you'd like to see, or any other kinds of houses you'd like to live in?

Questions: Where do white children live in this town? What kinds of houses—are there houses different? How? Better? How? Where does the Police Chief live? The banker? The store owner, etc.?

Visual Aids (pictures of both rural and suburban middle-class houses, modern bedrooms, bathroom, kitchens, living rooms, etc.) Do you like these pictures? These houses? Are they like your house? How are they different? Would you like this kind of house? Why?

NOTE: Discuss relationships between housing and schools (i.e. privacy, a place to study, quiet and books in the home, as related to studying) and housing and health (i.e., overcrowding, unheated housing as related to ease of sharing communicable diseases such as colds, TB, and infant mortality rates; bring in statistics on Negro-white life expectancy and mortality rates in Mississippi)

Question: Why do these differences exist?

EMPLOYMENT FOR NEGROES

Adult Employment (men and women):

Sample questions: Who works in your family? What kind of work does your father do? Your mother? Do they work for white people or for Negroes? Who works most (mother or father)? Do they get paid a lot or a little? What do they do with the money they make? —pay rent, buy food, buy clothes, buy things for you? Do you think they could use more money? Why? Why don't they get more money?

Children's employment.

Sample questions: Do you ever work? What kind of work? After school? Or do you have to stay home from school to work sometimes? What happens when you stay home? Do you miss learning? If so, why do you have to do it?

Employment for Whites.

Sample questions: in this town, what kind of jobs do white people do? Are there any Negro police or firemen, or store owners? Do Negroes work as clerks or cashiers in the store or the bank? Are there any Negroes who have tenant farmers, any Negro lawyers? Doctors, Negroes who work at the textile mills?

What kinds of jobs do people do? List responses and suggest areas through questions if necessary, i.e., who fixes cars, who makes our clothes, who sells them, who makes cars, airplanes, rockets, who builds houses, who invents machines (shoe last, air brake, telephone, etc.), who writes books, who fixes radios, plumbing, electricity, who drives tractors and mechanical cotton-pickers?

Break up into small groups and see which group can make up the largest list of jobs that people have, and what duties these jobs have.

Question: Can Negroes do these jobs? Are they smart enough? Do some Negroes do these jobs? If not, why not?

Questions: Can anyone name:

1. A Negro inventor (George Washington Carver, Jan Matzeliger, Elijah McCoy)
2. A Negro scientist (Dr. Charles Drew, Benjamin Banneker, Dr. Daniel Hale Williams.)
3. A Negro writer (Richard Wright, Phyllis Wheatley, Ralph Ellison, James Baldwin, Alexander Dumas, W.E.B. DuBois, Langston Hughes, M.L. King, Septima Clark, etc.)

Material on Negroes in various fields, pictures, stories, etc. Poetry reading and discussion. Photos or drawings of Negroes and Negro history figures should be posted.

Negro employment and white—salary comparison, etc. Review what has been discussed.

MEDICAL FACILITIES

Is there any hospital here? Where do you (your parents) go if they are sick, have a baby, a car accident, etc.? Where is the nearest hospital? Is it for Negroes, white, both? If there are different hospitals for Negroes and whites, compare facilities. (How close are they? How many beds, doctors, operating rooms, etc.)

Review Unit I. (Include schools, housing, employment, health)

Suggested approach: We've talked about jobs and health in Mississippi and in other states, and we have seen that Negroes have to live one way and whites another. Remember, we found out that your schools were (list) and we found out that other schools were/had (list), etc.

Question: What can we do about this?

Re-introduce three basic questions:

1. Why are we (teachers and students) here in Freedom School?
2. What is the Freedom Movement?
3. What does the Freedom Movement have to offer you?

Unit II—North to Freedom? (The Negro in the North)

Purpose: To help the students see clearly the condition of the Negro in the North, and see that migration to the North is not a basic solution.

Summary: Starting with a new clarity of their conditions in the South to raise the question of whether the Negro can escape oppression by going North.

Materials: Chester, Pennsylvania,
New York City Schools

[Inserted by Editors:] Triple Revolution

Suggested Introduction: *Map of U.S. with the South shaded. Point out each city.*

For years Negroes in Mississippi and other Southern states have seen how hard Jim Crow makes them live, just as we have talked about the last few days. In fact, since 1950, Negroes have left Mississippi (use census figures.) Where have they gone? Most of them have moved North, to Chicago, Detroit, New York, Cleveland, Pittsburgh, Washington, Baltimore, Boston, etc. They have gone North looking for better jobs, more money, better schools, good hospitals, better housing. Now there are more than one million Negroes in New York City alone. Do you think that they've found what they were looking for? How do you know?

Magazine pictures of city skyscrapers, bright lights, wide avenues, etc., Here is what some of those cities look like.

But how is it for the Negro?

They have had school boycotts to protest against segregation in Chicago, New York, Boston. Why?

Case Studies: NYC Schools and Chester, Pa.

Cover the Same Topics as in Unit I

Questions: *Picture or other materials on the ghetto.* Do you have relatives there? What do they say about the North? Do you have to say “yessir” to white men there? Do you have better housing in the slums or only crowded bad housing? Do you have better jobs in the North? (The median income of Negro families, nationally, in 1960, was half that of white families.) Does it cost more to live? How about schools? —better buildings, but still segregated, still overcrowded, still old textbooks, still few college graduates?

How about housing? More integrated neighborhoods in the South. In the North, housing very expensive and more expensive for bad housing. Negroes still can’t work at some jobs and they are paid less money. The overcrowding means there is more TB in Negro ghettos and a higher infant mortality rate. (30 percent higher among Negroes than whites).

Conclude: Itemize similarities in areas covered in Unit I (housing, jobs, schools, health).

Question: Are things better in the North? Is the Negro really free, equal? Why not?

Conclude: The Negro is a second-class citizen all over the U.S., and you can’t escape by leaving the South.

Introduce questions:

1. What does the dominant culture have that we want?
2. What does the dominant culture have that we don’t want?
3. What do we have that we want to keep?

Unit III—Examining the Apparent Reality (The “Better Life” That Whites Have)

Purpose: To find out what the whites’ “better life” (better schools, jobs, housing, health facilities, etc.) is really like, and what it costs them.

Materials: Guide to Negro History, parts 1-3.

[Inserted by Editors:] In White America

[Inserted by Editors:] Negro History Addendum I

[Inserted by Editors:] Negro History Addendum II

[Inserted by Editors:] Negro History Study Questions

[Inserted by Editors:] Development of Negro Power

Introduction, Suggestions: We have seen that Negroes live differently than whites in Mississippi and in the rest of the U.S.—and it seemed that whites go to better schools, get better jobs, and live in better houses than Negroes.

Reintroduce pictures of school. Let us see if it’s as good as it looks. The nice, new building, the laboratories, the school libraries, the gyms, and new textbooks and so on.

Concept: What education is.

Suggested questions: What do people learn in school beside reading, writing, and arithmetic? Do they learn things about other people? What? About jobs? What? About their country? What? About their city or town? About their government? About what they believe? About other countries? What?

1. Repeat pledge of allegiance. Analyze it: does it mean everything it says? When you say it, what does it teach you about your country and what it believes?

2. Recite the “Bill of Rights.” Analyze it: Does it teach us about our country’s beliefs? What? What does Freedom of Assembly mean? Does it mean you have the right to come together and demonstrate? If so, why do demonstrators go to jail? What does Freedom of Worship mean? Does it mean you can go into any church? If so, why do people get arrested at kneel-ins? What does Freedom of Speech mean? Do you have a right to say what you wish about voting and freedom and other things at rallies and meetings at Freedom Schools? Do you have a right to say what you wish on leaflets and are you free to distribute them? If not, why not?

Question: Are these things the truth? Are they just ideals that we talk about or do Americans really believe them and practice them? Why could this be?

Concept: That truth, freedom, liberty, equality, and other ideals are often distorted and used as excuses and justifications for contradictory actions.

Questions: Are there any other things that the schools teach us that are untrue—myths? Can you point out any of the myths that are taught in the schools? What do the schools teach about Negroes?

NOTE: There is a real opportunity here for the teacher (white or middle-class Negro), if he can be honest and searching enough, to share the misinformation or myths he learned about Negroes and/or himself, and use his experience to help deepen the insights of the students.

Suggested supplements to students’ lists:

1. That all Negroes were slaves.
2. That Negroes are inferior—mentally, morally, physically.
3. That Negroes were happy and satisfied as slaves (well-fed and singing and dancing on the plantation)
4. That Negroes are happy and satisfied now.
5. That Negroes are incapable of participating in government.
6. That Negroes don’t want to participate in government.
7. That Negroes are lazy.
8. That Negroes can only do menial work and nothing more.

Examine each of these myths.

Questions: How do you know these myths aren’t true? Can you give examples?

Suggestion: Let us explore history and see how true these myths are (take them one at a time).

Case study: Guide to Negro History

Myth: That Negroes were happy and satisfied as slaves.

(Present Guide to Negro History in storytelling style first, then have students dramatize extemporaneously, using their own words.)

NOTE: the dramatization of a slave revolt can serve an important function by permitting students to vent repressed hostility and aggression against whites and their condition.

Case Study—Guide to Negro History, Part II: Negro Resistance to Oppression

Raise myth again. Question: What do you think now? Were Negroes happy as slaves?

Myth: That Negroes don't want to participate in government and are incapable of participating.

Case Study—Guide to Negro History, part III: Reconstruction (1865-1877) and the Beginning of Segregation

Raise myth again: Question: if Negroes can and want to participate in politics, why don't they?

Myth: Negroes are inferior mentally, morally, and physically, and can do only menial work.
Cassius Clay and Joe Louis: list other accomplishments of outstanding Negroes in music, science, etc.

Case Study—Guide to Negro History, part I: Origins of Prejudice (1600-1800)

Raise myth again. Question: Why is this kind of myth started?

Concept: the effect on a person's self-image, motivation, and achievement when presented with low expectations (as exemplified by these myths.)

Questions: how do you feel in school when a teacher calls you "stupid" or "dumb"? Do you try harder or do you give up? Are you angry? (Set up other examples within the students' experience.)

Questions: What does this kind of myth do to you? Does it make you try? Does it make you proud to be Negro?

Discussion: Reintroduce three basic questions:

1. Why are we (students and teachers) here in Freedom Schools?
2. What is the Freedom Movement?
3. What alternative does the Freedom Movement have to offer?

We've talked about some of the myths that the schools teach; let us see what some of the others are.

NOTE: At this point schools might use the discussion method to try to help the students discover other myths from their own experience or what they have seen or heard on TV or the movies, etc. They might even be asked to recite the plots of war movies or cowboy and Indian movies, and

then follow up with questions, etc. (I.e., why are the Indians always bad and savage? Why are Negroes always domestic savages? {servants?})

Question: What do these movies teach us?

Review entire Unit III. What is taught in the schools and through other media? The myths of our society (enumerate) and what the effect of these myths is on the Negro (and other Americans) and what purposes these serve.

Re-introduce three secondary questions:

1. What does the American majority society have that we want?
2. What does it have that we don't want?
3. What do we have that we want to keep?

Unit IV—Introducing the Power Structure

Purpose: 1. To create an awareness that some people profit by the pain of others or by misleading them;

2. To create an awareness that some people make decisions that profoundly affect others (i.e., bare power);

3. To develop the concept of “political power.”

Summary: Starting with the material learned in preceding units on Negro-white differences in education, housing, etc. and the use of myths to distort and misinform, to develop a concept of who constructs the myths, who profits from them, and how they profit both in local (town and state of Mississippi) terms and in larger terms. And to name these people as “decision-makers” and “the power structure.”

Materials: Mississippi Power Structure;

The Power of the Dixiecrats

[Inserted by Editors:] Nazi Germany

Review—suggested approach: Let's see what we have learned so far. We have learned that Negroes and whites live differently in both the South and the North and that Negroes are not given equal treatment in housing, education, etc. We have learned that although it seems that white people have better schools, for instance, that they pay for it by learning lies, and by learning to “hate” and be afraid. We have learned that we are misled by these lies too—that the myths have taught us to believe that we are inferior and dumb and that we have made no contributions to our society.

Now we want to find out why the schools tell these lies and find out who is helped by these lies.

Concept: That the myths serve a purpose by:

1. Keeping Negroes servile and teaching whites to feel superior.
2. Providing a justification for race relations in this country.

Questions: Why do the schools tell these lies? Who hears and believes them? What do they believe? How does it make them feel to believe these things? Do the lies give them excuses?

What kinds of excuses do the lies provide:

- * If a white man kills a Negro?
- * If a policeman beats a Negro for demonstrating?
- * If a policeman beats a white demonstrator?
- * If a Negro is refused the vote?
- * If a Negro tries to integrate a school?
- * If Negroes are paid less money for the same work?
- * If white workers want to start a union?

Now, who profits by these lies? Let's start here in this town.

Case Study: Mississippi Power Structure, Part I.

Concept: That some people profit by the propagation of myths (make money, gain power, bolster up their egos, etc..)

Question: Who makes money when Negroes are paid less than white people? *Ask students about plantations near where they live; about factories near where they live.*

Example: A cotton farmer's profit is the price he gets for his cotton minus what he pays for labor. Does the farmer make more money if the workers he hires are Negro? Why? Is it profitable for the farmer to keep Negro labor cheap? How does he do it? Do the myths help him do it? How?

Example: Why does Northern industry come to Mississippi? They come from the North because Mississippi has cheaper labor and they can make more money. Why does Mississippi have cheap labor? Because there are no unions? Because there are white workers in Mississippi who are told that unions believe in integration. Where there are no unions, the workers are paid less and the businessman makes more money. Do the myths help to keep the salaries low for whites too?

(Caution: many unions maintain segregationist practices.)

Question: Why don't white people want the Negro to vote?

Example: The same farmer is able to pay Negroes less money than white people are paid because the state laws of Mississippi support segregation and inequality. Who makes these laws? How do they get their jobs? Who elects them? What would happen to these men and these laws if Negroes voted? Would you vote for a man who made laws that paid you less? Does the farmer vote for them? Does the business man? Do white workers? Why?

Concept: That poor whites suffer from the myths too.

Questions: If there was a union, the white workers would make more money too. Why, then, do they vote for politicians who are against unions? Are they more afraid of something else? Why are they so afraid of integration? What have the myths and lies that they have learned done to them? Who profits by this? The rich farmer? The rich businessman? How?

Concept: That the police work for the power structure and enforce the status quo.

Example: The following is an excerpt from one of Franklin D. Roosevelt's press conferences in 1938, when he unsuccessfully attempted to purge Southern reactionaries from the Democratic Party. Roosevelt described the experience of union organizers in a Southern town in a way that makes one think of COFO today:

They got in town about ten o'clock in the morning. They had a list of eight or ten of the operators. They were going to see them at the noon hour.

So they went to the factory and they asked, "Where is so and so? Where can I find so and so?"

They were engaged in asking questions, when one of the mill police tapped him on the shoulder and showed his badge and said, "Come with me."

He said, "We have not done anything; we are outside and on the street and just asking to see some fellows."

"Oh, we know; come with me."

They were taken to the police station and locked up in a cell on the charge of vagrancy. Both of them had, oh, fifteen or twenty dollars apiece in their clothes.

They said, "We are not vagrants; we came down here from such and such a city."

"But you are organizers."

"Of course we are organizers."

"Well, you are in a bad place."

They were kept in jail until five o'clock, just before dark, and the judge came in and said,

"What are you doing here?"

"We are down here to try to start an organization of the textile workers of this mill."

"That is what you think," he said. "Ten dollars fine and out of town before six o'clock, and do not come back."

They did not know what they were fined for, but they paid the fine, and as they went out of the courtroom, one of the marshals, or policemen, went up to them and said, "Which way are you boys going?" They said, "We have got to get out of town and we thought we would go to such and such a town, ten miles away."

They rode with him and he said, "This is where I turn off." They went about a quarter of a mile and out of a clump of bushes came some men with blackjacks and they got the worst beating up that any two people could get without getting killed."

Question: Who helps to keep the Negro from voting and the union from starting? Who helps the farmer and businessman make money by enforcing the segregation laws? Who pays the police? Who gives them their orders? Why? What would happen to a policeman who didn't obey orders? Why do the police follow orders?

Important to bring out:

1. For pay
2. For illicit gains from graft, etc.
3. Because they have learned the myths too, and "hate"

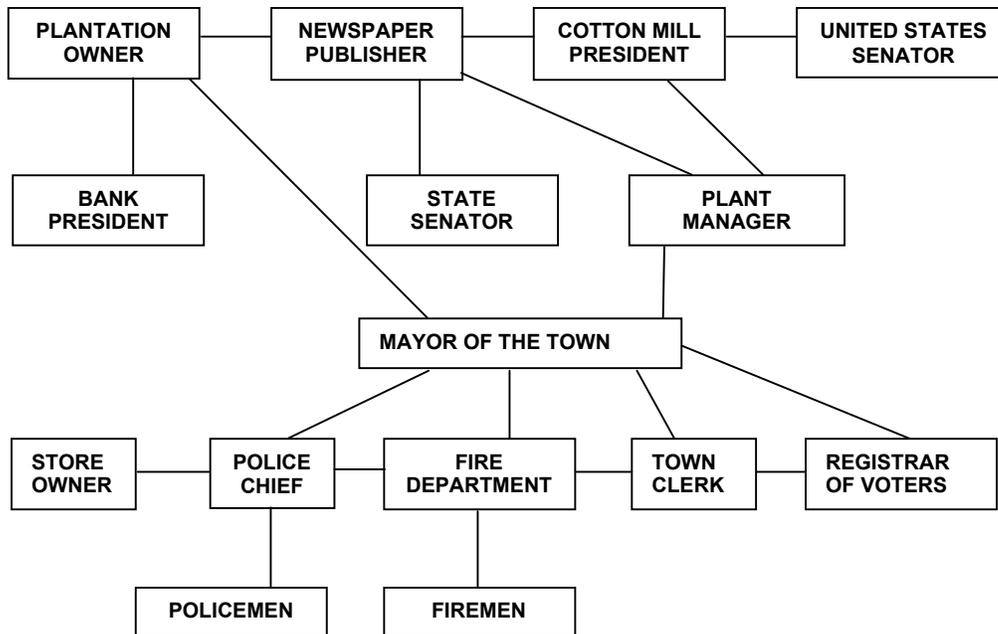
and "fear"

Case Study: Mississippi Power Structure, Part II

What is a power structure? That is the name we give to groups of men who make the myths, who profits from them like the farmer and the businessman who pay the police and give them their orders, who make the laws and decide what laws they want, who make decisions about who gets paid and how much they get, about who votes and who doesn't vote, about what is taught in the schools, and what gets printed in the newspapers., etc.

Can you name some of these men in your town? (Suggestions: look for the mayor, big plantation owners, businessmen, plant managers, mill owners, etc.)

Suggestion: With the information you get from either students, parents, or COFO research staff, construct an organizational chart of the power structure on the blackboard or large paper.



Show how a decision made on the upper level gets passed down through the chain of command and finally implemented.

Example: *Dramatize if possible.* A Negro tries to register. The registrar of voters fails him, and calls the Mayor. The next day the plantation owner fires him and orders him off the land, and his name is published in the newspaper. The bank forecloses on his car, and the store refuses him any more credit and the county welfare department says he must get three references from white people before he is eligible for relief. His wife is fired from her job as a cook for a white family. When they move in with relatives, the house is shot up one night and the Negro man arrested on "Suspicion."

Concept: That the Power Structure is a connecting and interlocking series of cliques that goes from local towns and cities up to the highest levels of the national government.

Case Study: The Power of the Dixiecrats.

We have seen that there is what we call a power structure in this town—a small group of men that make the decisions in this town—they run it, they decide when schools are built and what is taught. They decide, as much as they can, who votes and who doesn't; they decide who gets a loan from the bank; they make the laws. In every other town and country of this state, there are other men who do the same things—who make the plans and decide what will happen for all the rest of us. They decide who will run for the United States Congress; they pay for the campaigns; they decide what laws will be made; and they help to make the myths that we all learn.

Southern representatives in Congress, acting on behalf of the Southern power structure, obstruct progress not only in the South but in the whole nation. Because of the one-party system in the South, these representatives serve in the House and Senate over and over again. Their seniority enables them to become chairmen of key committees. Examples: Senator Eastland of Mississippi is the Chairman of the Senate Judiciary Committee, influences the appointment of judges to the Federal Courts in which civil rights demonstrators are tried.

Discussion: Review entire Unit IV. Raise and answer the three basic questions. Raise and answer the three secondary questions.

Unit V—The Poor Negro, the Poor White, and their Fears

Purpose:

1. To indicate that the Power Structure derives its power in the final analysis, by playing upon the fears of the people, Negro and white;
2. To come to an understanding of these fears—what has helped to produce them and what they, in turn, have produced, namely, the myths, the lies, the system;
3. To grasp the deeper effects of the system we have produced and have allowed to continue, the deep psychological damage to Negroes and whites.

Materials: *Case Study on Hazard, Kentucky*

Introduction: We have talked about the world we want and the world we now have. Something is wrong with the world we have. We have looked at some of the wrong things. Now let us look at why the world has come to be as it now is . . . in particular, our world here in the South.

Concept: That the “power structure”—which, as we have seen, is one force that maintains a bad world—derives its power from playing upon the fears of the people, Negro and white.

Questions: Have you ever been afraid? Have you every been afraid enough to let somebody else take your punishment or take the blame for something they did not do? Were you afraid of being punished yourself? What is punishment? Physical pain like a beating? Could punishment also be losing something you wanted to keep? Like money? Like your pride? When you were a child, were you ever punished by having to stay inside the house, or in your room, or stand in the corner at school? Was this punishment loss of pride?

Here are some things we have learned about the “power structure.” (Write them on the blackboard.)

1. The “power structure” is made up of a small number of people who, because of their power, have a great deal of control over our lives.
2. Their power is financial and it is political.
3. They use their power to maintain segregation.

Here is something we do not know about the “power structure.” Why is it possible for such a small group to have so much control over all the rest of us? Is it only because they have money? If so, where do they get their money? Is it because of their political power? Where do they get the political power? Could it be that the “power structure” has power because we let it? That these few control us because we let them? Why? Why would we let a few people not only control us but control us in such a terrible way, build such a terrible world?

Do we like what they do? No? Then why do we let them do it? Are we afraid? What about whites? Are they afraid? Do they like to be controlled by a few people? Does anybody? What about poor whites? Isn't their condition much like ours? Poverty, unemployment, fear? Is it true that the "power structure" has power only because we give it to them—we and the whites. The power structure is built upon the fear of Negroes and the fear of whites. What if we moved out from under this structure? Where would be power go then? To the people? The whites will not move because they fear us because they believe the lies about us. Is it possible to show these whites the truth? How? What would happen if the whites and Negroes got together and moved right out from under the "power structure"? Do we have anything in common that might draw us together? What? What keeps us apart? Fear? Yes.

The "power structure" gets its power, in the final analysis, because we allow them power and we allow them power because we are afraid of something.

Concept: That the people of the South, Negro and white, are afraid; that the fears are sometimes different, sometimes alike; that all the fears work together to perpetuate the system.

Questions: Why should Negroes be afraid? Is there any real basis for our fear? Of course there is. We have been beaten and murdered, have lost our jobs and homes. We have real reason to fear. What about whites? Do most whites agree with the "power structure" and the lies? Why? Are they afraid? Why?

Let us imagine what might have happened inside the white man, over the years, to fill him with so much fear. We know in part already what happened to make the Negro fear—he was shot and lynched and murdered and beaten. What made the white fear? Write on board "What Happened Inside the White Man?" Let's list the things which might have caused him to create myths and lies.

1. Slavery: since the white man in the South lies about Negroes, let us begin with the coming of Negroes. We came from an unknown continent and we were unknown to the whites. Can we compare this lack of knowledge with, say, Columbus' day when men said if you sailed far enough, you would fall right off the earth? So the white men looked at us and we were unknown. They created myths—Africa is a deep dark place filled with savages.

2. Guilt: it is true that the white man did not know and still does not know much about Negroes. But it is also true that no man in his right mind can put any other man in chains without, sooner or later, feeling guilt.

Not long after the beginning of slavery, the guilt of the white man began. What did he do with this guilt inside him? He did not free us? Why?

3. Economics: the white man needed the Negro to work the plantation. He chose then not to free the Negro and so he had to find some other way to get rid of his guilt. What did he do to try to get rid of it?

4. Fear and lies: What does guilt do to you? Have you ever felt guilty? Does it make you afraid inside? What does fear do? Suppose you have done something you know to be wrong and you are first guilty and then afraid? Do you make up lies to get out of it? Have you ever tried to excuse yourself? Protect yourself? The white man did. He wanted to keep his slaves but he wanted very much to get rid of his guilt . . . so he made up lies: He said Negroes were not really human, therefore there is no reason for me to feel guilty. And from guilt came the whole lie of white supremacy/Negro inferiority . . . and from guilt came segregation.

As we saw, the power structure uses segregation to keep poor Negroes and poor whites from working together to solve their common problems. Segregation is also the white man's program for hiding away the cause of his guilt—the Negro—hiding him in slums, segregated schools, backyards. Segregation is a wall the white man builds to hide from you, the cause of his guilt . . . and by hiding you, to hide from his own conscience.

Negroes and whites are afraid. Negroes have reason to be afraid. Whites are afraid because of guilt. When Negroes are afraid, they continue to go along with the system. The same is true of whites. And so we say that: there is great fear in the South and it is from this fear that the "power structure" derives its power, from fear that the system keeps going. What do fear and lies do to people?

Concept: that the fear we have felt and the lies we have lived and the guilt have done great damage to us all, Negro and white.

Questions: What happens to you when you keep telling a lie over and over? Do you finally believe it? If you do not believe it, what happens inside to keep telling it anyway? What happens if you are afraid of something for a long long time? Does it change you inside? Does fear finally destroy something in you? What about guilt? If you are guilty of something and have to hide for a long long time, what happens? Are you happy? Free?

Draw a stick figure on the board—a man standing tall and straight. Here is man. He stands tall and straight as he is meant to stand. Draw a man stooped with his head hung down. Here is man again. What do you feel when you look at this figure? Tired? Old? Ashamed? Sick? Draw a stick figure stooped behind a fence or wall. What about this man? What do you feel? Fear? Hiding? What is alike about these two figures? They are bent. Is the first man bent?

Point to the first stooped figure. Have you ever seen a real person walk or stand this way? A Negro? A white man? Why? Age? Illness? Shame? Fear? Guilt? How about the other figure? Have you seen that? Which figure do you like? Why?

What do these figures represent? Above the two stooped figures draw arrows pointing down upon them and pressing them down. What do these arrows do? What do they represent?

We are talking about what lies do to people. What do you think about this? Do lies destroy something in man? Yes. Living, telling, or believing lies destroys something in us all. If somebody tells you that you are bad or lazy or inferior or guilty—you can either believe them or not. Suppose you do not believe them. Suppose you know better, but still they continue to tell you are bad . . . what happens inside you? Anger? Frustration? Despair? Sickness? Suppose you believe the lies? Do you know Negroes who have come to believe that they are inferior? How do they act? How do they stand? Walk? What about whites? Have you seen the face of a white man twisted in hate, fear, anger? Is it the face of a free man? A happy man? Have you seen the empty faces of whites on Main Street—faces that look through you—blank and empty. Are they the faces and eyes of free and happy people? No. No, they are not. White men have lost their health too—the health of their minds and of their bodies . . . from living the lies. No man can live the lie without being bent. The whole South is bent . . . and broken.

Can we really compare Negroes and whites in this matter of being free? It is clear to anyone who looks around that Negroes are not free to grow, to move about, to learn and develop and become whole inside. How about whites? Look down the biggest street in town. You see find houses, cars, pools, trees, lawns. Do most whites live this way? Do whites who live this way have freedom? Does it show in their faces? If they had freedom, why would they also have fear? Do free men fear? Why would they have hatred? If they were free, why would they lock the doors of

their big houses? What about the rest of the whites? Those who have no fine houses and cars? What do they have? White skin? Are they free then? Is the KKK a group of happy men? No. No, we are not free and not happy. Because we are bent, broken, divided, not whole. We have taken a piece of ourselves and turned it over the “power structure” which is simply to say, we have turned ourselves over to a lie.

1. The “power structure” is one force that helps to maintain the world; in the South, that helps to maintain the terrible world of segregation.
2. That “power structure” derives its power, in the final analysis, from the fears of both whites and Negroes.
3. Poor whites and Negroes are oppressed by the “power structure.” We have much in common.
4. If poor whites and Negroes could get together and move out from under the “power structure,” it would fall.
5. We do not move because we are afraid.
6. Generally, the Negro’s fear is based upon very real danger.
7. Generally, the white’s fear is based upon guilt.
8. Fear—whatever the cause—produces lies. We live in the South.
9. Living lies bends and breaks us.
10. That is to say—keeps us from being whole.
That is to say—keeps us from being free.

Have you ever heard this: “Ye shall know the Truth and the Truth shall make you free?”
Have we seen in this unit that lies and the fear behind lies and the guilt behind the fear . . . work together to enslave men?
If lies enslave us, then Truth will free us.
What IS the Truth? That is . . . what will make us free?
In the next unit, we will try to find the answer to the question: What is the Truth? Or, the same question: What is freedom?

Unit VI—Material Things and Soul Things

Purpose: 1. To develop insights about the inadequacies of pure materialism;
2. To develop some elementary concepts of a new society.

Summary: Starting with a questioning of whether the material things have given the “power structure” satisfaction, to raise the question of whether achievement will bring the Negro and/or the poor white fulfillment. Then to explore whether the conditions of his oppression have given the Negro insights and values that contribute to the goal of a more human society. And finally to develop this relevance into some insights as to the characteristics of a new society.

Materials: Statements of Discipline of Nonviolent Movements.

Introduction: The last few days we have been exploring in another world—different than the one we live in everyday—the world of the “power structure,” and we have made some interesting discoveries:

1. That the “power structure” has a lot of power to make things happen just as they want them to be.

2. That the “power structure” has a lot of money that buys—big, luxurious houses, expensive cars, expensive clothing, trips, and all the other things we see on TV and in the movies.

But we’ve also discovered that—

1. The “power structure” is afraid of losing its power and its money; and
2. The “power structure” is afraid of Negroes and poor whites find out the “truth” and getting together.

Ideas to be developed:

1. The possessions of men do not make them free. Negroes will not be freed by:
 - a. Taking what the whites have.
 - b. A movement directed at materialistic ends only.
2. The structure of society can be altered.
3. While a radically new social structure must be created in order to give man the room to grow in, it is not the changing of structure alone that produces a good life or a good world. It is also the ethical values of the individual.
4. There are many kinds of power we could use to build a new society.

Concept: That just taking the “power structure’s” money and power would not make us happy either.

We have seen that having money and power does not make the “power structure” happy. We have seen that they have to pay a price for it.

Questions: Would just taking their money and power away and keeping it ourselves make us happy? Wouldn’t we have to be afraid and distrust people too? Wouldn’t we have to make up lies to convince ourselves that we were right? Wouldn’t we have to make up lies to convince other people that we were right? Wouldn’t we, too, have to keep other people down in order to keep ourselves up?

Suppose you had a million dollars. You could buy a boat, a big car, a house, clothes, food, and many good things. But could you buy a friend? Could you buy a spring morning? Could you buy health? And how could we be happy without friends, health, and spring?

This is a freedom movement; suppose this movement could get a good house and job for all Negroes. Suppose Negroes had everything that the middle class of America has . . . everything that the rest of the country has . . . would it be enough? Why are there heart attacks and diseases and so much awful unhappiness in the middle class . . . which seems to be so free? Why the Bomb?

Concept: That the structure of society can be changed. Discussion of a possible new society.

1. Money—should a few people have a lot of money, should everybody have the same, should everybody have what they need?
2. Jobs—should men be able to work at any job they can do and like, regardless of color, religion, nationality? Suppose a man were put out of a job by automation (like the mechanical picker?) What should happen to him? Should he just sit around? Should he be trained for a new job? Who can train him? When he is old, should he have to depend on his family or be poor? Should he be helped when he is old? Why? Should all workers join together if they wish? Should they share in the profits? Why?

3. Housing—Should every family be able to live where they wish to live, regardless of race or religion? Why? Should every family have a decent home? Should it have heat, a kitchen, a bathroom, hot water, nice furniture? Why does the kind of house a family has affect their family life? Suppose a family does not have enough money? Does a family have a basic right to good housing?
4. Health—should all people have a right to receive the same medical services regardless of religion or race or money? Should all people be able to receive whatever medical services they need regardless of how rich or poor they are? Why? From whom?
5. Education—Should all children be able to go to the same schools regardless of their race or religion? Should all children have the right to get as much education as they are capable of? Suppose they can't afford to go to special high schools or to college? Should they still be able to go? How? Who should pay?
What should be taught in schools? Do we teach myths and lies? Why? Should we? Should we train people for jobs in schools? To be good citizens? What else should we train people for?—culture, resourcefulness, world citizenship, respect for other people and cultures, peace? What about teaching adults? Should they have a chance too? Should it be free? Should they be able to go to special schools if necessary?
6. Legal—Should the laws and the courts treat all people the same? Should the laws be more concerned with protecting the property a man has or the man himself? Why?
7. Political system—should every man have the right to vote? What if he cannot read? Should he still have the right to vote and choose his representatives? Should politicians have a right to give out favors? Can they be honest in this system? Suppose people can get good housing, jobs, health services, etc., in other ways . . . will they need political favors?
8. Mass media—should newspapers, TV, magazines tell the truth? Should that be their basic job? Should they have to support themselves by advertising? How else could they get enough money?
9. International relations—how should we want to treat other countries? Should we help them if we have more than they do? Should we work for peace? Can we have peace if we keep building bigger bombs and faster planes? (What does fear do, threats? What about children fighting?)
10. Cultural life—are artists, actors, musicians, and writers important? Why? Should art and acting and music and writing be considered work? Should there be free concerts and free plays for everyone to see? Why?

Concept: It is not simply the changing of the structure of society that will make a good world, but the ethical values of the individual.

What if men were just naturally bad to each other-if they didn't care about each other? Would it matter about the structure of society? Are men good to each other because of laws? What is an ethical value? Would it matter about the structure of society? Are men good to each other because of law? What is an ethical value?

Discuss “do unto others as you would have them do unto you.” Do you have a set of values? Are society's laws enough? Are your own personal “laws” important, too? Are they even more important than society's laws?

Case Study: Statements of Discipline of Nonviolent Movements.

Is the movement the germ of a new society? How do people act toward each other in the movement? How do people act toward each other in Freedom School? How does this way of life

differ from the way of life of the larger society? We must keep these good ethical and spiritual values in the new society which we build.

Concept: That there are many kinds of power we could use to build a better society. What is power? (Power is the ability to move things.) What kinds of power are there? Discuss.

Mississippi

Freedom Movement

Physical Power

(Power to coerce or frighten)

Police state
Intimidation

Federal intervention

Political Power

(Power to influence)

One party
No vote
Unjust laws

Vote
Convention Challenge
Negro candidates

Economic Power

(Power to buy)

Citizens Council
control, banks, jobs etc

Boycott,
Strikes

Do these “powers” balance each other? Do they succeed in bringing the two sides together or do they tend to pull apart? Are there other kinds of power?

Truth Power

(Power to Convince or Persuade)

Does persuasion pull people apart? Is it a different kind of power? Can we use truth to reveal the lies and myths? What happens once they are revealed? Once someone is convinced or persuaded, can they join with us? Is the better world for them too?

Soul Power

(The Power to Love)

Can you love everyone like you love your family or your friends? What does compassion mean? Is that a kind of love? Is there something in other people that is like what is in you? Can soul power change things? How?

[Editors' Note: Units I to VI of the Citizenship Curriculum were written by Noel Day, and modified for the Freedom Schools by Jane Stenbridge.]

PART II: CITIZENSHIP CURRICULUM, UNIT VII—THE MOVEMENT

Purpose: To grasp the significance of direct action and of political action as instruments of social change.

Materials: Readings in Nonviolence;
 COFO Materials on Freedom Summer;
See: Prospectus for the Mississippi Freedom Summer
COFO Flyer: Freedom Summer
COFO Flyer: MFDP
COFO Flyer: Freedom Registration
Charles Remsberg, “Behind the Cotton Curtain” (excerpts);
 Southern Regional Council, report on Greenwood Voter Project;
Voter Registration Laws in Mississippi
[Inserted by Editors:] Civil Rights Bill
[Inserted by Editors:] Rifle Squads or the Beloved Community
[Inserted by Editors:] Nonviolence in American History
[Inserted by Editors:] Teaching Material for Unit 7, Part II

Unit VII, Part 1: Freedom Rides and Sit-Ins

QUESTION: What is a Freedom Ride?

ANSWER: A Freedom Ride is a special kind of direct action protest aimed at testing buses, trains, and terminal facilities—to see whether or not the seating of people on buses and trains is done according to law, i.e., the Supreme Court ruling of 1960 that segregated seating on interstate carriers and in terminal stations is illegal.

The second purpose of a Freedom Ride is to protest segregation where it still exists and to make known to the nation the conditions under which Negroes live in the deep South.

The third and overall purpose of the Freedom Ride is to change these conditions.

QUESTION: What happens on a Freedom Ride?

ANSWER: A group of people—in the case of the Freedom Rides—an integrated group buy interstate bus or train tickets. By interstate, we mean going from one state to another. They board the bus or train and sit in seats customarily used by whites only. At stations, they use restrooms customarily used by whites only. They eat at lunch counters customarily used by whites only and sit in waiting rooms customarily reserved by whites.

QUESTION: What is a sit-in?

ANSWER: A sit-in is another kind of direct action protest aimed at breaking down racial barriers in restaurants, dining rooms, and any places where whites are allowed to sit, but Negroes are not.

QUESTION: What happens on a sit-in?

ANSWER: People go and sit at lunch counters, in dime stores and drugstores, etc. They usually sit and refuse to move. When this happens, they are sometimes arrested or sometimes the whole lunch-counter closes down and nobody—neither Negro nor white—gets to sit and eat.

QUESTION: What do Freedom Rides and sit-ins want to do?

ANSWER: They want to make it possible for people to sit where they choose, ride where they choose, and eat where they choose. *They want to change society*, and we call these two forms of protest “instruments of social change.”

QUESTION: What is society?

ANSWER: Society is the way people live together. People get together and they decide certain things they want—like schools and banks, parks and stores, buses and trains. We call all these things *social institutions* because they are the things people *build* as they live together.

QUESTION: Why do some people want to change society?

ANSWER: Sometimes, people build bad institutions. A bad institution is anything that keeps people from living together and sharing. Segregation is a bad institution. It is a bad thing that a few people have built in order to keep other people outside. In the South, in places like Mississippi, the whole society has become one big evil institution—segregation. If a good society is one where people live together and share things . . . then a segregated society is the exact opposite of a good society—because the whole purpose of segregation is to keep people separate. Segregation means separation and separation means a very bad society. That is what people want to change.

QUESTION: How can you change society?

ANSWER: You can tear down the bad institutions which people have built and replace them with new institutions that help people live together and share.

There are different ways of tearing down bad institutions. You can write to the President or Congressman and ask them to help get rid of bad institutions. They can make a law against those institutions. For example, after the Freedom Rides, there was a law made by which we can force buses and stations to desegregate. (ICC Ruling, September 22, 1961)

Also, in 1954, the Supreme Court of the United States ruled that segregated schools were unconstitutional. A Negro took the case to the Supreme Court.

So, you can try to get laws passed. Or, you can persuade people to stop building bad institutions. You can go and talk to the white people who make segregated schools and maybe you can help them to see that this is wrong and maybe they will change it without having to be told to by the government.

QUESTION: Does this really work?

ANSWER: It does not work very quickly . . . and Negroes have waited too long. Unfortunately, people don't change easily. Unfortunately, the government does not pass new laws very readily.

QUESTION: Then what can you do?

ANSWER: You can compel things to change.

QUESTION: How?

ANSWER: You can refuse to keep evil laws. You can refuse to cooperate with bad institutions. You can refuse to cooperate with segregation. That is what the Freedom Riders and the sit-inners did—exactly.

The Freedom Riders said we will not keep that law which says we have to sit in the back of a bus because we are Negro. That law is wrong. It is wrong because all men were created equal. It is

wrong because Negroes are citizens of the United States and the Constitution of the United States says that no law can be made which takes away the freedom of any citizen. Since the law about sitting in the back of the bus takes away our freedom, we will not sit there. We will sit in the front, or in the middle, or wherever we choose because we have tickets and we have the right. The students who went to sit-in at the dime store lunch counters said we shop in this store and so we are customers of this store, so we will eat there.

QUESTION: Is there another way of changing things?

ANSWER: Yes, there is a way we don't support: to get a gun and go down to the station and take over the whole station.

QUESTION: Why didn't the Freedom Riders do that?

ANSWER: For two reasons. First of all, it won't work. Not for long. Because there are always people with bigger guns and more bullets. The Negroes in America are a minority and they cannot win by guns.

The second reason the Freedom Riders did not take guns is that when you use guns, you are building just another bad institution. Guns separate people from each other, keep them from living together and sharing . . . and for this reason *guns never really change society*. They might get rid of one bad institution—but only by building another bad institution. So you do not accomplish any good whatsoever.

In the South, the white men are masters over the Negroes. No man—Negro or white—has the right to be master of another man . . . and the whole purpose of the integration movement is to bring people together, to stop letting white men be masters over Negroes . . . what good would it do, then, to take a gun?

It is true that whoever has the gun is a kind of master for a while. It is also true that the best society is one in which nobody is master and everyone is free.

And, it is further true that there is a weapon which is much better and much stronger than a gun or a bomb. That weapon is nonviolence.

QUESTION: Why is nonviolence a stronger weapon?

ANSWER: Nonviolence really changes things—because nonviolence changes people.

Nonviolence is based on a simple truth: that every human being deserves to be treated as human being just because he is one and that there is something very sacred about humanity.

When you treat a man as a man, most often he will begin to act like a man. By treating him as that which he should be, he sees what he should be and often becomes that. He literally changes and as men change, society changes . . . on the deepest level.

Real change occurs inside of people. Then they, in turn, change society. You do not really change a man by holding a gun on him . . . you do not change him into a better man. But by treating him as a human being, you do change him. It is simply true that nonviolence changes men—both those who act without violence and those who receive the action.

The white people in the South and in America have to be changed—very deep inside.

Nonviolence has and will bring about this change in people . . . and in society.

QUESTION: What exactly did the Freedom Rides accomplish?

ANSWER: For one thing, because of the Freedom Rides, the Interstate Commerce Commission made a ruling by which a bus or train or station can be made to desegregate. This ruling came in September of 1961 just after the Freedom Rides.

QUESTION: Why didn't the ICC make that rule a long time ago? Why were the Freedom Rides necessary?

ANSWER: Sometimes, with governments, you have to show them a thing a thousand times before they see it once and before they do something about it. Way back in 1862, Abraham Lincoln wrote the Emancipation Proclamation. But Negroes still are not free. Just because there is a law on paper, it doesn't mean there is justice.

The Supreme Court said in 1960 that buses and trains and stations had to desegregate for interstate passengers. But in the South, nobody did anything about it. So, the Freedom Riders came to show the nation and the government that they would have to do something else. They would have to enforce the Supreme Court ruling. As a result of the Freedom Rides, the ICC enforcement was passed. If it had not been for the Freedom Rides, the ICC would have waited a long time and maybe forever to do anything.

QUESTION: Why?

ANSWER: Unfortunately, governments do not do anything until the people get up and say they have to. What happened with the Freedom Rides and the sit-ins was that Negroes were tired asking the government to do something . . . tired of writing letters and going through the slow process of the courts to get laws changed . . . tired of making speeches that never accomplished anything. SO THEY ACTED. We call the Freedom Rides and the sit-ins "DIRECT ACTION."

QUESTION: What is direct action?

ANSWER: Direct action is just another way of telling the world what is wrong. The special thing about direct action is that it makes use of the human body—instead of just the voice or the mind. Direct action is putting your body in the way of evil—placing your whole self on the very spot where injustice is.

A segregated lunch counter is wrong. So, people went and sat down in the middle of it. They put their bodies in the way and they were saying: here I am in the middle of your lunch counter and I will not move because your lunch counter is all wrong. It is segregated. Either you will desegregate it (make a new institution) or you will just have to close it altogether (destroy an old institution) . . . I am not moving.

Direct action is putting your body in the way of evil and refusing to move until the evil is destroyed, until the wrong is made right.

Direct action is saying, with your body, either you will have an integrated lunch counter or none at all. AND THIS IS WHAT HAPPENED. All over the South, lunch counters began to close to everybody. If it opened for everybody, the sit-inners had succeeded in destroying something evil and building up something good. If it closed to everybody, at least the sit-inners had succeeded in getting rid of something evil.

That is the power of direct action. We call Freedom Rides and sit-ins direct action.

QUESTION: What really happened on the Freedom Rides?

ANSWER: Negro and white students working with CORE in Washington, D.C. and places like that decided that somebody ought to come down South and see if the Supreme Court law had

made any difference and, if not, to tell the world about it. They felt that everybody should know about Alabama and Mississippi and how Negroes are treated in these places. All over the South, students were sitting-in at lunch counters and restaurants, courtrooms and offices. They had been doing other things in addition to sitting in. They had staged wade-ins at swimming pools, sleep-ins at hotels, stand-ins at theaters, kneel-ins at churches. They had picketed and marched, gone to jail. Already victories were being won.

It was time to try out the buses and trains. The students in Washington knew two things: one, they had every right to sit where they wanted because they were human beings and two, that the law said every citizen who is riding on an interstate carrier can sit where he chooses both on the bus and in the station.

All they needed was an interstate bus ticket. They each bought a ticket. The first Freedom Riders bought tickets from Washington, D.C. to New Orleans, Louisiana. On May 4, 1961, they left—thirteen of them, seven were Negro and six white. One interracial team rode on Trailways Bus and the other on Greyhound.

They went through Virginia and Tennessee without much real trouble. They came into Alabama. The trouble started. About six miles outside of a town called Anniston, a white mob was waiting for the buses. The Greyhound bus got there first and the mob attacked. They slashed tires, threw gas in and set the whole bus on fire. Many people were hurt very badly. When the Trailways bus arrived, the mob tried to get it. This bus was able to escape and made it on to Birmingham—only to meet a white mob at the Birmingham station. The Freedom Riders were beaten up.

Police and patrolmen escorted the bus all the way from Birmingham to the Mississippi line. The bus came to Jackson. Police were waiting. As soon as the Freedom Riders got into the white waiting room, the police picked them up and took them to the city jail in Jackson. From the city jail, they were moved to the Hinds County jail, from there to the county farm and finally to Parchman State Penitentiary, where they served their time rather than cooperate with the state by paying bail money.

During that spring three years ago, more than a thousand students made the Freedom Rides. Most of them were either beaten up or arrested or both. Bill Mahoney, a Negro student from Washington, was one of the Freedom Riders who spent a long, long time in Parchman. Bill wrote about how badly they were treated there and how they refused to eat and refused to cooperate in any way. In spite of everything they suffered, these Freedom Riders at Parchman were determined to stick to their belief in the power of nonviolence. One day, Bill and some of the other prisoners, wrote this prison code which they all followed:

“Having, after due consideration, chosen to follow without reservation, the principles of nonviolence, we resolve while in prison:

- * to practice nonviolence of speech and thought as well as action;
- * to treat even those who may be our captors as brothers;
- * to engage in a continual process of cleansing of the mind and body in rededication to our wholesome cause;
- * to intensify our search for orderly living even when in the midst of seeming chaos.”

So this is what happened on the Freedom Rides. Sometimes Riders would go back and tell everything that had taken place. Sometimes, they would write about it and tell the government in Washington. Before it was all over, the whole world knew how bad things really were in such places as Alabama and Mississippi. AND TODAY, because of the Freedom Riders, most of the

bus and train stations in the South are open to everybody. For those stations which are not opened on an integrated basis, there is now a ruling by which we can force them to open. This ruling was the direct result of the Freedom Rides.

Bill Mahoney and his group got out of Parchman Penitentiary on the seventh day of July in 1961. This is what he said about that day, “When we left, the number of Freedom Riders still in jail was close to a hundred. Before parting for our various destinations, we stood in a circle, grasped hands, and sang a song called “We Will Meet Again.” As I looked around the circle into my companions’ serious faces and saw the furrowed brows of the nineteen- or twenty-year-old men and women, I knew that we *would* meet again.

QUESTION: Did the Freedom Rides succeed? If so, how?

ANSWER: The Rides succeeded in five important ways:

- a. They showed clearly that it is not enough just to make a law; that simply because the Supreme Court says it is wrong to have segregated bus stations, these stations do not integrate overnight (e.g. 1954 Supreme Court decision on public schools.)
- b. They showed the terrible truth about the deep South.
- c. They showed those people who think social change can be made without suffering that they are wrong.
- d. They brought the fight for freedom into the deep South,
- e. They forced the Interstate Commerce Commission to do something—which it did on September 22, 1961. The ruling went into effect on November 1, 1961.

NOTE: As late as July 20, 1961, the Justice Department reported segregation in ninety-seven of the 294 terminals in twelve of the seventeen states surveyed. After the November 1 order, there were very few still segregated.

QUESTION: What about Mississippi?

ANSWER: All over Mississippi we still see signs like “Colored Waiting Room“ and “For Whites Only” in stations. We still see Negroes going into sections where they are told to go. And, in some towns, if you protest, you are arrested or worse.

QUESTION: Why?

ANSWER: Because Mississippi makes its own laws. It does not keep the law of the United States, not when it comes to race. This means if you go to a white waiting room, and some policeman tells you it is against the law—he is right. It is against the law. It is against Mississippi law.

QUESTION: So what do you do?

ANSWER: You break that law. You break it because it is both evil and is against the Supreme Court of the United States—which is the Law of the whole land. You act on two higher laws—the law of human rights and the law of civil rights, because you are a human being and because you are a citizen of the United States.

QUESTION: What will happen?

ANSWER: In a sense, you do not even ask what will happen. You simply do what is right because it is right. Mississippi is a bad place. It is not easy to do the right thing in Mississippi. A

lot can happen to you. But a lot happened to the first Freedom Riders and the students who first went to the white lunch counters. They did it anyway.

THE IMPORTANT THING IS THIS—unless we keep going and keep going to these places WHERE THE LAW HAS ALREADY BEEN PASSED IN OUR FAVOR—we will be cooperating with those people who want to keep us down. Every time you go into the “Colored” section, you are saying that Mississippi is right.

When you say Mississippi is right, you are saying one thing and one thing only: I am wrong. If Mississippi is right, then Negroes *are* inferior.

No, Mississippi is dead wrong. BUT YOU HAVE TO SAY SO. Every time you go to the back door, you are building up segregation. Mississippi likes to say “our Negroes are happy. They do not want changes.”

And every time you go where they want you to go, you are saying exactly the same thing. And it is not true.

QUESTION: Then what?

ANSWER: Then, if you are arrested, you get in touch with as many people as you can—COFO, the Department of Justice, the Department of Commerce, lawyers, the Civil Rights commission. You appeal the case. You file suit against the state of Mississippi. You get the case into a federal court and out of the state courts. You fight it until some court orders that bus station to desegregate, and sees that it does.

QUESTION: Has anybody ever done this in Mississippi?

ANSWER: Yes. A Negro in McComb, Mississippi filed a suit against the state, asking that the bus station in McComb be forced to desegregate. Recently, U.S. District Court Judge Sidney Mize issued an injunction against the state to force them to stop segregating that bus station. We will do this to every station in every town in Mississippi if we have to. The Freedom Rides did a lot, but they were only a beginning. They got the law completely on our side. It is up to us to use that law and force a change in Mississippi.

QUESTION: What is the story on the sit-ins?

ANSWER: The sit-ins, as we know them, began on February 1, 1960, when four freshmen from North Carolina A. and T. College in Greensboro, North Carolina took seats at Woolworth’s Dime Store in downtown Greensboro.

Within a week, the sit-in movement had spread to seven other towns in North Carolina and within six weeks, the movement covered every southern state except Mississippi.

The first success came on the seventh of March, 1960—only five weeks after the very first sit-in.

On March 7, three drugstores in Salisbury, North Carolina desegregated their lunch counters.

Sit-ins continued and increased all that summer. By September, it was estimated that 70,000 students had been in sit-ins in every southern state as well as Nevada, Illinois, and Ohio; and that 3, 600 had been arrested.

AND that one or more eating places in 108 southern cities had been desegregated *as a result of the sit-ins*. (Southern Regional Council figures.)

To grasp the happenings of 1960, you must feel the revolutionary spirit which swept across the campuses of hundreds of Negro colleges and high schools in the South. Four students went to Woolworth’s. Then twenty went in another town. Then, 200 went in a third town. It spread like wildfire—unplanned, spontaneous, revolutionary. Within a week after the first sit-ins, the entire

South was in an uproar. It was like a volcano had erupted, cracking through the earth and flooding the plain.

SO SEGREGATION BEGAN TO BREAK DOWN. The old institutions crumbled. The new society was being created. A fantastic spirit was felt—people went to jail, left schools, left home, filled the streets and jails. The seams which had for so long held together the rotten system broke completely and the people came pouring out. There was no way to stop them.

Police tried. Parents tried. Teachers tried. The South tried. They did not stop. Every attempt to stop them only increased their determination. Until thousands of students became involved that summer of 1960 . . . and the South and the nation began to listen. They had to listen. These students put their bodies in the way and would not move.

THAT is how they got the attention of the world.

Once they had got the world's attention, they never let it go. The minute somebody would forget about them and turn the other way, the students would do something new. There was fantastic creativity. Sit-ins gave birth to kneel-ins and to wade-ins and to sleep-ins.

The students were everywhere . . . and nobody could forget them. Nobody could forget the Negro and his grievances. If a man went to the movie to escape the sit-in at the lunch counter, he ran into the line of stand-inners at the movie. If he went to the hotel to sleep, there they were.

Everywhere . . . everywhere so that nobody would forget for one minute that the American Negro wanted his freedom and wanted it right then and there.

Students who were involved in those early days can talk on and on all day—can tell you what happened in Nashville the morning in May when 3,000 students marched in silence to the Mayor's office to present their demands, can tell you what happened in Orangeburg on Black Friday when hundreds of students from South Carolina State and Claflin Colleges were thrown in stockades and crushed with water from fire hoses, can tell you about North Carolina opening up, and Virginia closing its schools, and Alabama fighting back, about a thousand little lunch counters in a thousand towns across the South, can tell you how society began to change, how southern society began to collapse altogether, can tell you about nonviolence and about violence because they felt plenty of violence in jails and on the streets of America.

And all of this is still happening. It is just beginning to happen in Mississippi. We are living in the middle of the revolution and in the middle of a new history. . . .

When you talk about what happened in the sit-in movement, you are talking about a living moving force that still exists. Because of the great dynamic of the movement, one cannot do more than capture a moment here and there, a victory in Greensboro, an event in Atlanta, . . . one can talk about the songs and the people who make up this movement . . . but most of all, one can feel the spirit.

Some special things which happened can be described now—such as the spring of 1960 when it all began and the birth of the Student Nonviolent Coordinating Committee—”Snick.”

QUESTION: What is the Student Nonviolent Coordinating Committee?

ANSWER: SNCC is a group of students who work full-time for civil rights, all over America.

QUESTION: How did it begin?

ANSWER: The first sit-in was in February. In six weeks, the movement was covering the South. In April, Miss Ella Baker, who had been fighting for the rights of Negroes for many years, arranged for the sit-inners to come to Atlanta and talk about what was happening. So they came—right from jail, many of them, and met each other for the first time. For the first time,

together, we sang “We Shall Overcome” . . . and for the first time, we recognized that we had begun a revolution. The students who came to that meeting wanted a committee that would stay in touch with all the towns where things were happening, would tell the nation, and would help keep things going through the summer. Each state named someone to be on this committee, which was called the Temporary Student Nonviolent Coordinating Committee.

SNCC met each month that summer, opened an office in Atlanta, started a newspaper called *The Student Voice*, and made plans for a southwide student movement conference to be held in the fall.

At that October 1960 conference, SNCC was made a permanent committee. SNCC today has its headquarters in Atlanta still, with offices in every state in the South and Friends of SNCC offices all over the north and west. SNCC has offices in every major town in the state of Mississippi.

And this summer, more than 2000 people will be working for SNCC.

That’s a long way since June 1960 when we set up an office in the corner of another office and there were only two of us then.

QUESTION: What does SNCC do in Mississippi?

ANSWER: In Mississippi, SNCC is part of the Council of Federated Organizations (COFO), which is all the people who want freedom. COFO has two main purposes in Mississippi: voter registration and education.

QUESTION: Do we have sit-ins in Mississippi?

ANSWER: Yes, there have been sit-ins in Mississippi—and, of course, the Freedom Rides came through and were stopped in Mississippi. In Jackson, students of Tougaloo College, have been kneeling-in at Jackson churches all year. Many people have been arrested.

The people have concentrated on other things in Mississippi. There have been very few direct action protests, such as sit-ins, in comparison with other southern states.

QUESTION: Why are people doing a different thing in Mississippi?

ANSWER: They are operating differently in Mississippi because Mississippi is different.

Mississippi is the worst state in the South as far as treatment of Negroes is concerned. The thing that makes Mississippi different and worse, even than Alabama, is that every single thing the state has is designed to keep the Negro down.

Before Mississippi changes, there will have to be a well-planned and very strong movement among the Negro people. COFO, the people’s organization, is building up that movement. It just takes more “getting ready” in Mississippi.

The second thing people are doing in Mississippi is making up for lost time. All these years when Negroes had to live under the awful conditions in Mississippi, they lost the chance for good education. They lost the chance to understand government and to help run it—political education.

They lost the chance to vote. Or better, they never had a chance for these things. COFO is building up good freedom schools so people can have that chance. COFO is having FREEDOM VOTES so Negroes can vote. COFO is helping the Negroes of Mississippi run their own candidates for Senate and congress in the Mississippi Freedom Democratic Party.

In Mississippi, COFO is thinking first of helping the people who want freedom get some control in the state and gain a voice in the government of Mississippi.

When Negroes have a vote, then they can help make the laws. And when Negroes make the laws . . . they will get rid of all the segregation laws. They will get rid of segregated lunch counters. They will get rid of the walls that hurt people—black and white.

There are several ways to desegregate a lunch counter. One is by sitting in, or what we call direct action. Another way is by voting for people who will themselves desegregate the lunch counter . . . this is a kind of indirect action.

It is very good to desegregate a lunch counter—but it is good also to be elected to the United States Congress. Mrs. Hamer, a Negro lady from Ruleville, is running for Congress on the Mississippi Freedom Democratic Party. Once we get good people from Mississippi in Congress, then they will change the laws.

QUESTION: Why doesn't COFO do both—direct action and indirect action?

ANSWER: They do both. It is true that there are not many sit-ins in Mississippi. One reason for this is that there would be so much violence. Students got beaten up for sitting-in in Alabama—they would likely be killed in Mississippi. Rather than subject people to certain violence for the sake of a lunch counter, COFO asks people to go to the registrar office and try to become registered voters. This is hard enough. This is direct action as far as Mississippi is concerned . . . and, if you get the vote, you have gotten something much more powerful than a lunch counter seat in the long run.

QUESTION: How can Mississippi society be changed?

ANSWER: It will take every tactic we have. Sooner or later, we will have to try all these ways of changing society: sit-ins, marches, kneel-ins, pickets, boycotts, voting, running people for Congress, Freedom Schools to prepare young Negroes to lead, literacy classes to teach people to read and write—everything will be needed to change Mississippi. This is the reason for COFO. COFO is all the people who want freedom working together to change Mississippi.

QUESTION: Even with all this, how can we hope to win in Mississippi?

ANSWER: We won't win, at least not for a very long time, unless the federal government throws its weight behind us.

Howard Zinn, writing in the winter issue of *Freedomways* states quite clearly: "I am now convinced that stone wall which blocks expectant Negroes in every town and village of the hard-core South . . . will have to be crumbled by hammer blows. . . ." Zinn sees two ways for this to happen: one would be a violent Negro revolt; the other would be forceful intervention of the federal government—and, Zinn continues, unless this latter happens in such places as Mississippi, the former surely will.

The federal government does *not* have a good record in Mississippi. Time and again, in fact hourly, Negroes are denied those basic freedoms guaranteed them by the United States Constitution, by the Bill of Rights, by Section 242 of U.S. Criminal Code . . . and the federal government has done very little. (Section 242 of the U.S. Criminal Code, which comes from the Civil Rights Act of 1866, creates a legal basis for action and prosecution, says Zinn. The Section reads: "Whoever, under color of any law . . . willfully subjects . . . any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and the laws of the United States. . . .")

Zinn continues: “The responsibility is that of the President of the United States, and no one else. *It is his job to enforce the law. And the law is clear.*”

The wall which the state of Mississippi has thrown between Negroes and whites cannot be broken down by us alone—it is too high and too thick. It will take the power of the United States to break that wall *plus* the power of the people of Mississippi.

QUESTION: What can we do to force the federal government to help us?

ANSWER: We can continue working constantly to show the world how horrible Mississippi is, and continue trying to change it. We can put pressure on the federal government—by constantly writing the President and the Attorney General and members of the Civil Rights Commission, by going to Washington every chance we have and showing the President what we want.

That is the meaning of the March on Washington which took place last August. Hundreds of thousands of Negroes marched, with whites, to show the government that we are not free and that it must do something about the fact that we are not free. Mississippi people went on that March—and they carried signs, they talked about Mississippi, they got on radio and television—so the nation would know the truth and *do something*.

Our job this summer is to keep on telling America to do something about injustice in Mississippi. And our job is to keep doing something ourselves. We cannot afford to stop until we are free.

The favorite freedom song of the people of Mississippi has these lines:

We shall never turn back
Until we have been freed
And we have equality
And we have equality. . . .

QUESTION: What has happened in Mississippi so far?

ANSWER: The Mississippi story really begins to take shape in the summer of 1960. Robert Moses, a young Negro teacher from New York, came to Atlanta and went to work for SNCC. In July, he first came into Mississippi to try and find students who would come to Atlanta for a big meeting with other Negro students from all over the South. He did find Mississippi students, and some came to the Atlanta meeting. After that meeting, they returned to the state and Bob returned to his teaching in New York. All that year, Bob kept thinking about Mississippi and the students in Mississippi kept thinking about the things they had heard from Bob and from other Negro students in the meeting. After that school year was over, Bob came back to Mississippi.

Negro leaders in southwest Mississippi had been wanting to start a citizenship school and a voter registration drive. Bob went down to help. During that summer, he worked in Amite County, Pike County, and Walthall County. Some people were registered, some were beaten, some were killed. The center of the work down there was McComb and the story of McComb is a very important story—because it is largely about high school students.

Things began to happen in a big way on August 18, 1961. The people formed the Pike County Nonviolent Movement. Eight days later, Elmer Hayes and Hollis Watkins went to Woolworth’s lunch counter and sat in. **THIS WAS THE FIRST DIRECT ACTION IN MISSISSIPPI.** Hayes and Watkins were arrested and jailed for thirty days for breach of the peace. Four days later there was a sit-in in the bus station. Three students were arrested—two of them were high school students: Isaac Lewis and Brenda Travis, sixteen. Their charges were breach of the peace and failure to move on. They got 28 days in the city jail.

Toward the end of September, Mr. Herbert Lee, Negro farmer and voter registration worker in Liberty, was killed. On the 3rd of October, there was a mass meeting. Many, many high school students attended. They had something important to decide.

This was what they had to decide—when Brenda Travis and Ike Lewis, their classmates, got arrested for sitting in at the bus station, the principal of their high school, Burgland High, threatened to expel any students who got involved in sit-ins. The students got mad. They came to this mass meeting. They decided that if Brenda and Ike were not re-admitted to Burgland High, they would protest. Brenda and Ike were not re-admitted. So the very next day, the high school students marched: one hundred and twenty of them right down through McComb and up to the City Hall.

And here is what those high school students said:

We, the Negro youth of Pike County, feel that Brenda Travis and Ike Lewis should not be barred from acquiring an education for protesting an injustice. We feel that as members of Burgland High School they have fought this battle for us. To prove that we appreciate their having done this, we will suffer with them any punishment they have to take.

In the schools we are taught democracy, but the rights offered by democracy have been denied us by our oppressors; we have not had a balanced school system; we have not had an opportunity to participate in any of the branches of our local, state, and federal government; however, we are children of God, who makes the sun shine on the just and the unjust. So, we petition all our fellowmen to love rather than hate, to build rather than tear down, to bind our nation with love and justice with regard to race, color, or creed.

Those Negro high school students were arrested—all of them—on that morning when they marched through McComb. Some were released on suspended sentences because they were too young. Those of age were sentenced and fined. Brenda Travis was sent to the girls' detention home for a year. And seventy-five of the other high school students transferred to Campbell College in Jackson, rather than go back to Burgland High.

That is McComb and the first big march in Mississippi. Since that summer, three years ago, the people of Mississippi—who want to be free—have stood up again and again to demand their rights. All over Mississippi, Negroes have gone to the courthouses seeking to become registered voters. Some have succeeded. Most have not.

In Jackson, students and ministers who support them, from all over the country have gone to the churches of Jackson and asked to worship together. They have been arrested for this—hundreds of them. Some churches have opened. Most have not.

And this summer—the people of Mississippi who want to be free are having a whole summer called THE MISSISSIPPI FREEDOM SUMMER. This means Freedom Schools for all students who want to learn about civil rights and to talk about the things they can't talk about in regular school. Freedom Schools are a big part of the Mississippi Freedom Summer.

Another part is voter registration. All summer long people will keep on going to the courthouses of Mississippi and demanding to be registered as voters. In addition to regular registration, the people will have FREEDOM REGISTRATION. Freedom Registration is a chance for Negroes in Mississippi to show the world that they want to register and vote.

QUESTION: What else will the people be doing in Mississippi this summer?

ANSWER: The people will have their own community centers. A community center is a place where everyone can do many different things. It will be mostly for adults and will offer many

chances for them to learn things to help them live better. The centers will have job training programs, classes for people who cannot read or write, health programs, adult education and Negro history classes, music, drama and arts and crafts workshops.

QUESTION: What else will happen during the Freedom Summer?

ANSWER: The people who want to be free will have their own candidates running for office. These are our candidates. They are running in the Freedom Democratic Party. That is our party. The people of Mississippi have refused to cooperate with segregation. They are tearing down that old and evil institution and building new institutions—a new society where men can live together and share. That is the Mississippi story. . .

And it is a story of victory. It is a story of great suffering and death. Names like Clyde Kennard, Emmett Till, Medgar Evers, Herbert Lee, Lewis Allen. Like the sit-in movement, we have our stories of suffering and jail, of death and terrible suffering. And we have our songs of freedom . . . and our determination to BE free.

As far as Negroes are concerned, and as far as many poor whites are concerned . . . Mississippi is the worst state in America. But the people of Mississippi have done and are doing a great thing. They have built a new society, a statewide people's movement and for the first time, the nation is about to see what it means to have government of the people, by the people, for the people. . . . All across the South the walls have begun to fall. And in Mississippi, where things are so much worse, there is a whole new society taking shape. It is partly because things are so much worse here that the people have had the will and determination to build so much better. When the last stone of the wall called Jim Crow has fallen, the last evil institution collapsed . . . we will already have built the foundation of a new society where men can live without fear.

Unit VII, Part 2: Mississippi's Politics and COFO's Political Program in Mississippi

(Presented in question and answer form under topical headings.)

INTRODUCTION

- I. COFO—The Organization
 - A. What is COFO?
 - B. What are the Programs sponsored by COFO?
 - C. How did COFO get started?
- II. Mrs. Hamer's Campaign
 - A. Who is Mrs. Hamer
 - B. Why is she running for office?
 - C. What is Mrs. Hamer's Platform?
 - D. Who is her opponent?
 - E. How is the campaign to be conducted?
 - F. Has she any chance of winning?
If not, why challenge?
- III. Other COFO Political Programs for the summer
 - A. How will the Democratic Convention be challenged?
 - B. What are the plans for the Freedom Registration?
 - C. The Freedom Candidates?
- IV. Voting in Mississippi
 - A. How is the state Democratic Party organized?
 - B. What are the voting requirements?
 - C. Who votes in Mississippi?
 - D. What are the proofs of discrimination in voting?
 - E. Why isn't the Negro allowed to vote? What does the white man fear?
 - F. What steps have been taken to give Negroes the vote?
- V. Historical Development of white, one-party politics
 - A. What role did Reconstruction play?
 - B. Who controls the votes and how?
 - C. Why hasn't the Republican party been stronger?
 - D. What changes will occur when Negroes can vote?

Introduction

The following will provide a background of information from which it is hoped the teacher in the Freedom School will be able to direct a discussion and set up a situation in which dialogue will be possible on the subject of politics and its relation to the individual and to groups—especially politics in Mississippi. As part of this, the development of COFO, its aims and purposes as a political action group, will also be discussed.

The approach that will be taken is to use the example of Mrs. Hamer's campaign for Representative to the U.S. House as a point of departure for discussion of the political situation in the state. It is hoped that through the use of a specific case study, the students may see the political structure as relevant and close to his own experience. That even more importantly, the

students may be awakened to the essential role each individual plays in the democratic process, what this role is, and how to go about exercising his right to a voice in the decision making that concerns his life. Beyond this, by studying Mrs. Hamer's campaign and the broader aspects of COFO's political program for the summer and beyond, the student may see one example of how to combat the problems of discrimination that take his right away to have a voice in local, state and national government.

The basic concepts which it is important to get across from this unit are these:

1. Fundamentals of how the political structure is organized at local, state, and national level.
2. How the individual participates in politics and why it is important.
3. How the political structure in Mississippi is organized to discriminate against the Negro and why?
4. What steps can and are being taken to correct existing conditions of discrimination.

I.COFO

QUESTION: What is COFO?

ANSWER: COFO is the Council of Federated Organizations—a federation of all the national civil rights organizations active in Mississippi, local political and action groups and some fraternal and social organizations.

QUESTION: Why have such a federation of organizations?

ANSWER: To create unity and to give a sense of continuity to Civil Rights efforts in the state. Particularly since any civil rights program must be carried out in an atmosphere of extreme hostility from the white community, it was felt that unity through an organization of this kind would create a bond of support for Negroes all over the state. COFO also provides a sense of identity and purpose to local political action groups already existing and a means of exchanging ideas. One of its major purposes is to develop leadership in local communities all over the state. In the past people have *belonged* to civil rights organizations. COFO would like to be an organization which in a real sense *belongs to the people*. It is so structured that all decision making is done democratically and directly by all the groups working together—allowing each individual the right of voicing his opinion and making his vote count.

Decisions concerning COFO are made at its state-wide convention meetings, which are called when necessary. Anyone active under any of the organizations which make up membership is entitled to attend COFO conventions and participate in policy-making decisions of the organization.

The staff consists of anyone working full time with any civil rights organization in Mississippi. This staff carries out the decisions of the COFO convention and prepares recommendations for its consideration. Below the state COFO convention there are district organizations corresponding to the five congressional districts. These district organizations are only in the planning state at present. The staff is divided into congressional districts with five district directors; this organizational structure is functioning at present.

The state organization has four standing committees: Welfare and Relief, Political Action, Finance and Federal Programs. The district organizations have or will have, similar standing committees. Dr. Aaron E. Henry of Clarksdale, State President of the NAACP, is President of the Council of Federated Organizations. Robert Moses, Field Secretary and Mississippi Project Director for SNCC, is the Program Director, who supervises the Mississippi staff and is elected

by it. David Dennis, Mississippi Field Secretary for CORE, is Assistant Program Director, and is similarly elected.

QUESTION: What are the programs sponsored by COFO?

ANSWER: COFO works in two major areas. 1) Political 2) Educational and social. The educational and social programs are the Freedom Schools, Federal Programs, Literacy, Work-study, Food and Clothing and Community Centers. Some of these are in operation; others are in the process of being developed.

Freedom Schools are planned for the summer of 1964. There are several things which hopefully will be accomplished by the Schools. (1) to provide remedial instruction in basic educational skills but more importantly (2) to implant habits of free thinking and ideas of how a free society works, and (3) to lay the groundwork for a statewide youth movement.

Federal Programs Project is to make the programs of the Federal government which are designed to alleviate poverty and ignorance reach the people of Mississippi. The federal programs include the Area Redevelopment Act, the Manpower Development and Training Act, the bureau of the Farmers Home Administration and the Office of Manpower, Automation and Training. You may ask why it is necessary for COFO to be concerned about the administration of federal programs, which are by definition, desegregated and anti-discriminatory. As things now stand the normal channel of information—the state agencies—do not properly present these programs. The State of Mississippi is not reconciled to the desegregated nature of these programs, so Negroes are not allowed to participate. Because of this, private agencies, such as COFO, must act as liaison between the federal program and the people they are designed to help.

The Literacy Project at Tougaloo College is a research project under the direction of John Diebold and Associates Company, and is financed by an anonymous grant to the college. The goal of the project is to write self-instructional materials which will teach adult illiterates in lower social and economic groups to read and write.

The Work-Study Project is an attempt to solve the pressing staff problems in Southern movement—the conflict between full-time civil rights work and school for the college age worker. Under the work-study program, students spend a year in full-time field work for SNCC, under the direction of COFO field staff, and with special academic work designed to complement their field work and keep them familiar with learning and intellectual discipline. After this year of field work, they get a full scholarship to Tougaloo College for one year.

Food, Clothing, and Shelter Programs is a privately financed distribution program of the necessities of life for persons whose needs are so basic that they cannot feed their families one meal a day per person. This welfare services aspect of COFO grew partly out of a need to provide for families who are leaving the plantations sometimes because of automation and sometimes because of their activities in voter registration projects, particularly in the Delta.

The food intake of most poor rural Mississippians is at some times sufficient. These times are usually (1) when they receive government commodities, (2) when the tenant or low-income farmer receives money from his cotton and other minor crops, usually in early and mid-fall, and (3) when landlords give credit to tenant families usually from late March to July. The rest of the time the poor rural families and the unemployed often go hungry.

The clothing situation of both the urban and rural poor is desperate. But the problem is not as difficult in summer months, when the weather is warm, as it is in winter, when the children must have warm clothes to go to school.

Many people in the deep South live in housing unfit for human habitation. In Mississippi over 50 percent of the rural occupied farm housing is classified as deteriorating or dilapidated. More than 50 percent of the rural homes in Mississippi have no piped water and more than 75 percent have no flush toilets, bathtubs or showers. COFO hopes to begin a program of home repair workshops and volunteer youth corps assisting people to repair their homes, all working out of a community center.

The Community Centers is to be a network of community centers across the state. It is conceived as a long-range institution. The centers will provide a structure for a sweeping range of recreational and educational programs.

In doing this, they will not only serve basic needs of Negro communities now ignored by the state's political structure, but will form a dynamic focus for the development of community organization.

QUESTION: How did COFO get started?

ANSWER: COFO has evolved through three phases in its short history. The first phase of the organization was little more than an ad hoc committee called together after the Freedom Rides of 1961 in an effort to have a meeting with Governor Ross Barnett. This committee of Mississippi civil rights leaders proved a convenient vehicle for channeling the voter registration program of the Voter Education Project, a part of the Southern Regional Council, into Mississippi.

With the funds of the Voter Education Project, COFO went into a second phase. In this period, beginning in February 1962, COFO became an umbrella for voter registration drives in the Mississippi Delta and other isolated cities in Mississippi. At this time COFO added a small full-time staff, mostly SNCC and a few CORE workers, and developed a voter registration program. The staff worked with local NAACP leaders and SCLC citizenship teachers in an effort to give the Mississippi Negroes the broadest possible support. COFO continued essentially as a committee with a staff and a program until the fall of 1963.

The emergence of the Ruleville Citizenship Group, and the Holmes County Voters League, testified to the possibility of starting strong local groups. It was felt that COFO could be the organization through which horizontal ties could develop among these groups, with the strongest common denominator possible within the general aims of the Civil Rights Movement. Every effort was made during this time to cut across county and organizational lines and have people from different areas meet with each other, to sponsor county, regional, and state-wide meetings, to bring students together from different parts of the state for workshops, to help and send groups outside of the state to meetings, conferences, workshops, and SCLC citizenship schools. During this second phase we began to feel more and more that the Committee could be based in a network of local adult groups sprung from the Movement as we worked the state.

The third phase representing the present functioning of the organization began in the fall of 1963 with the Freedom Vote for Governor. This marked the first state-wide effort and coincided with the establishment of a state-wide office in Jackson and a trunk line to reach into the Mississippi Delta and hill country. The staff has broadened to include more CORE and SNCC workers and more citizenship schools.

Plans for the fourth phase of the organization would include a budget or funds for program and staff on a long term basis, worked out with the major civil rights organizations and individuals across the country. The aim would be to organize every Negro community in Mississippi to train local people to help lead Mississippi through the next difficult years of transition.

II. Mrs. Hamer's Campaign For Congress

(2nd Congressional District)

QUESTION: Who is Mrs. Fannie Lou Hamer?

ANSWER: Mrs. Hamer is one of the four candidates running for political office this summer in Mississippi. She is challenging Mr. Jamie Whitten for the seat of U.S. Representative in the Second Congressional District. Mr. Whitten is a powerful man in the House of Representatives, holding the position of Chairman of the House Appropriations Sub-Committee on Agriculture. Since the Second Congressional District is the heart of the cotton-growing Delta, where Negroes outnumber whites in most of the counties, what Mr. Whitten does as chairman of this committee has direct bearing on both Negro and white populations. So far, Mr. Whitten's actions have reflected a decidedly racist bias—so that he is not representing *all* the people of the Second Congressional District, but those white landholders who control the majority of the wealth in the Delta.

One of the most blatant example of this bias on Mr. Whitten's part was a bill before the Sub-Committee on Agriculture to train 2400 hundred men to drive tractors. The bill was killed. Why kill a bill which obviously would benefit the state by attacking the problems of automation? The answer becomes clear when we realize that (1) under the Manpower Retraining Act, all projects must be integrated. (2) The majority of those to be trained were Negro (600 whites.)

QUESTION: Why is Mrs. Hamer running for office?

ANSWER: Mrs. Hamer is the mother of several children and besides that, a woman, which is very unusual for Mississippi politics. It is certainly partially because she is a mother and concerned about the future of her children that she is running. However the real answer to this question can only be found in Mrs. Hammer's history and the experiences she has had as a native Mississippian. Mrs. Hammer, who is forty-seven, comes from Ruleville, Mississippi, in Sunflower County. This is cotton growing country—large plantations (of sometimes hundreds and thousands of acres of land), small towns, the Company Store, the sheriff whose job it is to “control the niggers” and not see the bootleg whiskey being sold—the home of Senator James O. Eastland.

Until 1962, the Hamers had lived for sixteen years on a plantation four miles from Ruleville. On August 31, 1962, Mrs. Hamer tried to register to vote—the same day she and her husband were told they would have to leave the plantation immediately by the owner. His comment to Mrs. Hamer was, “What are you trying to do to me.” A Negro does not act independently of his “Owner.” This revealing comment illustrates how inextricably the Negroes' destiny has been linked to the land and its owner. A system from which all the legal restrictions of slavery have been removed but which has remained frozen in place. It is only now changing because of the forces of change all around it. Mrs. Hamer's action represents the new attitude of emancipation on the part of the Negro, an attitude which has come slowly to the feudal-like system of the Delta, where the symbiotic relationship of white and black has perhaps been more intense than anywhere else. The slowness with which change has come to the Delta is in direct relationship to the amount of opposition expressed by the white people there. Mrs. Hamer began working with the Student Nonviolent Coordinating Committee in December, 1962, and has been one of the most active workers in the state on Voter Registration. Because of her activities she has received much abuse from white people in the Ruleville community—people shoot into her home, threaten her

life. In 1963, she was arrested in Winona, Mississippi, held in jail overnight for no reason and severely beaten with a blackjack. She still suffers from this incident.

Mrs. Hamer feels very strongly that Negroes are not being represented in either state or national government and this forms the basis for her willingness to run for office even in the face of tremendous dangers to herself personally. Mrs. Hamer tells her audiences that she is only saying "what you have been thinking all along." But Mrs. Hamer plans to direct her campaign to whites as well as Negroes. It is her feeling that all Mississippians, white and Negro alike, are victims of the all-white, one-party power structure of the state. The major emphasis of Mrs. Hamer's campaign however, will be voting rights for the Negro. Her platform, like that of the other three candidates, includes a discussion of issues that reach beyond the problems within the state of poverty, automation, education, and equal representation and touches on national domestic issues as well as international policy.

It is a comment on the conservative reaction that the state has shown in the past ten years, that Representative Frank Smith was defeated in the 1962 elections. Although not outspokenly liberal about voting rights for the Negro, Smith was concerned for all the people of the Delta and has some idea of the problems the region faces in the future as automation takes away the jobs of many people. Recently he made a statement in support of the Civil Rights bill now before the Congress. The two or three rational men of some vision in the Mississippi Legislature have all been voted out of office in the last four years. It is necessary that Mrs. Hamer and people like her come forward to fill this gap.

QUESTION: How will Mrs. Hamer conduct her campaign?

ANSWER: Mrs. Hamer is entered in the regular Democratic primary in Mississippi to be held June 2, 1964. She is running on what is to be called the FREEDOM DEMOCRATIC PARTY. If defeated in the Democratic party, she will be able to continue her campaign as an Independent in the General Election.

QUESTION: Has she any chance of winning? If not, why challenge?

ANSWER: The chances of Mrs. Hamer actually becoming the Representative to the House at this time are of course almost impossible. But since the campaign, as well as the campaigns of the other three candidates, has a two-fold purpose—the chances of winning the goals they seek are very good. One of the purposes is to encourage Negroes not now registered to vote to register by means of the "Freedom Registration" to be conducted this summer. The second purpose is to let the State of Mississippi and the nation become aware that change is taking place in Mississippi and that the rights of the Negro must be realized, if Democracy is to work in a state like Mississippi.

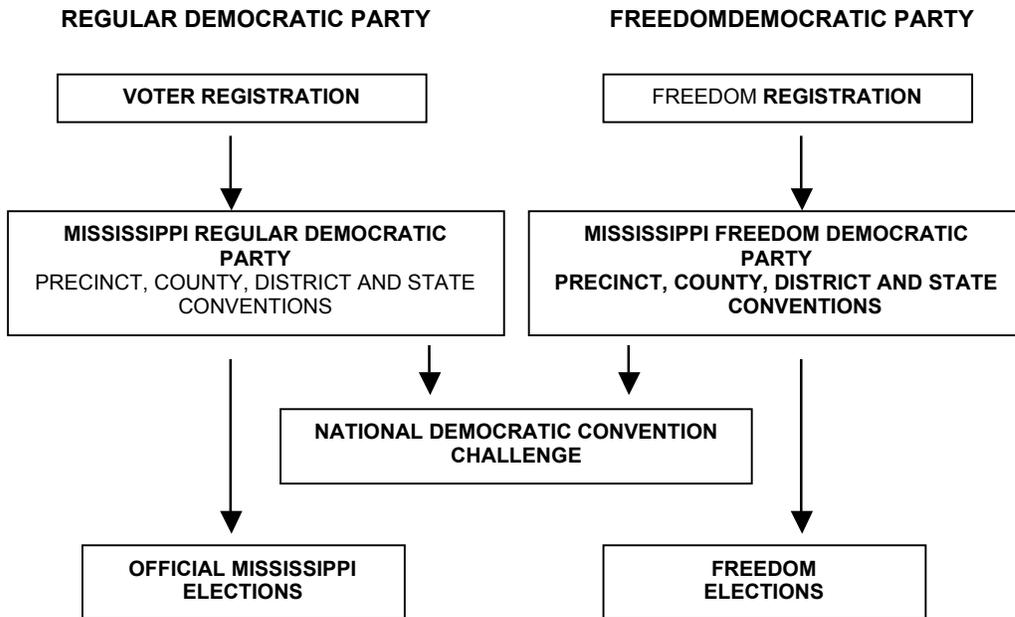
III. Other Aspects of the COFO Political Program for the Summer

QUESTION: How will the Democratic Convention be challenged?

ANSWER: The focus of political activity during the spring and summer will be an attempt to unseat the regular Mississippi Delegation to the National Democratic Convention at Atlantic City, New Jersey, in August of this year.

Mississippi does not allow many people, particularly Negroes, to participate in political affairs in meaningful numbers. For this reason COFO claims that the Mississippi delegation to the Convention does not represent all the people of Mississippi and should not be seated. An attempt

is being made to contact delegations from other states to have them vote against seating the regular Mississippi delegation. It is not known whether this challenge will be successful. Two groups of delegates will attempt to be seated at the convention—the regular Democratic delegation and the so-called Freedom Democratic Delegation. This means that COFO is organizing (1) those people who are now registered voters in Mississippi and (2) those who have tried to register and have not been allowed to vote. From each of these groups a delegation will be chosen to go to the National Convention.



Note: Any registered voter can take part in both columns

Regular Democratic Party—The Democratic Party in Mississippi every four years holds a series of conventions to select delegates to the National Democratic National Convention. The conventions are held in years of a national election; 1964 is such a year.

COFO’s plan is for as many Negro registered voters to attempt to attend precinct meetings as possible and, if allowed to participate, to use their influence to get Negro representatives elected to attend the County Conventions. In other words, the attempt will be to have Negroes participating in the regularly prescribed manner in every stage of the political process from precinct meeting, to County convention, district convention and state convention. The possibilities of Negroes actually being allowed to participate is slim but it is important that the effort be made to go through the normal channels as an educational process for Negroes who have never had the opportunity of doing it before and also as an indication of serious intent to the white political structure.

Freedom Democratic Party—Because the state officials have refused to register so many people in Mississippi, COFO is running a parallel registration procedure called Freedom Registration. Freedom Registration will take place under a Freedom Registrar—one in each of the counties in the state. The Freedom Registration is a simplified registration form with no literacy or interpretative requirements. Any U.S. citizen who is a resident of Mississippi can be Freedom registered. The anticipated goal for Freedom Registration is 300,000 to 400,000 people.

It is these two delegations—from the regular Democratic Party and from the Freedom Democratic Party—which will attempt to be seated as the delegates to the National Democratic Convention. The challenge of the Freedom Democratic Party at the National Convention is one attempt to win truly representative government for all the people in Mississippi.

In addition to the campaign being conducted by Mrs. Hamer in the Second congressional district, there are three other Freedom Candidates. They are Mr. James M. Houston of Vicksburg, Representative of the Third Congressional District; Reverend Jone E. Cameron of Hattiesburg, Fifth Congressional District and Mrs. Victoria Jo Gray of Hattiesburg, Senate against Senator John Stennis.

The Freedom Candidates are running on generally the same platform. The platform was drawn up by the COFO Convention. Each of the candidates, of course, will vary in terms of the issues they discuss in the campaign. The platform drawn up by COFO touches on issues of foreign aid and domestic policy as well as local problems. On the issues of disarmament, the United Nations, foreign aid, the platform emphasizes our working directly for a peaceful world by urging further steps toward curtailing bomb testing. It recognizes that only through responsible involvement in the U.N. and foreign aid programs can the U.S. contribute to a peaceful world. It strongly urges passage of the Civil Rights bill *now*. On domestic issues at the National level it urges and supports the anti-poverty program of President Johnson, recognizing that poverty is one of America's most pressing problems. In addition, it supports medicare, federal supported education programs, particularly job retraining programs; further development of the nation's poverty-stricken rural areas; urban renewal programs in Mississippi, which have been curtailed by the Mississippi House of Representatives during this session of the Legislature.

In the November elections this fall all Freedom registered voters and regularly registered voters will be eligible to vote in the Freedom election. This election will have a ballot which will include Freedom candidates as well as the regular candidates. The election will again show that people wishing to take part in Mississippi political affairs are prevented from doing so by existing restrictions.

The COFO political program is designed to fill two roles:

1. Challenge the existing political structure in Mississippi and show how it discriminates against the Negro.
2. Educate the Negro politically; get the Negro thinking about specific ways of acting to improve Mississippi and his position in the state and to train people for future positions of leadership in the state.

IV. Voting in Mississippi

QUESTION: How is the Democratic Party organized in the State?

ANSWER: The precinct is the smallest political unit. It is usually a part of a supervisor's district (called a "beat"). Each county has five beats. Since there are usually two or three precincts to a supervisor's district, there are at least ten to fifteen precincts in a county. Some counties have many more precincts, other counties have fewer precincts. There are about 1800 precincts in the state.

The precinct convention is the only convention open to all voters in an area. These conventions are usually poorly attended. This is an indication of the apathy on the part of voters in the state—apathy which allows a frightening amount of power to be in the hands of a very few men who make most of the decisions. Negroes, since Reconstruction, have not been a part of this process at all, even those who are registered to vote. At the precinct convention delegates to the

county convention are chosen. The number of delegates is decided earlier by the County Democratic Executive Committee; usually from one to six delegates are chosen. Usually there are alternate delegates, thus doubling the size of the delegation. The precinct convention is run by majority vote and by rules decided by majority vote.

COFO challenged the precinct meetings in about fifteen or twenty precincts by having both registered and unregistered Negroes attempt to attend the meetings. This is to form the basis for the national challenge and therefore is most important. After the challenge, the duplicate Freedom Democratic precinct meetings were held to parallel the Democratic meetings.

The county convention meets at least one week after the precinct conventions and is attended by elected delegates from the precincts of the eighty-two counties of the state. The county convention selects delegates to the district and state conventions. Each county elects delegates equal to twice the number of representatives that county has in the Mississippi House of Representatives. Many times, each vote is split in half, so twice as many delegates are elected, and an alternate is then elected for each half-vote delegate. The county convention also elects the County Democratic Executive Committee, which has fifteen members. This committee appoints poll watchers, counts votes, and is the county political body.

The district conventions are held at least a week after the county conventions. There are five district conventions—one for each Congressional district. At the district convention six delegates, each with half a vote, are chosen to go to the National Democratic Convention. Three alternate delegates are also chosen. The National Democratic Convention is where the selection of the Democratic candidate for President is made. Three members of the State Democratic Executive Committee are chosen at the convention. One candidate for Democratic Presidential elector is chosen.

At the state convention, held at least a week after the last of the district conventions, the rest of the delegates to the National Convention are chosen. Mississippi has twenty-four votes at the National Democratic Convention. The state convention also elects the National Democratic Committeeman and the National Democratic Committeewoman. These two people sit on the Democratic national Committee; this is the committee in charge of policy for the state between conventions. The State Democratic Executive Committee is the policy body for the Democratic Party throughout the state.

Since traditionally there has not been a strong Republican Party in the state, the Primary for all practical purposes indicates the results of the election. Until the 1963 Gubernatorial election, when a Republican for the first time really offered opposition, people tended to vote in the Primary and not in the general election. This monolithic structure has offered very little atmosphere for real debate. There is some hope that the favorable showing of the Republicans (even though Goldwater conservative in nature) will offer at least an interchange of ideas for the future.

QUESTION: Who votes in Mississippi?

ANSWER: There are no statistics available on whites registered to vote. Even the information available on Negro voting is incomplete since it comes from only sixty-nine of the eighty-two counties in the state. In these counties Negroes constitute 37.7 percent of the adult population but only 6.2 percent are registered to vote. In thirteen of the sixty-nine counties there are no registered Negro voters.

It is no accident that information on voting is hard to obtain or that only 25,000 Negroes are registered. As anywhere else, part of the problem is apathy. But in Mississippi even apathy is

different. It is born not so much of disinterest as a feeling of utter frustration and futility passed from generation to generation.

For instance in Holmes County where Negroes are three fourths of the population, there are no Negro voters. Two or three have been trying to register every day since July, 1963. The registrar has said flatly that he will allow Negroes to take the test but he has no intention of passing them. It is this kind of frustration which the Negro is faced with for even attempting to exercise the most basic of democratic rights in Mississippi.

QUESTION: What are the proofs of discrimination in voting?

ANSWER: The whole pattern of voting requirements and of the registration form is calculated to make the process appear to the voter to be hopeless. The process is a complicated one which culminates in the would-be voter's name being published in the paper. Why publish a prospective voter's name in the paper—like announcing his marriage or the birth of a child? The major purpose is to overwhelm the voter so that he is afraid to even attempt to register. Behind this approach is supposed to be—and all too often is—a collection of fears that someone will challenge a voter's moral character, that he may be prosecuted for perjury. This not an altogether unfounded fear as illustrated by the fact that one man who attempted to register was accused of being morally unfit to be a voter because he and his wife were not legally married but had been living in a common-law relationship for over twenty years. In addition, publishing a prospective voter's name announces his intention to his employer, landlord and anyone else who might retaliate with violence.

It is difficult to prove, on the face of it, that the voting laws in Mississippi are purposefully discriminatory, since they apply equally to white and black. However it is by comparison with other states—particularly those outside the deep South—that the whole procedure becomes suspect. It is much less difficult to see how discrimination works at the level of the individual Negro who attempts to register. There are many evidences of brutality, economic and physical retaliation. An illustration of physical retaliation is the case of the three Negro men who went to Rankin County Courthouse to register. As one man was filling in the form, the County Sheriff came in and began questioning him. When the man told him he was registering to vote, the sheriff began beating him on the head with a blackjack and forced him out of the office. This was the result of individuals deciding on their own to register—not a planned registration campaign which had aroused feelings against Negroes.

We do have clear evidence, however, that the *intent* of the voting laws passed by the legislature in 1955 and 1962 was discrimination against Negro voters. Public officials at the time carefully avoided making statements which could be used in court actions as proof of intention to discriminate. However, Governor White stated in 1954 that the constitutional amendments proposed (and passed in 1955) would “tend to maintain segregation.” In 1962 a representative urged the legislators not to take up unnecessary questions regarding the legislation in public. So there was no real debate on the floor of the house. In recent times this policy has been strictly adhered to on any legislation affecting race in the state legislature. The comments of a legislator, who was very conscious of the power of the Citizens Council, give us an indication of how restricted the lawmakers are to differ:

It's hard for us sometimes to consider a bill on its merits if there is any way Bill Simmons (executive secretary of the Citizens Council) can attach an integration tag. For instance, a resolution was introduced in the House to urge a boycott of Memphis stores because some of

them have desegregated. I knew it was ridiculous and would merely amuse North Mississippians who habitually shop in Memphis. The resolution came in the same week that four Negroes were fined in court for boycotting Clarksdale stores. Yet the hot eyes of Bill Simmons were watching. If we vote against the resolution he would have branded us. So there we were, approving a boycott while a Mississippi court was convicting Negroes for doing what we lawmakers were advocating. It just didn't make sense.

In October, 1954, the Jackson *Daily News* editorialized on statements made by Robert Patterson, Head of the Citizens Council, about the legislation. The headline read, "The amendment is intended solely to limit Negro registration." The *Jackson Times* (a now defunct newspaper) reported, "This proposed amendment is not aimed at keeping white people from voting, no matter how morally corrupt they may be. It is an ill-disguised attempt to keep qualified Negroes from voting; and as such, it should not have the support of the people of Mississippi." This advice was not heeded, however, and the legislation was passed.

The registration form itself is not too difficult in terms of its demands on the person's literacy. There are, however, numerous factual questions which the registrant must answer, such as his precinct. The attempt to make the application appear difficult begins with its title "SWORN Written Application for Registration." There are included a series of potentially confusing questions, which ask about the registrant's occupation, business and employment. The numerous small questions which make up this part of the form are obviously not all necessary and could be answered by fewer questions. Then why have them? Because they provide more opportunity for error on the part of the person registering.

The voter test is an exam in which the registrant must be able to write and interpret a section of the Mississippi Constitution. A Yale law graduate states that "there are some 285 sections of the state constitution, and the document is one of the most complex and confusing in the nation." The examiner points to a section and tells the applicant to copy and interpret it. On the tester's cognizance, you pass or fail. He has absolute power. His decision is not reviewable, and there are no standards by which it can be judged in court.

The above information gives us the background of discrimination in voting in the state and some specifics of how the Registrar misuses the registration form to keep Negroes from voting. There are, however other proofs of discrimination—incident after incident of people who have been turned away from the Circuit Clerk's office without being allowed to register; people who have been shot at, lost their jobs or otherwise have been intimidated for attempting to vote. It has always been made clear to the Negro by his white employer, landlord, or acquaintance that he is not to attempt to vote—this is the most present kind of proof of discrimination.

QUESTION: Why isn't the Negro allowed to vote? What does the white man fear?

ANSWER: In Mississippi, where the Negro represents 42 percent of the population, perhaps the numerical reason is the most overpowering answer as to why the Negro is not allowed to vote and why the white man is so afraid. The intensity of white reaction is in direct proportion to the numbers of Negroes in a given county or area. For instance, in the gulf counties and the extreme northern hill counties where there is not as large a percentage of Negroes, opposition by whites to voting is less violent. While in the Delta counties, southern counties and the river counties, with a few exceptions, opposition is sudden, violent and explosive when Negroes attempt to register to vote in large numbers or individually. It is often the individual Negro who deviates from "his place" which frightens the white man the most. What was known and safe suddenly becomes

unknown and uncontrollable. Retaliation to individuals is often death, as in the case of Herbert Lee in Amite County. Mr. Lee tried to register and encouraged others to register—for this he was shot down by a state legislator. When Negroes register in large numbers because of a voter drive, the white man can blame “outsiders” and “agitators” for stirring up things.

In essence, then, the reasons Negroes are not allowed to vote and the things the white man fears are inextricably part of the same cloth. The white man fears a “Negro take-over”—block voting. Negroes controlling the state—these are the surface things. Underneath this are the sometimes conscious and sometimes unconscious fears about himself—the guilt for an enslaving system which makes a man less than human because of the color of his skin. All of this gets translated into myths about the Negroes’ inferiority, dirtiness, ignorance, violence. These myths in turn justify the system. For those people who can see beyond the myths, who either for moral or economic reasons would like to see the segregated pattern of southern life change, there is the White Citizens Council. The Council has a great deal of control of the political structure but even more than that is a “big brother” looking over the shoulder of anyone who wants to step out of line.

Perhaps some quotations from Council literature can say it better. “If the Negro was permitted to obtain the ballot . . . it would mean that no qualified white man . . . could ever hold public office (and) seats now held by competent white representatives would be held by ignorant, incompetent Negroes.” “There is a vast gulf between the IQ of the Negro . . . and the average white man because of an inherent deficiency in mental ability, psychological and temperamental inadequacies, of indifference and natural indolence on the part of Negro.”; “If segregation breaks down, the social structure breaks down. . . . The Communists hope to achieve disintegration through integration America”; “Integration represents darkness, regimentation, totalitarianism, communism and destruction. . . . Segregation represents the freedom to choose one’s associates, Americanism, state sovereignty and the survival of the white race”; “The enemy cloaked in the mysterious name of ‘integration’ is hysterically assaulting the natural order, the created order in nature, the legal order under God, and above all else, the free grace of Jesus Christ.”

QUESTION: What steps have been taken to give the Negroes the vote?

ANSWER: The first concerted effort to get Negroes registered in Mississippi began in 1961 when Bob Moses, moving into Greenwood, Mississippi, started a program to educate and encourage local people to participate in political activity. This project was sponsored by the Voter Education Project of the Southern Regional Council. As has already been discussed, the beginning of COFO came from this effort. The focus of COFO has been largely on political action. Because obtaining the individual’s right to vote is the key to full participation in the democratic process through which hopefully a deeper kind of change can come. Until 1963 much time was spent simply in becoming known in local communities and establishing the basis of a political organization which could act with united effort. The past year has seen several new attempts at education and mass registration.

The Mock Campaign for Governor was one such attempt. By focusing on the Campaign with Freedom Candidates, COFO was able to garner 80-90,000 votes and in the process educate this many people to the process of voting and the importance of political participation.

Freedom Days have also been planned in several communities this past spring. Most notable are the ones in Hattiesburg and Canton, Mississippi. These are voter drives sponsored by COFO to get as many people in the community as possible registered to vote. In both places a day or several days were set to get as many people as possible to go down to register. It was necessary to

picket the courthouse in both Canton and Hattiesburg because of the obvious policy of discrimination on the part of the Registrar. In Canton only two or three people a day have been allowed to take the test at all. Picketing has been allowed by the local officials, which in itself is an innovation in Mississippi, where people have never been allowed to picket over five minutes without being arrested. The National Council of Churches has cooperated in this project by sending teams of northern ministers to each city to act as observers and to be in a negotiating role with city officials and sympathetic whites. This has tended to keep down the violence but has not stopped arrests altogether.

QUESTION: How successful have the Freedom Days been?

ANSWER: They have not been successful in terms of numbers. For instance in Hattiesburg of about 500 attempts to register, about 150 people have actually been registered (and here the registrar is under federal court order not to discriminate). Other federal suits are being filed against Registrars to try to get them disqualified. This kind of counter-action may in time prove so harassing to local registrars that they will improve, but is a lengthy and expensive process. Since 1961, out of about 70,000 people who have been reached by civil rights groups, only 6,000 to 7,000 have actually attempted to register and only 10 percent of that number have actually gotten registered. This is very little success for a lot of time and effort spent. But to understand the goals COFO is trying to reach, we must look at things other than numbers. The amount of education and political awareness among Negroes has been incalculable. The feeling that at last there is something they as individuals can do to better themselves and their lot in Mississippi has been created. Once this spirit has been aroused, change *has already begun to take place*. In a real sense, the Freedom School is attempting to spread this spirit to students, who can gain from this a new sense of their own identity and importance as people. The second thing that has been accomplished is that the white Mississippian can no longer believe the myth that the Negro is “happy”; he is too aware there is change in the air. This means that one segment of the white population is becoming resigned to change; another is beginning to feel it can do what it has wanted to do all along—help bring about change; and the other feels backed into a corner and is becoming vicious. The third aspect of the effects of political activity is that the rest of the nation has before it constantly the stark reality of the disenfranchised Negro in Mississippi. It makes it a little more difficult for James O. Eastland in Washington to talk about “gradual change” and States Rights as an excuse for segregation, when Negroes are being denied their basic right of the vote in Mississippi.

V. Historical Development of White, One-Party Politics

QUESTION: What role did Reconstruction play?

The striking parallel between people and events of the 1850’s and the 1950’s reminds us that Mississippi has been on the defensive against inevitable social change for more than a century and that for some years before the Civil War it had developed a closed society with an orthodoxy accepted by nearly everyone in the state. The all pervading doctrine then and now has been white supremacy.

Dr. James Silver
Mississippi-The Closed Society

ANSWER: Dr. Silver, History Professor at the University of Mississippi, points out a truth that far too few people are aware of or want to recognize. And that is that the south has always, for all practical purposes gone its own way, politically and otherwise. People from outside the Southern states have always been prone to view the “Old South” as a more backward section of the United States—but very definitely a part of the same heritage. It would be a mistake to say that slavery had its influence on the politics of Mississippi but so did the influx of immigrants to New England. This is to reduce the problem to the too-simple answer of sectional politics.

The white Southerner if asked to explain his “way of life” to the outside often harks back to Reconstruction to answer for the South’s sectionalism, one-party politics, and segregation. It is as much a mistake to take this answer at face value as it is to see the white southerner only as a bigot and a racist. There is no doubt that Reconstruction was a difficult time for both the white southerner whose rights, temporarily, had been suspended and for the newly freed slave, who had to adjust himself to freedom. The aftermath of war is the price that must be paid for waging war. C. Van Woodward in *Reunion and Reaction* points out that the South had by 1877 regained control of its own destiny and proceeded between then and 1890 to reestablish segregation by means of enacting segregation laws and making the new battle cry “states rights.” An important element of this control was keeping the Negro from voting.

He further states that democracy in America had always operated through compromise. The period of the Civil War and Reconstruction represent the only time when principle became the prime motivation for political action. For the ten years following the end of the war the South remained true to its principles and so did the North. However, with the secret compromise of 1877 between southern politicians and northern Republicans, the pattern of compromise and political expediency was re-established. This compromise represents the beginning of the coalition between the South and those northern Republicans who espouse the causes of states rights and business interests. It is this coalition which, in part, make the South the powerful force it is in the legislature.

The compromise of 1877 over the election of Hayes and Tilden essentially was that the South would allow Hayes to win the election in exchange for the three remaining states then under federal occupation being returned to local control. Prior to the Civil War the South had been as divided in political loyalty as other sections of the country. It was after the war that the Southern Whigs, unable to tolerate the Northern wing of party because of their concern with equal rights for Negroes, resignedly settled into the Democratic Party. Many of these so-called conservative Democrats still basically held the same views that led them to vote for Henry Clay’s nationalistic and capitalistic protective tariff and national bank.

After this party shift, Woodward says, “a thick miasma settled down over the political scene in the South. Under the fog of the one-party system, one white man was virtually indistinguishable from another in his politics.”

QUESTION: Who controls the vote?

ANSWER: Most obviously, white people control the vote, leaving the Negro without representation, except as they see fit to represent him. However, traditionally the one-party system has continued based on a lack of dialogue. This control has had to be tight and monolithic. Ralph McGill talks about the “small town rich man” as the source of political as well as economic power in the small towns of the rural South. This is not just the plantation owner of the cotton growing area, but the man in each small town who owns the gin and the main store, the cotton warehouse, the lumber mill. He lives in the largest house in the town, has his finger in everything

that goes on in the town and rules with an iron hand. He makes a contribution at campaign time and always to the right man, and if in doubt, to both candidates. He has a hand in political patronage in his county.

Since the time of the depression in the 1930's this pattern has been gradually changing. It has remained longest perhaps in Mississippi, where change has come slowest and most painfully. This kind of small town demagogue can still be found in Mississippi but his influence in being displaced by industrial interests and as the state's economy becomes more diversified.

QUESTION: Why hasn't the Republican Party been stronger?

ANSWER: It has been to the advantage of the deep South to remain monolithic. It has been able to have more influence this way, at a national level. On the whole, few people have participated in politics and most have been willing to let a few people make the decisions for them. However, in the recent Gubernatorial campaign, for the first time, the Republican Party made a strong showing. Not nearly enough to win the election, only 34 percent of the vote. But this represents a crack in the wall of the one-party system. The legislation before the Mississippi legislature indicates how threatening this showing was to the political power structure in the state. The legislation, if passed, would virtually outlaw the Republican Party in the state. In an analysis of the election returns, Dr. Gordon Henderson of Millsaps College, stated that the majority of the Republican voters seemed to be urban, young, educated, and of the middle class. Their political views seemed to be conservative. And indeed the Republican candidate offered little hope to the Negroes of Mississippi. What it does offer is a chance for dialogue. However, there is hope for the future, if a two party system does develop, the Negro's vote will certainly be in demand.

QUESTION: What changes will occur in the state when Negroes can vote?

ANSWER: Most important, it will give the Negro a chance to voice his opinion in how his children should be educated, how his town is to be run, in short to decide for himself those things which in the past have either been neglected or done for him. In terms of what changes will occur on the state scene. When Negroes have the opportunity to use their vote, it is likely to have a liberalizing influence. Many kinds of social legislation, which have previously been defeated or kept out of the state, such as federal job retraining programs, urban renewal projects, stronger welfare policy, etc. will have a chance of being passed. It means an opportunity for Negroes to hold public office and to begin to work at other than menial tasks.

Certainly, obtaining the vote alone is not going to create the "good society" in Mississippi. There has to also be a beginning of understanding and acceptance of each other, if the Negro is to obtain his human as well as his civil rights. In the long run one is useless without the other. But obtaining the vote has the potential for unlocking a number of doors that have been closed to the Negro in Mississippi and is absolutely essential if a democratic form of government is to work in the state.

LESSON PLANS FOR THE UNIT ON MISSISSIPPI POLITICS

INTRODUCTION

The lesson plans are organized to be a combination of lecture and discussion, with a great deal of freedom given students to discuss his own ideas and pursue topics of interest to the class. For instance the sections dealing with party organization and historical aspects of the one-party system might be presented in lecture form with discussion afterward. Then hopefully, this factual material will be brought into the discussion in other places. Each of the lectures will be organized around one or more concepts that the student should be presented with through the material. Case studies, visual materials and in some cases field trips may be used to illustrate points discussed.

This is to be a general outline only. It is hoped that the teacher will be flexible enough to adapt the material to his own background and experience. There are excerpts from some of the bibliographical material used in reparation of the background which have been duplicated for the use of the teacher. It may be useful in providing illustrations for some of the points of discussion.

The lesson plan material is not divided into specific periods, i.e., it is topically arranged with questions and illustrative material suggested at appropriate places. The teacher may use the plans in any way which seems best to suit the students interests. The arrangement does follow a natural train of development.

MATERIALS TO BE USED AS TEACHING AIDS

Campaign literature on Mrs. Hamer (to be passed out to all students)

Voter Registration forms—regular forms (to be passed out to all students)

Freedom Registration forms (to be passed out to all students)

Sample Sections of the Mississippi Constitution (to be passed out to all students)

Pamphlet, “Why Vote—the ABC’s of Citizenship” (to be passed out to all students)

Film—“We’ll Never Turn Back”, on Greenwood Voter Project

Tapes of Mrs. Hamer conducting campaign and singing—obtainable from COFO office, 1017 Lynch St., Jackson, Miss.

Two sections of “Behind the Cotton Curtain” by Charles Remsberg on the Republican Party, and retaliation to the white community.

Report on the Greenwood Voter Project, printed in a larger report by The Southern Regional Council.

SNCC research staff, “Voter Registration Laws in Miss.”

- TOPIC: Mrs. Hamer’s Campaign and the organization of Mississippi Political System.
- CONCEPTS: (1) Importance of individual participation in politics and
(2) Fundamentals of political organization at local, state and national level.
- PRESENTATION: Mrs. Hamer’s story and the facts about her campaign
DISCUSSION: Discussion should center around why Mrs. Hamer is running. If the students have heard her speak they might discuss what her platform is and what they think of it. How does she differ from her opponent? Why is her campaign unusual?

Use Campaign lit. on Mrs. Hamer.

PRESENTATION: Process of how someone runs for office—how will Mrs. Hamer be different? Present Democratic Party Organization in state.

DISCUSSION:

Play tapes of Mrs. Hamer's speeches and singing

PRESENTATION: Other ways that an individual can take part in politics other than voting or running for office. Present other political programs of COFO such as Freedom Registration Freedom Vote—ways of working for these programs for the students.

Pass out S.C.L.C. Pamphlet "Why Vote"

DISCUSSION:

REVIEW:

TOPIC: COFO Programs and discrimination in voting.

CONCEPTS: (1) How discrimination works and
(2) what is being done about it.

PRESENTATION: Voter Registration Campaigns—Freedom Days in Hattiesburg and Canton. Could use here the material on the Greenwood Project as a case study.

DISCUSSION: Discussion should center around why Mrs. Hamer is running? If the students have heard her speak they might discuss what her platform is and what they think of it.

Film: "We'll Never Turn Back"

PRESENTATION: Voter requirements in Mississippi—how this works to discriminate against the Negro. Specifics of how the registration form is filled out.

Use here the regular and Freedom reg. forms to illustrate differences.

DISCUSSION:

Regular and Freedom Registration Forms

PRESENTATION: All aspects of COFO's Political Program, as a means of obtaining the vote for Negroes in Miss.

DISCUSSION:

If students have not already had experience canvassing, a field trip might be arranged in which the students and teacher would canvass for an afternoon or evening in order to use the knowledge they had gained about the registration process and also to give them a sense of participation.

If a trip is not feasible, the teacher should encourage students to participate in this way.

TOPIC: Historical Aspects of Discrimination and the Future.

CONCEPTS: (1) why discrimination exists
(2) What political freedom can mean.

PRESENTATION: One party system, how it developed and why.

DISCUSSION:

PRESENTATION: The effects of the one-party system. Citizens Council—untrue myths about Negroes—psychological effects on Negro and white. You could

use here the excerpts from “Behind the Cotton Curtain” on Republican Party and retaliation to whites.

DISCUSSION:

PRESENTATION:

How the vote can change the lives of people in Miss., what it cannot do that has to be done in other ways.

DISCUSSION:

REVIEW:

-
- ¹ Charles Cobb, "Organizing the Freedom Schools," in *Freedom is a Constant Struggle: An Anthology of the Mississippi Civil Rights Movement*, Susan Erenrich, editor and developer, Cultural Center for Social Change, Washington, D.C., 1999, 136.
- ² Ibid., 110.
- ³ Ibid., 136.
- ⁴ George W. Chilcoat and Jerry A. Ligon, "Theatre as an emancipatory tool: classroom drama in the Mississippi Freedom Schools," in *Journal of Curriculum Studies*, (1998, volume 3, number 5), 518.
- ⁵ Daniel Perlstein, "Teaching Freedom: SNCC and the Creation of the Mississippi Freedom Schools" in *History of Education Quarterly* 30 (Fall 1990), 310.
- ⁶ Ibid, 312.
- ⁷ George W. Chilcoat, and Jerry A. Ligon, "'Helping to Make Democracy a Living Reality': The Curriculum Conference of the Mississippi Freedom Schools," in *Journal of Curriculum and Supervision* (XV:1, Fall 1999, 43-68), 58.
- ⁸ Ibid., 59
- ⁹ Bob Zangrando to Tom Wahman, August 15, 1964. SNCC Papers, Martin Luther King Library and Archives (Sanford NC: Microfilming Corporation of America, 1982; Reel 67, File 337, Page 0640).
- ¹⁰ Ibid., 6.
- ¹¹ In this and in many other ways, the Freedom School Curriculum reflected much of the philosophy of John Dewey. Dewey argued that "Organized subject matter . . . does not represent perfection or infallible wisdom; but it is the best at command to further new experiences which may, in some respects at least, surpass the achievements embodied in existing knowledge and works of art. From the standpoint of the educator, in other words, the various studies represent working resources, available capital. Their remoteness from the experience of the young is not, however, seeming; it is real. The subject matter of the learner is not, therefore, it cannot be, identical with the formulated, the crystallized, and systematized subject matter of the adult" (*Democracy and Education*, p. 182, Free Press, 1966, originally published, 1916).
- ¹² Staughton Lynd and Harold Bardanelli to Freedom School Teacher, 20 May 1964, SNCC Papers, Martin Luther King Library and Archives (Sanford NC: Microfilming Corporation of America, 1982; Reel 67, File 340, Page 1189).
- ¹³ George W. Chilcoat and Jerry A. Ligon, "Developing Democratic Citizens: The Mississippi Freedom Schools", in Erenrich, *Constant Struggle*, (edited from "Developing Democratic Citizens: The Mississippi Freedom Schools as a Model for Social Studies Instruction" in *Theory and Research in Social Education*, Spring, 1994, 128-175), 113.
- ¹⁴ Howard Zinn, "Freedom Schools," in *The Zinn Reader*, Seven Stories Press, New York, 531.
- ¹⁵ Kirsty Powell, *A Report, Mainly on Ruleville Freedom School, Summer Project, 1964*, SNCC, The Student Nonviolent Coordinating Committee Papers, 1959-1972 (Sanford, NC: Microfilming Corporation of America, 1982) Reel 68, File 367, Page 0582.
- ¹⁶ Robert Weisbrodt, *Freedom Bound*, New York, Penguin Books, 1991, 111-112.
- ¹⁷ Ibid., 111.
- ¹⁸ Staughton Lynd, "Freedom Summer," in *Living Inside Our Hope: A Steadfast Radical's Thoughts on Rebuilding the Movement*, ILR Press, Ithaca, New York, 1997, 33.
- ¹⁹ Len Holt, *The Summer that Didn't End: The Story of the Mississippi Civil Rights Project of 1964*, Da Capo Press, New York, 1992, 107.
- ²⁰ John Dewey, in *Democracy and Education* argues that thinking requires that we have an aim in view, that we learn about current and past facts for the purposes of creating ideas that we test in action. "The opposite to thoughtful action are routine and capricious behavior The latter makes the momentary act a measure of value, and ignores the connections of our personal action with the energies of the environment. It says, virtually, 'things are to be just as I happen to like them and this instant,' as routine says in effect, 'let things continue just as I have found them in the past.' Both refuse to acknowledge responsibility for future consequences which flow from present action. Reflection is the acceptance of such responsibility" (Free Press, New York, 1966, 146).
- ²¹ Zinn, *Reader*, 534
- ²² From the Introduction to the Citizenship Curriculum

-
- ²³ *Profiles of Typical Freedom Schools*, COFO memo, Jackson office (nd), SNCC, The Student Nonviolent Coordinating Committee Papers, 1959-1972 (Sanford, NC: Microfilming Corporation of America, 1982) Reel 68, File 364, Page 0552.
- ²⁴ Staughton Lynd, *Freedomways*, Second Quarter, 1965, 304.
- ²⁵ *Ibid.*, 304.
- ²⁶ George W. Chilcoat and Jerry A. Ligon, "Developing Democratic Citizens: The Mississippi Freedom Schools as a Model for Social Studies Instruction," in *Theory and Research in Social Education* (XXII:2, Spring 1994), 147.
- ²⁷ Len Holt, *Summer*, 108.
- ²⁸ Zinn, *Reader*, 537
- ²⁹ Zinn, *Reader*, 537.
- ³⁰ Chilcoat and Ligon, *Constant Struggle*, 122.
- ³¹ Chilcoat and Ligon, *Constant Struggle*, 122.
- ³² Chilcoat and Ligon, *Constant Struggle*, 124.
- ³³ Zinn, *Reader*, 536.
- ³⁴ Chilcoat and Ligon, *Constant Struggle*, 120.
- ³⁵ Herbert Aptheker, *A Documentary History of the Negro People in the United States*. Vol. 7, New York, Citadel Press, 1993, 282.
- ³⁶ Holt, *Summer*, 110.
- ³⁷ Holt, *Summer*, 109.
- ³⁸ Cobb, *Constant Struggle*, 137.
- ³⁹ Chilcoat and Ligon, *Constant Struggle*, 110.
- ⁴⁰ Zinn, *Reader*, 539.

Litigating International Child Abduction Cases Under the Hague Convention



A Manual to provide attorneys with a road map to assist in the effective and competent litigation of a Hague Convention case involving the abduction of a child from his or her home country.

Litigating International Child Abduction Cases Under the Hague Convention

Prepared by



2012

**National Center for Missing & Exploited Children®
Charles B. Wang International Children's Building
699 Prince Street
Alexandria, VA 22314-3175
1-800-THE-LOST®
(1-800-843-5678)**

**Copyright ©2012 Kilpatrick Townsend & Stockton LLP and the National Center for Missing & Exploited Children.®
Although this Manual is protected by copyright laws and treaties, you may make copies for use with clients but not for resale or for other commercial purposes. If you give a copy to anyone, it must be in its original, unmodified form, and must include all attributions of authorship, copyright notices, and republication notices. National Center for Missing & Exploited Children® and 1-800-THE-LOST® are registered service marks of the National Center for Missing & Exploited Children.**

This Manual is provided for informational purposes only and does not constitute legal advice or an opinion on specific facts. This Manual may not be correct, complete, and/or up-to-date, so recipients should use this Manual only as a starting point for their own independent research. The publisher is distributing this Manual with the understanding that neither it nor the authors are engaged in rendering legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

NCMEC INTERNATIONAL CHILD ABDUCTION TRAINING MANUAL
TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	<u>1</u>
A. The Hague Convention On The Civil Aspects Of International Child Abduction.....	<u>1</u>
B. The Role Of The State Department & The National Center for Missing And Exploited Children.	<u>3</u>
C. Overview Of A Hague Convention Case.....	<u>5</u>
II. ESTABLISHING A <i>PRIMA FACIE</i> CASE FOR RETURN.....	<u>9</u>
A. Habitual Residence Prior To Wrongful Removal Or Retention Was In A Foreign Country.....	<u>11</u>
B. Removal Or Retention Was Wrongful Because Custody Rights Were Breached.	<u>19</u>
1. Breach Of Rights Arising By Operation Of Law.....	<u>21</u>
2. Breach Of Rights Arising By Judicial Or Administrative Decrees Or Agreement Of The Parties.	<u>23</u>
C. Petitioners Must Be Exercising Their Custody Rights At The Time Of Removal.	<u>25</u>
D. The Children Must Be Under The Age Of Sixteen.....	<u>26</u>
E. If True, Prove That The Petition Was Filed Within One Year Of Wrongful Removal.....	<u>28</u>
1. Determining When Removal Or Retention Became Wrongful.	<u>29</u>
2. Determining When Proceedings Were Commenced.	<u>32</u>
3. Tolling Of The One-Year Period.	<u>32</u>
III. THE AFFIRMATIVE DEFENSES OF ARTICLES 12, 13, AND 20	<u>37</u>
A. The Article 12 Well-Settled Defense: The Child Has Become Well-Settled In The New Surroundings.....	<u>39</u>
B. The Article 13 Consent Or Acquiescence Defense: Petitioners Consented To Or Acquiesced In The Removal Or Retention.	<u>45</u>

1.	Authorization To Travel.	46
2.	Words And Actions Of Left-Behind Parents.	47
3.	Nature Of Children’s Removal.	47
4.	Filing Of Hague Convention Petition.	48
5.	Other Considerations.	48
C.	The Article 13 Grave Risk Defense: There Is A Grave Risk That The Child Would Be Exposed To Physical Or Psychological Harm Or An Intolerable Situation If Returned.	49
1.	Grave Risk of Physical Or Psychological Harm.	50
2.	Intolerable Situations.	55
3.	Undertakings.	56
D.	The Article 13 Mature Child Objection To Removal Defense.	60
E.	The Article 20 Public Policy Defense: Returning The Child Would Violate Public Policy.	64
F.	The Often-Used But Invalid Defense: Best Interests Of The Child.	65
IV.	PROCEDURAL ISSUES.	68
A.	Procedures For Filing And Litigating A Hague Convention Return Case.	68
1.	Choice Of Court - Whether To File In Federal Or State Court.	68
2.	The Petition For Relief Under The Hague Convention.	70
(a)	Preparation of the Complaint.	70
(b)	Provisional Remedies.	72
(i)	Temporary Restraining Orders/Preliminary Injunctions.	72
(ii)	Obtaining Custody of the Child.	74
(iii)	Guardian Ad Litem Appointments.	76
(c)	Notice and Service of the Hague Convention Petition.	78
(d)	Discovery.	79

(e)	Evidentiary Issues.....	80
(f)	Witnesses (Including Experts).....	81
3.	Article 16 Stay Of Pending State Court Action.....	82
4.	Checklist Of Activities.....	84
B.	Appeals.....	86
1.	Standard Of Review.....	86
2.	If The Trial Court Stays Its Order Returning The Child.....	86
3.	Appeals May Be Mooted By The Child’s Return.....	88
(a)	Return of the Child Moots an Appeal.....	89
(b)	Return of the Child does not Moot an Appeal.....	90
4.	Post-Appeal Considerations.....	91
C.	The Logistics Of Handling A Hague Convention Case.....	91
1.	Introduction.....	91
2.	The Investigation.....	92
3.	Initial Conversation/Interview With Clients.....	93
4.	Checklist Of Items To Discuss During The Client Call For Retention Of Counsel.....	96
5.	Filing The Petition/Communicating With The Court.....	98
6.	Perfecting Service On The Abducting Parent.....	99
7.	Travel And Accommodations.....	101
8.	Pending The Second Hearing.....	103
9.	Court Order.....	104
10.	Mediation.....	104

V.	THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT.....	106
A.	When The Hague Convention Does Not Apply.	107
B.	Strategic Alternative To The Hague Convention.....	108
C.	Supplement To The Hague Convention.....	109
VI.	RIGHTS OF ACCESS.....	111
VII.	PRACTITIONERS’ CONCLUDING THOUGHTS: WHAT ABOUT THE IMPACT ON THE CHILD?.....	115
	EXHIBIT A— LIST OF CITED CASES BY CIRCUIT OF ORIGIN	A-1
	EXHIBIT B—HAGUE CONVENTION.....	B-1
	EXHIBIT C—SIGNATORY COUNTRIES TO HAGUE CONVENTION.....	C-1
	EXHIBIT D—INTERNATIONAL CHILD ABDUCTION REMEDIES ACT	D-1
	EXHIBIT E—PUBLIC NOTICE 957	E-1
	EXHIBIT F—PEREZ-VERA REPORT.....	F-1
	EXHIBIT G— <i>ROBLES ANTONIO v. BARRIOS BELLO ORDERS</i>	G-1
	EXHIBIT H—SAMPLES OF COMMON HAGUE CASE PLEADINGS AND FILINGS.....	H-1

I. INTRODUCTION

A. THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION.

The purpose of the first Manual, issued in 2007, was to provide attorneys with a road map for litigating international child abduction cases. Since the publication of the first Manual, the United States Supreme Court issued its first opinion concerning the Hague Convention on the Civil Aspects of International Child Abduction, and more parties have sought to resolve international abduction matters through alternative methods, including mediation. This updated Manual not only provides a general understanding of the law and its recent developments, but also describes practical considerations to aid attorneys in advocating for their clients. Finally, it raises issues and makes suggestions to ameliorate the potentially negative impact that these proceedings may have on the children involved in such disputes.¹ As is evident in this Manual, representing a client in an international abduction matter requires a balancing of various considerations.

[The Hague Convention on the Civil Aspects of International Child Abduction](#) (the “[Hague Convention](#)”) (attached as [Exhibit B](#)),² is a treaty between multiple signatory countries wherein the countries agree to cooperate in returning children to their home country for custody proceedings. The United States assisted in drafting the Hague Convention and became a signatory in 1981. Eighty-seven countries throughout the world are parties to the Hague

¹ For ease of reference, the cases cited throughout this Manual are included in a list (attached as [Exhibit A](#)) organized by circuit of origin.

² October 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 22514 (the “Hague Convention”). The Hague Convention was the product of the final act of the Fourteenth Session of the Hague Conference on Private International Law, agreed upon in The Hague on October 25, 1980. At this session, each signatory country agreed to submit the Hague Convention draft to their governments. *See* Hague Conference on Private International Law: Final Act, *reprinted in* 19 I.L.M. 1501 (Am. Soc’t Int’l Law 1980).

Convention, including most recently Russia, Morocco, and Singapore. The signatories to the Hague Convention that are recognized by the United States are listed in [Exhibit C](#).³

The United States Congress enacted the [International Child Abduction Remedies Act](#) (“[ICARA](#)”)⁴ as the implementing legislation for the Hague Convention. A copy of [ICARA](#), as currently codified, is attached as [Exhibit D](#). ICARA establishes the Hague Convention as the law of the United States, provides definitions, sets forth jurisdiction, and addresses certain details regarding how the United States will enforce the provisions of the treaty. ICARA explicitly states that its provisions are in addition to, and not in lieu of, the Hague Convention.⁵

The State Department’s analysis of the Hague Convention is set forth in a document known as [Public Notice 957](#) (attached as [Exhibit E](#)).⁶ In addition, the history and commentary by the official reporter at the Fourteenth Session of the Hague Convention on Private International Law is set forth in a document commonly known as the “Perez-Vera Report.” A copy of the [Perez-Vera Report](#) is attached as [Exhibit F](#).⁷ Both Public Notice 957 and the Perez-Vera Report provide insight into the purposes and procedures of the Hague Convention.

³ Although there are 87 contracting countries to the Hague Convention, at this time, the United States recognizes only 68 countries as “partner countries” for purposes of resolving international child abductions under the Hague Convention.

⁴ [Pub. L. No. 100-300, 102 Stat. 437 \(1988\)](#) (“[ICARA](#)”). [ICARA](#) is codified at 42 U.S.C. §§ 11601-11611. ICARA was created to deal with the international abduction of children and to allow a petitioner to assert his or her rights in exigent circumstances. See [Distler v. Distler](#), 26 F. Supp. 2d 723, 727 (D.N.J. 1998).

⁵ See [42 U.S.C. § 11601\(b\)\(2\)](#).

⁶ Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10494 (1986) (“[Public Notice 957](#)”).

⁷ Elisa Perez-Vera, *Explanatory Report in Vol. III Hague Conference on Private Int’l Law, Actes et document de la Quatorzieme session*, at 426 (Bunean Permanent de la Conference 1980), available at <http://www.hcch.net/upload/expl28.pdf> (the “[Perez-Vera Report](#)”).

B. THE ROLE OF THE STATE DEPARTMENT & THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN.

On April 1, 2008, after the publication of the first Manual, the State Department's Office of Children's Issues reassumed the United States' Central Authority responsibilities in connection with incoming Hague Convention cases. The Central Authority is a government-designated agency within each Hague Convention signatory country that handles child abduction issues. Previously, the State Department delegated these duties to The National Center for Missing and Exploited Children ("NCMEC") under a Cooperative Agreement with the Department of Justice and the State Department. Although NCMEC no longer manages the incoming Central Authority functions, it continues to provide technical assistance and resources to parents, law enforcement, and professionals who are working to prevent and resolve international abductions, including through the publication of this updated Manual.

Most Hague Convention actions follow a similar factual and procedural path. After a parent realizes that his or her child has been abducted to the United States, the parent exhausts all avenues within his or her home country to find the child. The left-behind parent then informs the Central Authority within his or her home country. The Central Authority works with the left-behind parent to complete a set of documents (the "Application") to initiate the process for the return of, or access to, the child. The Central Authority then forwards the Application and all supporting materials to the State Department.

The State Department, with the aid of both governmental and non-governmental agencies, including NCMEC, then begins the process of locating the child in the United States by using school, employment, financial, social security, police, postal, internet or other public records. More information concerning this investigation is provided in [Section IV.C.2](#) of this Manual.

Once the State Department locates the child, if the left-behind parent requests *pro bono* legal representation based on the parent's personal assessment of eligibility under the Legal Services Corporation Poverty Guidelines,⁸ the State Department contacts attorneys in the International Child Abduction Attorney Network ("ICAAN")⁹ to locate counsel who may be interested in providing representation. The State Department provides potential counsel with basic information such as the country involved and the gender of the potential client. Counsel who consent to considering representation are included on a list with their contact information, and the client is instructed to contact potential counsel.

If counsel is interested in proceeding after having an initial call with the left-behind parent, the State Department will provide additional information such as the Application and custody documents. If the Application is completed in the left-behind parent's native language, the State Department will provide the foreign language Application and the translated Application to counsel. The Application serves as the initial source of relevant details regarding the abduction. After reviewing the materials, counsel will proceed with their independent representation of the left-behind parent in the Hague Convention litigation. Once the client engages counsel and an engagement letter is signed, the State Department provides counsel with the entire file.

⁸ See [45 C.F.R. pt. 1611, App. A \(2012\)](#).

⁹ Until April 2008, NCMEC ran the International Child Abduction Attorney Network ("ICAAN") on behalf of the Department of State. However, in April 2008, the U.S. Central Authority assumed primary responsibility for all "incoming" casework, including operation of the attorney network. Attorneys who had signed up for ICAAN were invited to participate in the U.S. Central Authority's Attorney Network, and nearly all did. Following the transition of incoming Central Authority duties to the Department of State, NCMEC has maintained its network but has broadened the role of ICAAN to provide representation in international (and domestic) family abduction matters of all kinds, including both Hague and non-Hague matters. See http://missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=217 and http://travel.state.gov/abduction/attorneysjudges/network/network_4936.html.

NCMEC also provides legal technical assistance for attorneys at any point during the litigation. This assistance includes discussing legal questions, referring attorneys to ICAAN mentors, discussing alternate legal strategies, arranging logistical support, providing third party referrals for counseling and other support, and troubleshooting.

C. OVERVIEW OF A HAGUE CONVENTION CASE.

There are two types of Hague Convention cases: return and access. This Manual focuses primarily on return cases unless otherwise noted. In return cases the left-behind parent with custodial rights seeks the return of his or her child to the child's country of habitual residence.¹⁰ In access cases, the left-behind parent seeks enforcement of visitation rights to his or her child.

In return cases, the Hague Convention mandates that courts should determine only the jurisdictional merits of the case and should not evaluate any underlying merits of the custody dispute. Specifically, under the Hague Convention, courts can determine only *where* a child custody action should be tried. [Article 16](#) of the Hague Convention specifically bars courts in countries to which children have been abducted from considering the merits of custody once they receive notice of the wrongful removal or retention of the children. All circuits that have addressed this issue have followed this mandate of the Hague Convention.¹¹ When litigating a Hague Convention return action, counsel should be prepared to counter the defense's or the court's attempts to convert the action into a custody proceeding. More importantly, counsel should take every opportunity to remind the court that a Hague Convention case is purely

¹⁰ A return case arises when a child is removed from his or her home country of habitual residence or wrongfully prohibited from returning to the country of habitual residence. Both of these circumstances establish a legal basis for a return case and are used interchangeably throughout this Manual.

¹¹ See, e.g., [Nicolson v. Pappalardo](#), 605 F.3d 100, 109 (1st Cir. 2010); [Von Kennel Gaudin v. Remis](#), 282 F.3d 1178, 1182 (9th Cir. 2002); [Miller v. Miller](#), 240 F.3d 392, 398 (4th Cir. 2001); [March v. Levine](#), 249 F.3d 462, 472 (6th Cir. 2001); [Diorinou v. Mezitis](#), 237 F.3d 133, 140 (2d Cir. 2001); [England v. England](#), 234 F.3d 268, 271 (5th Cir. 2000); [Lops v. Lops](#), 140 F.3d 927, 936 (11th Cir. 1998); [Friedrich v. Friedrich](#), 983 F.2d 1396, 1402 (6th Cir. 1993).

jurisdictional and is not intended to focus on the best interests of the child or other custody issues. See [Section III.F](#) for additional information on best interests of the child and [Section IV.C](#) for additional information on litigation logistics.

Both state and federal courts have jurisdiction to hear Hague Convention return cases.¹² Thus, whether to file in federal or state court is one of counsel's first strategic decisions in a Hague Convention return case.¹³ Access cases, in which a left-behind parent seeks only to exercise access rights (as opposed to custodial rights) to the child, can be filed only in state court.¹⁴

Certain procedural issues of a Hague Convention case are similar to those of a "typical" civil litigation matter. The petition for return,¹⁵ like any other petition or complaint filed in federal court, must set forth the basis for the court's jurisdiction, the general causes of action, and the relief sought by the left-behind parent. A notice of motion or order to show cause often is filed simultaneously with the petition for return to request that the court compel the abducting parent to attend a court proceeding and show why he or she should not return the child. This filing also is intended to ensure that the abducting parent will not leave the court's jurisdiction with the child.

Other procedural issues are unique to Hague Convention cases. One major procedural issue involves assessing the risk that the abducting parent, after being served with the petition,

¹² [42 U.S.C. § 11603\(a\)](#) (providing for concurrent jurisdiction in return cases).

¹³ See [Hague Convention, supra note 2, infra Section IV.A.1](#).

¹⁴ [Bromley v. Bromley](#), 30 F. Supp. 2d 857, 860 (E.D. Pa. 1998) (holding that the "plain language of the Convention does not provide federal courts with jurisdiction over access rights"); [Wiggill v. Janicki](#), 262 F. Supp. 2d 687, 689 (S.D. W.Va. 2003) ("Federal courts do not have jurisdiction to enforce rights of access under the Convention.").

¹⁵ The parties to a Hague Convention case are designated as the petitioner (the left-behind parent) and the respondent (the abducting parent).

will flee the jurisdiction with the child prior to the show cause hearing. This risk may be minimized in a number of ways, including having law enforcement place the child in the temporary custody of the left-behind parent (or Child Protective Services). The potentially competing interests of due process and the security and psychological safety of the child provide challenges that are not typical in the average federal court proceeding. Suggestions for handling these logistical issues follow in [Section IV.C](#).

The hearing to show cause is the first hearing in the action unless an *ex parte* hearing has been held to request that the court remove the child from the abducting parent prior to or upon service. The first hearing is a unique opportunity for the petitioner's attorney to advance the case and explain to the court why the petitioner is seeking relief from the court under the Hague Convention. It may be advisable at that time to provide to the court an explanation of the Hague Convention, how the child's situation falls within the operative scope of the Hague Convention, the specific relief sought by the left-behind parent, and the scope of the court's jurisdiction under the Hague Convention. Again, this is a prime opportunity to inform the court of its jurisdictional limits and ensure that the court understands what issues it can and cannot decide under the Hague Convention.

After the abducting parent has been served, an evidentiary trial is held. The trial typically consists of an opening argument, examination and cross-examination of witnesses, and a closing argument. The court may, *sua sponte*, decide to interview the child. Jurisdictions differ in their approach to considering a child's testimony in a Hague Convention case. If a court decides to speak with the child, typically the child will be taken into chambers where the court will question him or her. Some courts allow counsel to be present, but not the parents. The purpose of the court's questioning is to determine the child's preference regarding residence and/or to obtain

additional testimony regarding defenses that may have been raised in the proceeding. This situation should arise only when the court deems the child sufficiently mature to understand the issues and express objections to being returned.

After this evidentiary hearing, the court will issue a decision on whether the child should be returned to the home country. If the court grants the return, the opposing party may appeal to the appropriate appellate court. In light of the potential for appeal and/or a motion to stay the return order, travel arrangements should be orchestrated so that the left-behind parent and child can leave the country as soon as the court enters a return order, thereby mooting any subsequent filings that may delay enforcement of a return order.¹⁶ If the appellate court issues a stay, the left-behind parent and child may have to stay in the United States for an additional period of time.¹⁷

In Hague Convention cases, practitioners often struggle with the practical logistics of returning a child. Various options for the payment of travel expenses and potential available airline and hotel discounts should be explored. Where the child will reside pending the final hearing also requires strategic analysis and advocacy, as the lawyers will need to assist the court in deciding where the child will be most secure pending the trial. This process provides counsel with an opportunity to work with judges' chambers, translators, social services, federal marshals, and other law enforcement personnel in a problem-solving mode to achieve the client's goals. It

¹⁶ See [Bekier v. Bekier](#), 248 F.3d 1051, 1056 (11th Cir. 2001) (holding that removal of the children from the jurisdiction of the court mooted the appeal). But see [Fawcett v. McRoberts](#), 326 F.3d 491, 494-97 (4th Cir. 2003) (holding that an appeal was not moot despite removal of the children from court's jurisdiction).

¹⁷ Both the transportation costs associated with the child's return and attorney's fees can be sought and recovered by the left-behind parent. See [42 U.S.C. § 11607\(b\)](#). This relief should be requested in the initial petition. Realistically, however, these costs usually are borne by the left-behind parent and/or their counsel's firm.

is best to identify these issues as early as possible in the proceeding so they can be incorporated into the trial plan and counsel can be prepared for all related contingencies.

Ultimately, when filing a petition for return, counsel must anticipate the respondent's response. Explosive allegations often are raised in response to the petition for return. For example, defensive allegations may include spousal abuse, neglect or child cruelty. These issues should be discussed in your first substantive client interview.

In addition to preparing the left-behind parent for these potential defenses, the first discussion with your client should cover all relevant topics that can be used to build the case, including the exercise of custody, any agreements between the parties, and other logistical issues. By first identifying the jurisdiction and then reading through this Manual, counsel will have an understanding of the issues a court will consider in deciding a Hague Convention case.

II. ESTABLISHING A *PRIMA FACIE* CASE FOR RETURN

The Hague Convention provides that if the petitioner successfully proves a *prima facie* case, the child must be returned unless the respondent can prove that an affirmative defense applies. See [Section III](#). The petitioner must demonstrate a *prima facie* case by a preponderance of the evidence.¹⁸

¹⁸ [42 U.S.C. § 11603\(e\)](#).

The elements of a *prima facie* case are enumerated in [Articles 3](#)¹⁹ and [4](#)²⁰ of the [Hague Convention](#). Courts have recognized that the petitioner establish a *prima facie* case if he or she proves three elements: (1) prior to removal or wrongful retention, the child was habitually resident in a foreign country; (2) the removal or retention was in breach of custody rights under the foreign country's law; and (3) the petitioner actually was exercising custody rights at the time of the removal or wrongful retention.²¹ If the petitioner establishes a *prima facie* case, the abducted child must be returned to the country of habitual residence unless the respondent can prove that one of the designated affirmative defenses applies.²²

Although most decisions recite these three elements as establishing a *prima facie* case, technically there is at least one more element: proving that the abducted child is under the age of 16. This is a critical element of a Hague Convention case because, as further discussed below, [Article 4](#) of the Hague Convention explicitly states that “[t]he Convention shall cease to apply when the child attains the age of 16 years.”²³

In addition, although not part of the petitioner's *prima facie* case, if the petitioner can demonstrate that the petition is filed within one year of the wrongful removal or retention, then

¹⁹ [Hague Convention, supra note 2, art. 3](#). [Article 3](#) provides:

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 subparagraph 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.

²⁰ *Id.* at art. 4. [Article 4](#) provides: “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.”

²¹ *Id.* at arts. 3-4.

²² *Furnes v. Reeves*, 362 F.3d 702, 722 (11th Cir. 2004).

²³ [Hague Convention, supra note 2, art. 4](#).

the well-settled affirmative defense in [Article 12](#) of the Hague Convention does not apply. Thus, while technically not part of the petitioner's *prima facie* case, proving that the petition was filed within one year of wrongful removal or retention is critically important and is discussed below as if it were an element of the petitioner's burden of proof.

A. HABITUAL RESIDENCE PRIOR TO WRONGFUL REMOVAL OR RETENTION WAS IN A FOREIGN COUNTRY.

To establish a *prima facie* case, a petitioner first must demonstrate that the child was habitually resident in one Hague signatory country and then was wrongfully removed to or retained in a different Hague signatory country.²⁴ The determination of the child's country of habitual residence therefore is central to the disposition of a Hague Convention case.

For the Hague Convention to apply, the abducted child must have been "habitually resident in a Contracting State immediately before any breach of custody or access rights."²⁵ To be actionable under the Hague Convention, child abduction and retention cases must be international, and the involved countries must be recognized by the United States as signatories to the Convention.²⁶ For example, the Hague Convention would not apply in a case where a child is habitually resident in Atlanta, Georgia and is wrongfully removed to Phoenix, Arizona, since the child remained in the same country. Similarly, the Hague Convention would not apply in a case where the child is removed from the United States to Japan because Japan is not a signatory to the Hague Convention. However, if the child is living in and removed from the United States to Mexico City, the Hague Convention would apply because the child was

²⁴ [Public Notice 957, supra note 6, at 10504.](#)

²⁵ [Hague Convention, supra note 2, art. 4.](#)

²⁶ [Public Notice 957, supra note 6, at 10504.](#)

removed from the country where he or she was a habitual resident and both Mexico and the United States are signatories to the Convention.²⁷

The determination of habitual residence also is important because the parents' custody rights are governed by the laws of the country of habitual residence.²⁸ Despite the significance of determining habitual residence, it is defined neither by the Hague Convention nor by ICARA.²⁹ Notably, the Hague Permanent Bureau surveyed signatory countries in 2010 and inquired about the feasibility and desirability of a protocol to the Convention to define the term "habitual residence"³⁰ However, as of February 2012, no such protocol has been implemented and the United States opposed the addition of a definition of "habitual residence," explaining that it would be very difficult for the member countries to come to a consensus on the meaning of the term.³¹ United States courts view the habitual residence issue as a mixed question of law and fact that is a highly fact-specific inquiry.³²

²⁷ *Id.*

²⁸ [Hague Convention, *supra* note 2, art. 3\(a\).](#)

²⁹ See [Gitter v. Gitter](#), 396 F.3d 124, 131 (2d Cir. 2005) ("Following a long-established tradition of the Hague Conference, the Convention avoided defining its terms.") (*citation omitted*); [In re Bates](#), No. CA 122-89, High Court of Justice, Fam. Div'n, Ct. Royal of Justice, United Kingdom (1989) (explaining the lack of a definition in the following manner: "The notion [of habitual residence is] free from technical rules, which can produce rigidity and inconsistencies as between different legal systems . . . [t]he facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions . . . All that is necessary is that the purpose of living where one does have a sufficient degree of continuity to be properly described as settled.").

³⁰ See QUESTIONNAIRE ON THE DESIRABILITY AND FEASIBILITY OF A PROTOCOL TO THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, available at http://www.hcch.net/index_en.php?act=publications.details&pid=5292&dtid=33.

³¹ See <http://www.hcch.net/upload/abduct2011us2.doc> (containing the United States' response to the QUESTIONNAIRE ON THE DESIRABILITY AND FEASIBILITY OF A PROTOCOL TO THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION).

³² [Mozes v. Mozes](#), 239 F.3d 1067, 1073 (9th Cir. 2001).

The habitual residence is determined at the point in time “immediately before the removal or retention.”³³ Beyond this limited guidance, the Hague Convention offers no insight as to which, if any, factors are to be given weight. Accordingly, an extensive body of domestic and international law has developed. All eleven circuits have addressed the determination of habitual residence and identified a number of factors that should be evaluated. Among the factors courts may consider are changes in physical location, the location of personal possessions and pets, the passage of time, whether the family retained its prior residence or sold it before relocating, whether the child has enrolled in school, the parents’ intentions at the time of a move, and whether the child has established relationships in the new location.³⁴ A circuit-by-circuit summary of selected case law follows. Many of the circuits apply similar, although not necessarily identical, methodologies in determining the habitual residence. As shown below, one particularly notable difference is that some circuits will consider the parents’ intent as relevant to the habitual residence question, whereas other circuits will focus exclusively on the child’s experiences.

District courts within the First Circuit have employed very fact-specific analyses in determining the habitual residence.³⁵ The consensus among many of these decisions has been that “a child’s habitual residence is to be determined by examining the facts and circumstances at hand.”³⁶ More recently, the First Circuit has begun to follow a more structured approach to

³³ [Hague Convention, *supra* note 2, art. 3\(a\)](#).

³⁴ See generally Scott M. Smith, Annotation, *Construction and Application of International Child Abduction Remedies Act*, 125 A.L.R. Fed. 217 (2006); see also [Zuker v. Andrews](#), 2 F. Supp. 2d 134, 136–39 (D. Mass. 1998), *aff’d*, 181 F.3d 81 (Table), No. 98-1622, 1999 WL 525936 (1st Cir. Apr. 9, 1999).

³⁵ [Zuker](#), 2 F. Supp. at 136-39.

³⁶ [Id.](#) at 136.

evaluate questions about habitual residence. For instance, in [Nicolson v. Pappalardo](#),³⁷ the First Circuit adopted an approach similar to that of the Second Circuit, discussed below, that focuses on “the parents’ shared intent or settled purpose regarding their child’s residence.”³⁸

[Gitter v. Gitter](#)³⁹ afforded the Second Circuit its first occasion to interpret the phrase “habitually resident” within the meaning of the Hague Convention. The Second Circuit examined both parental intent and the child’s degree of acclimation to the residence in establishing the habitual residence of the child. The court explained that an analysis of the habitual residence should begin by focusing on the intent of the persons entitled to fix the place of the child’s residence, which is most frequently the parents.⁴⁰ The terms of the Convention make it seem logical to focus on the intent of the child, but the court found that children usually do not possess the “material and psychological wherewithal to decide where they will reside.”⁴¹ Parental intent is determined by actions as well as declarations.⁴² For the second part of the inquiry, the court held that one must look into whether the child has become acclimated to his or her new surroundings such that their habitual residence has shifted.⁴³

In [Poliero v. Centenaro](#),⁴⁴ the Second Circuit again followed this two part analysis. With respect to the first prong, the court found that there was no “‘settled intention to abandon’ Italy as the children’s habitual residence” in favor of New York. The court noted that the parties had

³⁷605 F.3d 100 (1st Cir. 2010).

³⁸ *Id.* at 104; see also [Zuker v. Andrews](#), 181 F.3d 81 (Table), No. 98-1622, 1999 WL 525936, at *1 (1st Cir. Apr. 9, 1999).

³⁹ 396 F.3d 124, 132 (2d Cir. 2005).

⁴⁰ *Id.* (citing [Mozes](#), 239 F.3d at 1074-77).

⁴¹ *Id.*

⁴² *Id.* at 134.

⁴³ *Id.* at 133.

⁴⁴ 373 F. App’x 102 (2d Cir. 2010).

not attempted to sell the family home in Italy, had maintained their personal belongings and furniture in Italy, merely leased and rented property in New York (but sent their children to school in New York), and had purchased tickets for the entire family to return to Italy with the intent to re-enroll the children in school there.⁴⁵ Turning to the second prong, the court found that the children had not become acclimated to New York, noting that although the children appeared to have “adjusted well” to New York and “expressed some preference for remaining,” they also had maintained contact with friends and family in Italy.⁴⁶

Earlier, the Third Circuit examined the term “habitually resident” in [Feder v. Evans-Feder](#)⁴⁷ and concluded that:

[A] child’s habitual residence is the place where he . . . has been physically present for a time sufficient for acclimatization and which has a “degree of settled purpose” from the child’s perspective [A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child’s circumstances in that place and the parents’ present, shared intentions regarding their child’s presence there.⁴⁸

However, in [Delvoe v. Lee](#),⁴⁹ the Third Circuit found this test to be inadequate when applied to the unique context of a very young infant whose parents lacked a settled intention regarding their child’s residence. Because infant children cannot acquire habitual residence apart from their caregivers, it often is difficult to make a distinction between the habitual residence of an infant child and that of his or her custodian.⁵⁰ Thus, the habitual residence of infant children most often is found to be the parental residence. However, the [Delvoe](#) court found that “where

⁴⁵ [Id.](#) at 105.

⁴⁶ [Id.](#) at 106.

⁴⁷ 63 F.3d 217, 223-24 (3d Cir. 1995).

⁴⁸ [Id.](#) at 224 (citing [Rydder v. Rydder](#), 49 F. 3d 369, 373 (8th Cir. 1995)).

⁴⁹ 329 F.3d 330, 333-34 (3d Cir. 2003).

⁵⁰ [Id.](#) at 333.

the [parental] conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence” for the child.⁵¹ Accordingly, where the parents lack shared intentions about their child’s presence in a country, the infant child does not become a habitual resident. In reaching its decision, the court quoted a Scottish commentator:

A newborn child born in the country where his parents have their habitual residence could normally be regarded as habitually resident in that country. Where a child is born while his mother is temporarily present in a country other than that of her habitual residence it does seem, however, that the child will normally have no habitual residence until living in a country on a footing of some stability.⁵²

In [*Miller v. Miller*](#),⁵³ the Fourth Circuit opined that there is no real distinction between ordinary residence and habitual residence, and that a person can have only one habitual residence, which correlates to the child’s residence prior to removal.⁵⁴ The court repeated that to properly engage in the inquiry, “[t]he court must look back in time, not forward.”⁵⁵ Specifically, it found that parents cannot create a new habitual residence by wrongfully removing and sequestering a child.⁵⁶ To do so would violate the purpose of the Hague Convention. In [*Maxwell v. Maxwell*](#),⁵⁷ the Fourth Circuit applied a two-part analysis similar to that of [*Gitter v. Gitter*](#), examining both the intent of the parents and whether the children had become acclimated to their new residence.⁵⁸ In doing so, the court cited several factors relevant to the two prongs of

⁵¹ [*Id.*](#)

⁵² [*Id.*](#) at 334 (citing E.M. Clive, *The Concept of Habitual Residence*, 3 Jur. Rev. 138, 147 (1997)).

⁵³ 240 F.3d 392, 400-01 (4th Cir. 2001).

⁵⁴ [*Id.*](#) at 400.

⁵⁵ [*Id.*](#) (citing [*Friedrich v. Friedrich*](#), 983 F.2d 1396, 1401 (6th Cir. 1993)).

⁵⁶ [*Id.*](#) (citing [*Diorinou v. Mezitis*](#), 237 F.3d 133, 141-42 (2d Cir. 2001)).

⁵⁷ 588 F.3d 245 (4th Cir. 2009).

⁵⁸ [*Id.*](#) at 252-54.

the test and provided a potentially useful list of fact-specific cases that may be helpful depending on the facts of the case at hand.⁵⁹

In *Isaac v. Rice*,⁶⁰ a district court in the Fifth Circuit used the children's past experiences to determine habitual residence, but also recognized the necessity to consider "the shared intentions of the parents regarding the child's presence in that country."

The Sixth Circuit focused on the child's acclimation and past experiences in a specific location to establish habitual residence in *Friedrich v. Friedrich*.⁶¹ In *Friedrich*, the child lived with his parents in Germany until the father forced the child and mother out of the apartment, whereupon the mother removed the child to the United States.⁶² The mother argued that the child's habitual residence was the United States because she always intended to move there, but the court held that "to determine the habitual residence, the court must focus on the child, not the parents, and examine past experiences, not future intentions."⁶³ As a result, the court held that the child's habitual residence was Germany. In *Robert v. Tesson*,⁶⁴ the Sixth Circuit reiterated that the habitual residence analysis must focus on a child's past experiences, not the future intentions of the parents, recognizing that such an analysis diverged somewhat from other circuits.⁶⁵

⁵⁹ *Id.*

⁶⁰ No. 1:97CV353, 1998 WL 527107, at *3 (N.D. Miss. July 30, 1998).

⁶¹ 983 F.2d 1396 (6th Cir. 1993).

⁶² *Id.*

⁶³ *Id.* at 1401.

⁶⁴ 507 F.3d 981 (6th Cir. 2007).

⁶⁵ *Id.* at 998.

The Seventh Circuit in [Koch v. Koch](#)⁶⁶ recognized that the purpose of habitual residence was “to identify the place where the children are settled and where recent information about the quality of family life is available.”⁶⁷ The court held that “a child will be found to be habitually resident in a country if he or she has been living there for a sufficient period of time. Where there is geographic stability and adequate duration, questions as to the purpose of the residence will usually be pushed into the background.”⁶⁸

In [Silverman v. Silverman](#),⁶⁹ the Eighth Circuit held that habitual residence can be established only by focusing on both the settled purpose from the child’s perspective and the parents’ intent. The Ninth Circuit in [Mozes v. Mozes](#)⁷⁰ held that habitual residence is determined by the parents’ intent regarding the child’s residence and the child’s perspective of where he or she is acclimated.⁷¹

The Tenth Circuit took a more fact-specific approach in [Kanth v. Kanth](#),⁷² holding that “a child’s habitual residence is defined by examining the specific facts and circumstances” and “the conduct, intentions and agreements of the parents during the time preceding the abduction are important factors to be considered.”⁷³

⁶⁶ 450 F.3d 703, 709 (7th Cir. 2006).

⁶⁷ *Id.* (citing [Koch v. Koch](#), 416 F. Supp. 2d 645, 653 (E.D. Wis. 2006)).

⁶⁸ *Id.* at *11.

⁶⁹ 338 F.3d 886 (8th Cir. 2003); see also [Barzilay v. Barzilay](#), 600 F.3d 912, 918 (8th Cir. 2010); [Sorenson v. Sorenson](#), 559 F.3d 871, 873 (8th Cir. 2009).

⁷⁰ 239 F.3d 1067, 1071 (9th Cir. 2001).

⁷¹ *Id.* at 1079; see also [Papakosmas v. Papakosmas](#), 483 F.3d 617, 622 (9th Cir. 2007).

⁷² 232 F.3d (Table), 2000 WL 1644099 (10th Cir. Nov. 2, 2000).

⁷³ *Id.*, 2000 WL 1644099, at *1.

Finally, in [Ruiz v. Tenorio](#),⁷⁴ the Eleventh Circuit interpreted “habitual residence” according to the “ordinary and natural meaning of the two words it contains, as a question of fact to be decided by reference to all the circumstances of a particular case.”⁷⁵ To establish a new habitual residence, there must be a “settled intention to abandon the one left behind.”⁷⁶ The “settled intention” does not have to be clear at the time of departure and can develop over time. The court explained that there must be an “actual change in geography and the passage of a sufficient length of time for the child to have become acclimatized.”⁷⁷ However, in cases where the parents lacked a shared intent, the court cautioned against placing too much emphasis on the child’s contacts in the new country to determine whether the child had become acclimated.⁷⁸ The court explained that “divining the significance of such contacts is extremely difficult,” and that “children can be remarkably adaptable even in short periods without any significance with respect to habitual residence.”⁷⁹

B. REMOVAL OR RETENTION WAS WRONGFUL BECAUSE CUSTODY RIGHTS WERE BREACHED.

A valid petition must allege that removal or retention of the child was wrongful. As is true for all other elements of a *prima facie* case, the petitioner must prove this element by a preponderance of the evidence.⁸⁰

⁷⁴ 392 F.3d 1247, 1252 (11th Cir. 2004).

⁷⁵ *Id.* (citing [Mozes](#), 239 F.3d at 1071-73).

⁷⁶ *Id.* at 1253.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1254.

⁷⁹ *Id.* at 1253 (quoting [Mozes](#), 239 F.3d at 1079). *See also* [Mikovic v. Mikovic](#), 541 F. Supp. 2d 1264, 1280 (M.D. Fla. 2007) (relying on [Ruiz](#), the court held that the parents had no shared intent to abandon the United States as the habitual residence, and therefore, the court denied the father’s petition to return the child to Wales).

⁸⁰ [42 U.S.C. § 11603\(e\)](#).

[Article 3](#) of the Hague Convention provides that removal or retention of the child is wrongful where it is in breach of custody rights attributed to a person, an institution, or another entity, either jointly or alone, under the law of the country in which the child was habitually resident immediately before the removal or retention.⁸¹ The Hague Convention provides little guidance toward the determination of whether the petitioner has custody rights. However, [Article 5\(a\)](#) broadly states that “rights of custody” are “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.” Custody rights differ from “rights of access,” which the Hague Convention defines as “the right to take a child for a limited period of time to a place other than the child’s habitual residence.”⁸² The Hague Convention allows petitioners to seek the return of children if they have “custody rights” of the children as compared to “rights of access.” See [Section VI](#) below for a detailed discussion on the issue of rights of access.

Custody rights may arise (a) by operation of law, or (b) by reason of a judicial or administrative decision or an agreement having legal effect under the law of the country of habitual residence.⁸³ Most cases discussing whether petitioners have custody rights involve custody rights that arise by operation of law. In cases where the parties have an agreement or a judicial decree, courts usually hold that the issue of custody rights is undisputed. The following section highlights recurring issues regarding rights of custody that arise by operation of law.

⁸¹ [Hague Convention, *supra* note 2, art. 3.](#)

⁸² [Id.](#) at art. 5(b).

⁸³ [Id.](#) at art. 3.

1. Breach Of Rights Arising By Operation Of Law.

In operation of law cases, courts usually assess the rights granted to the petitioner under the applicable civil code.⁸⁴ The Hague Convention expressly allows United States courts to take notice of the laws of foreign courts regarding custody determinations.⁸⁵

The case of [Sealed Appellant v. Sealed Appellee](#)⁸⁶ discusses custody rights arising by operation of law. Under Australian law, in the absence of any orders of the court, each parent is a joint guardian and has custody rights over the child.⁸⁷ In [Sealed Appellant](#), the father had not been stripped of his custody rights.⁸⁸ Therefore, the only issue for the court was whether the father had exercised his custody rights.⁸⁹ How to determine whether the left-behind parent was exercising custody rights at the time of the abduction is discussed further in [Section II.C](#) of this Manual.

A petitioner seeking to establish custody rights by operation of law may be able to rely on *patria potestas*⁹⁰ when the child's country of habitual residence recognizes such rights. *Patria potestas*, a concept of parental authority found in many civil law countries, is generally "the relationship of rights and obligations that are held reciprocally, on the one hand, by the father and the mother (or in some cases the grandparents) and, on the other hand, the minor children who are not emancipated."⁹¹ Countries whose laws are based on civil codes are most likely to

⁸⁴ See, e.g., [Sealed Appellant v. Sealed Appellee](#), 394 F.3d 338, 343-44 (5th Cir. 2004).

⁸⁵ [Hague Convention, supra note 2, art. 14](#) (providing that a court "may take notice directly of the law of, and of judicial or administrative decisions" of courts from the country of the child's habitual residence).

⁸⁶ 394 F.3d at 343-44.

⁸⁷ [Id.](#) at 343.

⁸⁸ [Id.](#)

⁸⁹ [Id.](#) at 344.

⁹⁰ In some instances, *patria potestas* is written as *patria potestad*.

⁹¹ [Whallon v. Lynn](#), 230 F.3d 450, 457 (1st Cir. 2000) (citation omitted).

recognize *patria potestas* rights and often define these rights in the context of the parents' state of wedlock and exercise of physical custody.⁹² United States courts generally have accepted custodial rights arising under *patria potestas* as sufficient to establish a left-behind parent's right to seek the return of the child. If parents have entered into a divorce decree that contains terms regarding the custody of the child, courts may seek to define the scope of custodial rights asserted under *patria potestas* in light of the decree.⁹³

In [Whallon v. Lynn](#),⁹⁴ the child's parents resided in Mexico and had never married. Mexico's Civil Code defines the doctrine of *patria potestas* and provides that where children are born out of wedlock, both parents exercise parental authority. It also distinguishes *patria potestas* from physical custody. The First Circuit examined Mexico's concept of *patria potestas* and held that these rights were more than mere visitation rights or rights of access because *patria potestas* rights imply a meaningful decision-making role in the life and care of a child.⁹⁵ The court found that the left-behind father/petitioner in Mexico had rights of custody and, therefore, that the removal of the child without the father's consent was wrongful.⁹⁶

⁹² See, e.g., [Lalo v. Malca](#), 318 F. Supp. 2d 1152, 1157 (S.D. Fla. 2004) (divorce decree under Panamanian law gave both parents *patria potestas* rights over the child; thus father/petitioner had rights of custody over child and could seek the return of the child); [Gil v. Rodriguez](#), 184 F. Supp. 2d 1221, 1225 (M.D. Fla. 2002) (under Venezuelan law, father/petitioner had *patria potestas* rights over child born out of wedlock and thus had custody rights under the Hague Convention); [Mendez Lynch v. Mendez Lynch](#), 220 F. Supp. 2d 1347, 1358 (M.D. Fla. 2002) (married father/petitioner had *patria potestas* rights under Argentine law, and thus had rights of custody pursuant to the Hague Convention).

⁹³ See [Ibarra v. Garcia](#), 476 F. Supp. 2d 630, 635 (S.D. Tex. 2007) (holding that while divorce decree recognized the parties' rights of *patria potestas*, the left-behind father could not seek the return of the child because the decree awarded custody of the child to the mother and only rights of visitation to the father); [Gonzalez v. Gutierrez](#), 311 F.3d 942, 949 (9th Cir. 2002) (holding that *patria potestas* rights do not confer custody rights where a formal custody agreement was in existence).

⁹⁴ 230 F.3d 450, 452 (1st Cir. 2000).

⁹⁵ [Id.](#) at 458.

⁹⁶ [Id.](#) at 454.

Similarly, in [*Giampaolo v. Erneta*](#),⁹⁷ the Eleventh Circuit found that the father/petitioner of an out-of-wedlock child had rights of custody because under Argentine law, if the parents had cohabitated, both had *patria potestas* rights. Argentine law “denotes the set of rights and duties belonging to the parents in respect to the person and property of their children, for their protection and integral education, from the moment of their conception and while under age and not emancipated.”⁹⁸ An agreement granting the mother physical custody of the child did not vitiate the *patria potestas* rights of the father/petitioner; thus, the removal of the child from Argentina was wrongful.⁹⁹

2. Breach Of Rights Arising By Judicial Or Administrative Decrees Or Agreement Of The Parties.

In addition to custody rights arising by operation of law, custody rights can be determined by judicial or administrative decree or by agreement of the parties. In determining the custodial rights of parents who have entered into a joint stipulated custody agreement, courts often make binding assessments regarding parents’ custodial rights to their children. As with custodial rights arising under operation of law or *patria potestas*, the terms of a custody order are binding on parents and will serve as evidence of custodial rights in a Hague Convention case.¹⁰⁰

Frequently, judicial decrees and custody orders contain *ne exeat* clauses, which are defined as writs mandating that the person to whom they are addressed not leave the country, the state, or the jurisdiction of the court.¹⁰¹ The circuits originally were split over whether *ne exeat* clauses constituted custodial rights entitled to enforcement under the Hague Convention. The

⁹⁷ 390 F. Supp. 2d 1269, 1277-78 (N.D. Ga. 2004).

⁹⁸ *Id.* at 1277 (quoting Argentine Civil Code, art. 264).

⁹⁹ *Id.*

¹⁰⁰ See, e.g., [*Morrison-Dietz v. Dietz*](#), No. 07-1398, 2008 WL 4280030, at *6 (W.D. La. Sept. 17, 2008), *aff’d*, 349 F. App’x 930 (5th Cir. 2009).

¹⁰¹ BLACK’S LAW DICTIONARY 1054 (8th ed. 2004).

Second, Fourth, and Ninth Circuits had held that *ne exeat* clauses were not custodial rights under the Hague Convention, reasoning that a *ne exeat* clause “confers only a veto, a power in reserve, which gives the non-custodial parent no say (except by leverage) about any child-rearing issue other than the child’s geographical location in the broadest sense.”¹⁰² On the other hand, the Eleventh Circuit had held that *ne exeat* rights were custody rights within the meaning of the Hague Convention, reasoning that a *ne exeat* right gives the noncustodial parent a joint right to determine the child’s place of residence.¹⁰³

The Supreme Court resolved this circuit split in [Abbott v. Abbott](#),¹⁰⁴ ruling that a *ne exeat* right is a right of custody under the Hague Convention.¹⁰⁵ In [Abbott](#), a Chilean court had granted the mother “daily care and control of the child, while awarding the father ‘direct and regular’ visitation rights. . . .”¹⁰⁶ Chilean law also conferred on the father a *ne exeat* right.¹⁰⁷ In holding that the father’s *ne exeat* right amounted to a right of custody under the Hague Convention, the Court noted that the Convention defines “rights of custody” to 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.”¹⁰⁸ Similar to the Eleventh Circuit’s analysis, the Supreme Court equated the *ne exeat* right to a joint right to determine the child’s country of residence.¹⁰⁹ Justices Stevens, Thomas,

¹⁰² [Croll v. Croll](#), 229 F.3d 133, 140 (2d Cir. 2000); see also [Fawcett v. McRoberts](#), 326 F.3d 491, 500 (4th Cir. 2003); [Gonzalez v. Gutierrez](#), 311 F.3d 942, 949 (9th Cir. 2002).

¹⁰³ See [Furnes v. Reeves](#), 362 F.3d 702, 724 (11th Cir. 2004).

¹⁰⁴ 130 S. Ct. 1983, 1990 (2010).

¹⁰⁵ [Id.](#) at 1990.

¹⁰⁶ [Id.](#) at 1988.

¹⁰⁷ [Id.](#)

¹⁰⁸ [Id.](#) at 1990 (citation omitted).

¹⁰⁹ [Id.](#)

and Breyer dissented from the majority, contending that the father's rights amounted to only visitation rights.¹¹⁰

C. PETITIONERS MUST BE EXERCISING THEIR CUSTODY RIGHTS AT THE TIME OF REMOVAL.

In addition to possessing custody rights under the laws of the country where the child habitually resides, the petitioner also must exercise those rights.¹¹¹ The determination of whether a left-behind parent has exercised custody rights is another highly fact-specific analysis in a Hague Convention case. In [Friedrich v. Friedrich \(Friedrich II\)](#),¹¹² the Sixth Circuit provided guidelines for determining whether a petitioner properly exercised custody rights. The Sixth Circuit held that courts should “liberally find ‘exercise’ [of custody rights] whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child,”¹¹³ and that “as a general rule, any attempt to maintain a somewhat regular relationship with the child should constitute ‘exercise.’”¹¹⁴ The Sixth Circuit stated that:

[I]f a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to “exercise” those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child. Once [the court] determines that the parent exercised custody rights in any manner, it should stop—completely avoiding

¹¹⁰[Id.](#) at 1997.

¹¹¹Courts have required that the petitioner demonstrate, by a preponderance of the evidence, that he or she actually was exercising custody rights at the time of removal, [Krefter v. Wills](#), 623 F. Supp. 2d 125, 135 (D. Mass. 2009), or immediately prior to the removal or retention, [Hague Convention, art. 3](#), [Nicolson v. Pappalardo](#), 674 F. Supp. 2d 295, 298 (D. Me. 2009); cf. [Olguin v. Cruz Santana](#), No. 03 CV 6299(JG), 2004 WL 1752444, at *4 (E.D.N.Y. Aug. 5, 2004) (holding that the respondent bore the burden of proving by a preponderance of the evidence her claim that petitioners were not actually exercising custody rights at the time of the removal) and [Morrison-Dietz v. Dietz](#), No. 07-1398, 2008 WL 4280030, at *6 (W.D. La. Sept. 17, 2008) (holding that “the party opposing the return has a burden of proving, by a preponderance of the evidence, that the other party was not actually exercising custody rights”) (citations omitted), [aff'd](#), 349 F. App'x 930 (5th Cir. 2009).

¹¹²78 F.3d 1060 (6th Cir. 1996).

¹¹³[Id.](#) at 1065.

¹¹⁴[Id.](#) at 1066.

the question whether the parent exercised the custody rights well or badly. These matters go to the merits of the custody dispute and are, therefore, beyond the subject matter jurisdiction of the federal courts.¹¹⁵

The [Friedrich II](#) court held that the father/petitioner exercised his *de jure* custody rights because in the short separation before the mother/respondent removed the child from Germany, the father/petitioner visited with the child and made arrangements for further visitation.¹¹⁶

Other courts have followed the reasoning of [Friedrich II](#). In [Giampaolo](#), the Eleventh Circuit found that the father/petitioner exercised his rights of custody because he picked up the child every morning to take her to school, chose the child's school, paid for some of the child's private school tuition, and saw the child the day before the mother/respondent left Argentina.

The First and Fifth Circuits also have followed the reasoning of [Friedrich II](#). In the case of [Aldinger v. Segler](#),¹¹⁷ the court held that the father/petitioner exercised his custody rights because he lived at the same address as the children and actively participated in the lives of the children by providing for their basic needs. Similarly, in the case of [Sealed Appellant v. Sealed Appellee](#),¹¹⁸ the court held that the father/petitioner exercised his custody rights because he had visited the children about five times per year and paid child support to the mother/respondent.

D. THE CHILDREN MUST BE UNDER THE AGE OF SIXTEEN.

The Hague Convention states explicitly that it “shall cease to apply when the child attains the age of 16 years.”¹¹⁹ The drafters of the Hague Convention easily could have stated—as they did for the well-settled defense in [Article 13](#)—that the Convention would not apply unless “the

¹¹⁵[Id.](#)

¹¹⁶[Id.](#) at 1066-67.

¹¹⁷263 F. Supp. 2d 284 (D.P.R. 2003).

¹¹⁸394 F.3d 338 (5th Cir. 2004).

¹¹⁹[Hague Convention, supra note 2, art. 4.](#)

commencement of proceedings” occurred before the children is sixteen. However, they did not and instead stated flatly that the Convention “shall cease to apply” once the child is sixteen. The State Department’s official commentary and legal analysis of the Convention explains that: “[t]he Convention applies only to children under the age of sixteen (16). Even if a child is under sixteen at the time of the wrongful removal or retention as well as when the Convention is invoked, the Convention ceases to apply when the child reaches sixteen.”¹²⁰ Legal commentators agree that this was the intent of the drafters of the Convention.¹²¹

Thus, once a child reaches the age of sixteen, the child cannot be returned under the Hague Convention, even if the child was less than sixteen years old at the time of wrongful removal and even if the petition was filed when the child was less than sixteen years old.¹²² Accordingly, when seeking relief under the Hague Convention, it is imperative to account not only for the child’s age at the time of filing the petition, but also for the probable length of the

¹²⁰ See [Public Notice 957, supra note 6, at 10504](#) (citation omitted).

¹²¹ See [Perez-Vera Report, supra note 7, ¶ 77](#) (noting the Convention adopted the “most restrictive” of the various options regarding age limitations, and thus “no action or decision based upon the Convention’s provisions can be taken with regard to a child after its sixteenth birthday”).

¹²² Note that while the Hague Convention cannot be used to order the return of a child who has reached the age of sixteen, other legal means can be employed. The State Department’s official commentary states that:

[Articles 18, 29, and 34](#) make clear that the Convention is a nonexclusive remedy in cases of international child abduction. [Article 18](#) provides that the Convention does not limit the power of a judicial authority to order return of a child at any time, presumably under other laws, procedures or comity, irrespective of the child’s age. [Article 29](#) permits the person who claims a breach of custody or access rights, as defined by [Articles 3 and 21](#), to bypass the Convention completely by invoking any applicable laws or procedures to secure the child’s return. Likewise, [Article 34](#) provides that the Convention shall not restrict the application of any law in the State addressed for purposes of obtaining the child’s return or for organizing visitation rights. Assuming such laws are not restricted to children under sixteen, a child sixteen or over may be returned pursuant to their provisions.

See [Public Notice 957, supra note 6, at 10504](#).

proceedings to determine if the child will turn sixteen at any point during the process.¹²³ Counsel also should plead and offer proof during the hearing that the child is less than sixteen years old.

E. IF TRUE, PROVE THAT THE PETITION WAS FILED WITHIN ONE YEAR OF WRONGFUL REMOVAL.

As noted in the introduction of [Section II](#) of this Manual, proving that a petition was filed within one year of wrongful removal technically is not part of the petitioner's *prima facie* case. However, whether the petition was filed within one year of wrongful removal or retention is critically important and must be considered when drafting a petition. If the petition is filed less than one year from the date of the wrongful removal of the child, the respondent *cannot* use the "well-settled" defense set forth in [Article 12](#) of the Hague Convention, and the child must be returned regardless of how acclimated the child has become to his or her new surroundings.¹²⁴ If the return proceedings are commenced one year or more after wrongful removal or retention, the court may still order the return of the child unless the respondent demonstrates that the child is "well-settled" in the new environment.¹²⁵

¹²³See [Mohamud v. Guuleed](#), No. 09-C-146, 2009 WL 1229986 (E.D. Wis. May 4, 2009). The petitioner in *Mohamud* advised in a cover letter accompanying her Hague petition "that the convention suggests that a decision on a petition filed thereunder be reached within six weeks of the date of filing." *Id.*, 2009 WL 1229986, at *2. The hearing on the petition was not scheduled until nine weeks later, and the court's decision stated that "the cover letter was not docketed and the court was not made aware of the need for scheduling a hearing before [the child] turned sixteen. No objection was made at the time the hearing was scheduled." *Id.* The court declined to exercise jurisdiction because the Hague Convention clearly did not apply to children sixteen or older, but the petition would have been denied anyway because the petitioner, the child's aunt, did not have formal legal custody of the child, the mother's natural rights had not been terminated, and the "mature" child's wishes to stay with her mother would have been taken into account because she was fifteen when the petition was filed. *Id.*, 2009 WL 1229986, at *4-5.

¹²⁴See [Hague Convention, supra note 2, art. 12](#).

¹²⁵*Id.* See [Falk v. Sinclair](#), 692 F. Supp. 2d 147, 164 (D. Me. 2010) (citing [Duarte v. Bardales](#), 526 F.3d 563, 569 (9th Cir. 2008) ("This one-year filing period is of particular importance under the Convention because the 'well[-]settled' affirmative defense is *only* available if the petition for return was filed more than a year from wrongful removal")).

Thus, as a practical matter, the court almost always will determine both (1) when the removal became wrongful, and (2) the date of the “commencement of the proceedings.” These critical facts must be addressed in the petition if they favor the petitioner. Otherwise, the petitioner’s counsel must be prepared to respond to a “well-settled” defense, as explained below. See [Section III.A](#).

1. Determining When Removal Or Retention Became Wrongful.

Courts generally agree that wrongful retention or removal begins when the parent without physical possession asks for the return of the child or the ability to assert parental rights, and the parent with possession of the child refuses.¹²⁶ When this happens, “the date of retention is that point when the noncustodial parent knows the custodial parent will not return the child.”¹²⁷ Note, however, that some courts do not require an explicit statement. Rather, “[w]rongful retention occurs when the noncustodial parent is on notice that the retaining parent does not intend to return with the child. This retention may occur before there is a definitive conversation between the parties about the child’s return if the noncustodial parent knew, or should have known, before the conversation that the child would not be returning.”¹²⁸ Furthermore, even where “notice of intent not to return a child” has been given, courts will consider whether there is

¹²⁶[Zuker v. Andrews](#), 2 F. Supp. 2d 134, 139 (D. Mass. 1998) (citing [Slagenweit v. Slagenweit](#), 841 F. Supp. 264, 270 (N.D. Iowa 1993)).

¹²⁷[Riley v. Gooch](#), No. 09-1019-PA, 2010 WL 373993, at *8-9 (D. Or. Jan. 29, 2010) (finding that the date of retention, when Riley clearly knew Gooch would not return the child, was the date Gooch served Riley with a petition for dissolution of marriage). See [Blanc v. Morgan](#), 721 F. Supp. 2d 749, 761-62 (W.D. Tenn. 2010) (finding the wrongful retention occurred when the mother “made explicit her intention to live with [the child] in the United States,” thereby ending “any pretense by [the] [m]other that she intended to return to France. . .”).

¹²⁸[Etienne v. Zuniga](#), No. C10-5061BHS, 2010 WL 2262341, at *9-10 (W.D. Wash. June 2, 2010) (citation omitted) (finding that circumstances such as the removing parent’s statement in July 2008 that “she was going to give the children a better life than he could give them,” the fact that the children were not back in Mexico to start school in January 2009, and that the children were still enrolled in school in Washington in January 2009 indicated the plaintiff knew or should have known before February 2009 that they were not returning to Mexico).

an agreement in place between the parents as to a trip, a visit, or temporary or permanent residency.¹²⁹ Where there is an agreement, “wrongful retention begins when the agreed date [of return] passes, not when the earlier notice of intent is given.”¹³⁰

In [*Slagenweit v. Slagenweit*](#),¹³¹ the court determined that wrongful retention occurred when the parent without physical possession first asked that the child be returned and the custodial parent refused.¹³² The court also noted that:

Since the Convention is directed principally at protection of the child, it can certainly be argued that the one year should be measured from the date the child actually starts living with the parent from whom custody is sought since it is clear that the Convention is concerned about the interest of the child who has become “settled” in his or her new environment. On the other hand, the Convention speaks about one year from the “wrongful removal or retention.” As in this case, there can be no wrongful retention when the child is residing with the parent from whom custody is sought pursuant to an agreement between the parents. The wrongful retention does not begin until the noncustodial parent . . . clearly communicates her desire to regain custody and asserts her parental right to have [the child] live with her.¹³³

As a result, the [*Slagenweit*](#) court held that the one-year period did in fact begin when the “wrongful” element of removal or retention took place (*i.e.*, at the point when the parent without physical possession was denied her agreed-upon right to have the child live with her). The court reasoned:

This reading gives effect to the literal wording of the Convention and comports with what this court believes to be the spirit of the Convention. In those cases where the child has become so settled in her new environment by mutual agreement of the parties, prior

¹²⁹[*Chechel v. Brignol*](#), No. 5:10-CV-164-OC-10GRJ, 2010 WL 2510391, at *7 (M.D. Fla. June 21, 2010).

¹³⁰[*Id.*](#)

¹³¹841 F. Supp. 264, 270 (N.D. Iowa 1993).

¹³²[*Id.*](#) Likewise, in [*Falls v. Downie*](#), the court stated that retention became wrongful when the child’s mother asked that the child be returned and the father refused. 871 F. Supp. 100, 102 (D. Mass. 1994).

¹³³841 F. Supp. at 270.

to the assertion of custodial rights, then the case should be analyzed under the question of whether a new habitual residency has been established for the child.¹³⁴

The *Slagenweit* court also noted that, in cases where a change in custody had been previously mutually agreed upon but was followed by a demand for return, “the parent demanding the return will have a difficult time showing that the voluntary change of place of residence did not also result in change of habitual residency.”¹³⁵ While the *Slagenweit* case was not determined specifically on this issue, it is instructive on when a removal takes place and when that removal becomes wrongful.¹³⁶

The decision of the court in *Zuker v. Andrews*¹³⁷ offers a more thorough analysis about when wrongful retention occurs, holding that it occurs when the parent without physical possession is on notice that the custodial parent does not intend to return with the child.¹³⁸ In *Zuker*, the court had trouble determining when wrongful retention occurred because the mother who had possession of the child gave the father mixed messages, telling him in June 1996 that she and the child would return to Argentina from the United States for a visit, but later admitting that she lied to the father about her intentions.¹³⁹ In July 1997, she told the father that she did not want to have anything to do with him and would not return to Argentina or live with him in the United States.¹⁴⁰ The husband claimed that the retention occurred at that point, because until

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See also *Cabrera v. Lozano (In re Cabrera)*, 323 F. Supp. 2d 1303, 1313 (S.D. Fla. 2004) (finding that, for purposes of determining the year period under Article 12 of the Convention, mother’s retention of child only became wrongful when child was not returned after close of school year and father realized that mother did not intend to return).

¹³⁷ 2 F. Supp. 2d 134 (D. Mass. 1998).

¹³⁸ *Id.* at 140.

¹³⁹ *Id.* at 139.

¹⁴⁰ *Id.*

then, he did not know that the mother was not going to return the child to Argentina.¹⁴¹ The court, however, held that the retention occurred in February of 1997 when the mother moved into her own apartment, because at that point, the husband knew or should have known that the mother would not return with the child.¹⁴²

2. Determining When Proceedings Were Commenced.

Proceedings commence upon “the filing of a civil petition for relief in any court which has jurisdiction in the place where the child is located at the time the petition is filed.”¹⁴³ Thus, proceedings normally will commence upon the filing of the petition for return of the child. Merely contacting a country’s Central Authority or law enforcement with a complaint does *not* constitute commencing an action for the purpose of defeating an [Article 12](#) exception,¹⁴⁴ even though [Article 8](#) states that a parent whose “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.”¹⁴⁵

3. Tolling Of The One-Year Period.

Courts have acknowledged that the “general rule is that a court shall order the return of a wrongfully-removed or retained child unless more than a year has elapsed between the date of the child’s wrongful removal or retention and the date that the proceedings were commenced and

¹⁴¹ *Id.* at 140.

¹⁴² *Id.*

¹⁴³ [42 U.S.C. § 11603\(b\)](#); see also [Antunez-Fernandes v. Connors-Fernandes](#), 259 F. Supp. 2d 800, 814, 815 (N.D. Iowa 2003) (holding that a mother “should not ultimately benefit from the effects of her own actions and the barriers [the father] faced in bringing his petition . . . [Her] actions are exactly what the Hague Convention seeks to remedy.”).

¹⁴⁴ See [Wojcik v. Wojcik](#), 959 F. Supp. 413, 418-19 (E.D. Mich. 1997) (finding that the father’s filing of a request for the return of his children with the French Central Authority did not commence proceedings).

¹⁴⁵ See [Hague Convention, supra note 2, art. 8](#).

the child has become settled in her new environment.”¹⁴⁶ Courts have expressed that the abducting parents should not benefit from their actions. Courts also do not want to reward abducting parents for concealing children. Thus, courts have held, in some circumstances, that the one-year deadline may be extended if the abducting parent conceals the child from the left-behind parent.¹⁴⁷ This concept is referred to as equitable tolling. If a petition for return is filed after a year, the petitioner often provides lengthy fact-specific narratives to explain the reasons for the delay, such as the abducting parent’s promise to return the child, difficulty in locating the abductor and child, or the left-behind parent’s lack of knowledge or ability to file a Hague Convention case for return.¹⁴⁸ In cases where a return was denied based on the well-settled defense, the court noted that the left-behind parent made little effort to file the petition within one year and no extenuating circumstances were present.¹⁴⁹

United States courts have reached a consensus allowing for equitable tolling of the one-year period required under [Article 12](#), which conforms with the State Department’s analysis on the topic:

If the alleged wrongdoer concealed the child’s whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the

¹⁴⁶[Giampaolo v. Erneta](#), 390 F. Supp. 2d 1269, 1276 (N.D. Ga. 2004) (citing [Furnes v. Reeves](#), 362 F.3d 702, 710-11 (11th Cir. 2004)).

¹⁴⁷See [Antunez-Fernandes](#), 259 F. Supp. 2d at 815 (finding that although the petition was filed more than one year after wrongful removal, “[e]stablishment of the ‘well[-]settled’ exception does not make refusal of a return order mandatory”).

¹⁴⁸[Giampaolo](#), 390 F. Supp. 2d at 1281-82 (mother told father that she was awaiting paperwork to return the child); [Koc v. Koc \(In re Koc\)](#), 181 F. Supp. 2d 136 (E.D.N.Y. 2001) (mother promised to return child, and father was denied a visa to see the child four times).

¹⁴⁹[Wojcik v. Wojcik](#), 959 F. Supp. 413, 415 (E.D. Mich. 1997) (father did not contact the French Central Authority until eight months after the wrongful retention, had not taken any other action during that time to have his children returned other than filing for divorce, and did not file a petition for return of the children until more than sixteen months after the retention); [Van Driessche v. Ohio-Esezeoboh](#), 466 F. Supp. 2d 828, 851 (S.D. Tex. 2006) (father made little effort to find the child and filed a Hague petition four years after the removal).

applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.¹⁵⁰

For example, in [Mendez Lynch v. Mendez Lynch](#),¹⁵¹ the court held that “[i]f equitable tolling does not apply to ICARA and the Hague Convention, a parent who abducts and conceals children for more than one year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available.”¹⁵²

The Eleventh Circuit was the first appellate court to analyze the question of equitable tolling under ICARA in cases where a parent wrongfully removed a child and then concealed the child’s whereabouts to prevent the other parent from filing within one year of the removal. The Eleventh Circuit addressed the issue in [Lops v. Lops](#)¹⁵³ but did not reach a final conclusion.¹⁵⁴ The Eleventh Circuit later reexamined the issue in [Furnes v. Reeves](#).¹⁵⁵ In [Furnes](#), the court clearly held that “equitable tolling may apply to ICARA petitions for the return of a child where the parent removing the child has secreted the child from the parent seeking return.”¹⁵⁶ A number of other district court cases within the Eleventh Circuit have extended the reasoning of

¹⁵⁰[Public Notice 957, supra note 6, at 10509.](#)

¹⁵¹220 F. Supp. 2d 1347 (M.D. Fla. 2002).

¹⁵²[Id.](#) at 1363.

¹⁵³140 F.3d 927 (11th Cir. 1998).

¹⁵⁴*See id.* at 946 (“[T]he district court found that it is difficult to ‘conceive of a time period arising by a federal statute that is so woodenly applied that it is not subject to some tolling, interruption, or suspension, if it is shown or demonstrated clearly enough that the action of an alleged wrongdoer concealed the existence of the very act which initiates the running of the important time period.’”).

¹⁵⁵362 F.3d 702 (11th Cir. 2004).

¹⁵⁶[Id.](#) at 723.

Lops and *Furnes*.¹⁵⁷ Courts in other jurisdictions also have demonstrated their inclination to allow equitable tolling in concealment cases.¹⁵⁸

On the other hand, at least two courts have expressed reservations about treating the one-year period in [Article 12](#) as a statute of limitations. The court in *Toren v. Toren*¹⁵⁹ categorically denied equitable tolling, albeit without using the term expressly, when it held:

The language of the Convention is unambiguous, measuring the one-year period from the “date of the wrongful . . . retention.” It might have provided that the period should be measured from the date the offended-against party learned or had notice of the wrongful retention, but it does not. That is not surprising, since the evident import of the provision is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitations does, but rather to put some limit on the uprooting of a settled child.¹⁶⁰

Meanwhile, the court in *Anderson v. Acree*¹⁶¹ delivered what ultimately might be the middle ground between the *Toren* ruling and the progeny of *Lops*. In *Anderson*, when

¹⁵⁷See *Giampaolo v. Ernetta*, 390 F. Supp. 2d 1269, 1281 (N.D. Ga. 2004) (allowing equitable tolling where abducting parent refused to inform wronged parent of precise location of child and abducting parent changed residences several times); *Cabrera v. Lozano (In re Cabrera)*, 323 F. Supp. 2d 1303, 1313 (S.D. Fla. 2004) (citing *Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004) in finding that “equitable tolling may apply to ICARA petitions for the return of the child where the parent removing the child has secreted the child from the parent seeking return”); *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1348 (S.D. Fla. 2002) (allowing equitable tolling where abducting parent failed to prove lack of concealment by a preponderance of the evidence and further stating that even if there was no concealment, left-behind parent’s inability to utilize Convention during first year because removed child was in a non-signatory country would create unjust bar); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) (allowing equitable tolling of one-year period due to abducting parent’s concealment of wrongfully children’s whereabouts and left-behind parent’s repeated attempts at voluntary resolution).

¹⁵⁸See *Belay v. Getachew*, 272 F. Supp. 2d 553, 563-64 (D. Md. 2003) (ordering return of child despite showing that child was well-settled because of concealment by abducting parent; noting that to do otherwise would create a “perverse incentive” for abducting parents to conceal wrongfully removed children for more than one year); *Gonzalez v. Nazor Lurashi*, No. Civ. 04-1276 (HL), 2004 WL 1202729, at *10 (D.P.R. May 20, 2004) (citing *Belay* in determining that perverse incentive to conceal abducted children required the flexibility allowed by equitable tolling).

¹⁵⁹26 F. Supp. 2d 240 (D. Mass. 1998).

¹⁶⁰*Id.* at 244 (internal cites omitted), *vacated on other grounds*, 191 F.3d 23 (1st Cir. 1999).

¹⁶¹250 F. Supp. 2d 872 (S.D. Ohio 2002).

considering the possibility of harm stemming from uprooting settled children, the court reasoned that:

This potential of harm to the child remains regardless of whether the petitioner has a good reason for failing to file the petition sooner, such as where the respondent has concealed the child's whereabouts. There is nothing in the language of the Hague Convention which suggests that the fact that the child is settled in his or her new environment may not be considered if the petitioning parent has a good reason for failing to file the petition within one year.¹⁶²

The synthesis of these disparate views might be best expressed in the words of the court in [Belay v. Getachew](#),¹⁶³ which concluded:

The court agrees with *Anderson* to the extent that it identifies the intentions of the drafters to allow courts to take into account the child's circumstances (after the passage of time) when deciding whether to order a return. The Court believes, however, that courts faced with the present situation, where the actions of the abductor in concealing the child may have abetted the child in forming roots in the new country, must have the flexibility to take into account those actions in determining the outcome of the case under [Article 12](#).¹⁶⁴

If the one-year deadline is read as a statute of limitations, then equitable tolling likely applies.¹⁶⁵ Further, when the taking parent has hidden the child, courts are more likely to toll or

¹⁶²[Id.](#) at 875 (cited by the [Belay](#) and [Gonzalez](#) courts as supporting the proposition that Article 12 should be flexible enough to allow courts to consider a child's settlement after the one-year period, regardless of possible equitable tolling, while *also* allowing for equitable tolling where necessary).

¹⁶³272 F. Supp. 2d 553 (D. Md. 2003).

¹⁶⁴[Belay](#), 272 F. Supp. 2d at 563.

¹⁶⁵[Ellis v. Gen. Motors Acceptance Corp.](#), 160 F.3d 703, 706 (11th Cir. 1998) (unless Congress states otherwise, equitable tolling should be read into every federal statute of limitations).

equitably estop the taking parent's use of the well-settled defense.¹⁶⁶ Additionally, some courts are lenient in determining the actual date of wrongful removal or retention.¹⁶⁷

III. THE AFFIRMATIVE DEFENSES OF ARTICLES 12, 13, AND 20

If the petitioner establishes a *prima facie* case for the return of the abducted child, the court must order the return of the child unless the respondent can rebut that *prima facie* case or establish one of the five affirmative defenses provided under the Hague Convention.¹⁶⁸ The practical effect of the petitioner's establishment of a *prima facie* case is to shift the burden of proof to the respondent to establish one of the five affirmative defenses.¹⁶⁹

The five affirmative defenses are set forth in [Articles 12](#), [13](#), and [20](#) of the Hague Convention. Each defense is described briefly in the following paragraphs and is addressed in more detail in later sections of this Manual.

The first affirmative defense, which is enumerated in [Article 12](#), is the well-settled defense.¹⁷⁰ As discussed above, if the petition is filed less than one year from the date of the wrongful removal of the child, the respondent *cannot* use the well-settled defense.¹⁷¹ The well-settled defense must be proven by a preponderance of the evidence.¹⁷²

[Article 13](#) establishes three more affirmative defenses under the Hague Convention: (1) the consent or acquiescence defense, which involves the petitioner's consent to or

¹⁶⁶ [Belay v. Getachew](#), 272 F. Supp. 2d 553, 560 (D. Md. 2003).

¹⁶⁷ [Cabrera v. Lozano \(In re Cabrera\)](#), 323 F. Supp. 2d 1303, 1313 (S.D. Fla. 2004) (child was taken in February 2001, but court held date of wrongful removal or retention was June 2003, when father lost contact with child).

¹⁶⁸ See [Steffen F. v. Severina P.](#), 966 F. Supp. 922, 925 (D. Ariz. 1997).

¹⁶⁹ *Id.*

¹⁷⁰ See [Hague Convention, supra note 2, art. 12](#).

¹⁷¹ *Id.*

¹⁷² [42 U.S.C. § 11603\(e\)\(2\)\(B\)](#).

acquiescence in the removal or retention of the child; (2) the grave risk defense, which arises when the respondent contends that returning the child would place the child at grave risk of physical or psychological harm or otherwise place the child in an intolerable situation; and (3) the mature child's objection defense, which arises when the child objects to being returned, and the court finds that the child has attained an age and degree of maturity at which it is appropriate to take the child's views into account.¹⁷³ The grave risk defense must be proven by clear and convincing evidence.¹⁷⁴ The consent or acquiescence defense and the mature child defense must be proven by a preponderance of the evidence.¹⁷⁵

[Article 20](#) of the Hague Convention establishes a fifth affirmative defense that rarely is used: the public policy defense. Like the grave risk defense, the public policy defense must be proven by clear and convincing evidence.¹⁷⁶

In addition to these acceptable defenses, respondent's counsel also may raise a "best interests of the child" defense. This is not a legitimate defense under the Hague Convention. Although it is not an acceptable defense, counsel nonetheless should be prepared for it.

The affirmative defenses specified in the Hague Convention are construed narrowly. ICARA explicitly states that "[c]hildren who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set

¹⁷³ See [Hague Convention, supra note 2, art 13](#).

¹⁷⁴ [42 U.S.C. § 11603\(e\)\(2\)\(A\)](#).

¹⁷⁵ [42 U.S.C. § 11603\(e\)\(2\)\(B\)](#).

¹⁷⁶ [42 U.S.C. § 11603\(e\)\(2\)\(A\)](#).

forth in the Convention applies.”¹⁷⁷ Courts have recognized that the exceptions to the Convention are “narrow.”¹⁷⁸

Even if one of the affirmative defenses applies, the ultimate power to return the child still remains in the discretion of the court. [Article 18](#) of the Convention states that “[t]he 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.”¹⁷⁹ In addition, the State Department has concluded that “[t]he courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies.”¹⁸⁰ Thus, even if the respondents prove an affirmative defense, the trial court may exercise its discretion and order a return “if such order would further the aims of the Hague Convention.”¹⁸¹

A. THE ARTICLE 12 WELL-SETTLED DEFENSE: THE CHILD HAS BECOME WELL-SETTLED IN THE NEW SURROUNDINGS.

The well-settled defense is an affirmative defense to the demand for return of a wrongfully-removed child and is enumerated in [Article 12](#) of the Hague Convention. The well-settled defense provides that if proceedings are commenced more than one year after wrongful removal, the child should not be returned if he or she has become settled in and is accustomed to

¹⁷⁷[42 U.S.C. § 11601\(a\)\(4\)](#).

¹⁷⁸See, e.g., [Friedrich v. Friedrich \(Friedrich II\)](#), 78 F.3d 1060, 1067 (6th Cir. 1996) (“All four of these exceptions are ‘narrow.’ They are not a basis for avoiding return of a child merely because an American court believes it can better or more quickly resolve a dispute.”) (citation omitted); [Rydder v. Rydder](#), 49 F.3d 369, 372 (8th Cir. 1995) (“We believe, however, that a court applying the Hague Convention should construe these exceptions narrowly.”); [McManus v. McManus](#), 354 F. Supp. 2d 62, 68 (D. Mass. 2005) (“‘The Convention establishes a strong presumption favoring return of a wrongfully removed child,’ and ‘[e]xceptions to the general rule of expedient return . . . are to be construed narrowly.’”) (alterations in original) (quoting [Danaipour v. McLarey](#), 286 F.3d 1, 13-14 (1st Cir. 2002)).

¹⁷⁹[Hague Convention, supra note 2, art. 18](#).

¹⁸⁰[Public Notice 957, supra note 6, at 10509](#); see also [Antunez-Fernandes v. Connors-Fernandes](#), 259 F. Supp. 2d 800, 815 (N.D. Iowa 2003); [Moreno v. Martin](#), No. 08-22432-CIV, 2008 WL 4716958, at *24 (S.D. Fla. Oct. 23, 2008); [Bocquet v. Ouzid](#), 225 F. Supp. 2d 1337, 1347 (S.D. Fla. 2002).

¹⁸¹[In re Marriage of Jeffers](#), 992 P.2d 686, 690 (Colo. Ct. App. 1999).

his or her new surroundings.¹⁸² The well-settled defense is inapplicable if proceedings were commenced within one year of the wrongful removal.¹⁸³ Respondents opposing a child's return have the burden of establishing the well-settled defense through a preponderance of the evidence.¹⁸⁴ As discussed below, even if some factors militate in favor of the well-settled defense, other factors may weigh against it, and ultimately, the court has discretion to order the return of the child notwithstanding any defense.

Neither ICARA nor the Hague Convention provides much guidance on the factors that should be used to determine whether a child is "settled in [the] new environment." The State Department's Public Notice 957 states that "nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof" for an [Article 12](#) defense.¹⁸⁵ Thus, courts will look beyond the passage of time and determine the degree to which the child is "in fact settled in or connected to the new environment so that, at least inferentially, return would be disruptive with likely harmful effects."¹⁸⁶

The court in [Koc v. Koc \(In re Koc\)](#)¹⁸⁷ compiled a list of six factors to use in determining whether a child is settled in a new environment:

- 1) the age of the child;
- 2) the stability of the child's residence in the new environment;
- 3) whether the child attends school or day care consistently;

¹⁸² [Hague Convention, supra note 2, art. 12.](#)

¹⁸³ [Id.](#)

¹⁸⁴ [42 U.S.C. § 11603\(e\)\(2\)\(B\).](#)

¹⁸⁵ [Public Notice 957, supra note 6, at 10509.](#)

¹⁸⁶ [Anderson v. Acree](#), 250 F. Supp. 2d 876, 880 (S.D. Ohio 2002) (quoting [In re Robinson](#), 983 F. Supp. 1339, 1345 (D. Colo. 1997)); see [Zuker v. Andrews](#), 2 F. Supp. 2d 134, 141 (D. Mass. 1998), [aff'd](#), 181 F.3d 81 (Table), No. 98-1622, 1999 WL 525936 (1st Cir. Apr. 9, 1999).

¹⁸⁷ 181 F. Supp. 2d 136 (E.D.N.Y. 2001).

- 4) whether the child attends church regularly;
- 5) the stability of the abducting parent's employment; and
- 6) whether the child has friends and relatives in the new area.¹⁸⁸

The *Koc* court also distinguished that a “comfortable material existence” does not mean that a child is well-settled.¹⁸⁹ The court went on to examine the mix of factors, including the child’s attendance at three schools and living in three different homes in three years, the uncertain immigration status of the child and her mother and the unstable nature of the mother’s employment history, before ultimately determining that the child was not settled.¹⁹⁰ Other courts have adopted the *Koc* factors when analyzing whether the child is well-settled. Generally, when these courts find the presence of most of the *Koc* factors, they will find the child to be settled.¹⁹¹ For example, in *In re Robinson*, the court found that children were well-settled where the children had lived in the same area for 22 months prior to commencement of the action, had active involvement with extended family in the area, were doing well in school, had made

¹⁸⁸ *Id.* at 152.

¹⁸⁹ *Id.* (citing *Lops*, 140 F.3d at 946).

¹⁹⁰ *Id.* at 154.

¹⁹¹ *Zuker v. Andrews*, 2 F. Supp. 2d at 141 (finding that four-year-old child was well-settled where the child had been enrolled in the same day care for over a year, had attended birthday parties and play dates at his home and at those of his friends, established relationships with other adults and children, and bonded with his grandmother, notwithstanding the fact that mother had changed residences once over course of 15 months); *Neng Nhia Yi Ly v. Heu*, 294 F. Supp. 2d 1062, 1066-67 (D. Minn. 2003) (finding that child was well-settled where child had spent over three years in Saint Paul continuously, child had attended only one school, child had participated in extracurricular and cultural activities, mother was studying to become nurse practitioner and had support of stepfather who had steady employment, and child had numerous relatives in area and no apparent ties to France beyond father); *Silvestri v. Oliva*, 403 F. Supp. 2d 378, 388 (D.N.J. 2005) (applying well-settled defense where the children’s immigration status was certain, home life had been stable in two-and-a-half years with only one move and same school throughout, and no allegations that mother had sought to conceal children from father); *Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 848 (S.D. Tex. 2006) (holding that child was well-settled, in part because she had lived in her current country of residence for more than two-thirds of her life).

friends, and were active participants in extracurricular activities.¹⁹² Similarly, in [Wojcik v. Wojcik](#),¹⁹³ the court held that children were well-settled where they had been in the United States for eighteen months and in their current residence for ten months, attended school or day care regularly, had friends and relatives in the new area, attended church regularly, the mother had stable employment, and the petitioning father was unable to show that the children had ties to their home country.¹⁹⁴

In addition to the [Koc](#) factors, courts also consider other factors in determining whether children are well-settled. For example, courts have found that children are well-settled where the children speak English well¹⁹⁵ or their English language skills are improving.¹⁹⁶ Courts also may consider the health of the children.¹⁹⁷

Courts are unlikely to find that the children are well-settled within the meaning of the Hague Convention in cases where the children are deemed too young to establish connections to

¹⁹²[983 F. Supp. 1339, 1346 \(D. Colo. 1997\)](#).

¹⁹³[959 F. Supp. 413 \(E.D. Mich. 1997\)](#).

¹⁹⁴*Id.* at 421 (E.D. Mich. 1997).

¹⁹⁵[Diaz Arboleda v. Arenas](#), 311 F. Supp. 2d 336, 343 (E.D.N.Y. 2004) (finding children well-settled where children spoke English well, children had been in United States over 30 consecutive months and lived in New York area the entire period, children were in second year at same school, mother had stable employment, children had many friends, children had relatives in New York but missed relatives in Colombia, and children did not miss old friends or neighbors in Colombia).

¹⁹⁶[Reyes Olguin v. Cruz Santana](#), No. 03 CV 6299(JG), 2005 WL 67094, at *8-9 (E.D.N.Y. Jan. 13, 2005) (applying well-settled defense where children were either fluent or improving in English, had lived with mother in New York for over eighteen months, went to and performed well in school, and attended church, maintained contact with relatives in nearby area).

¹⁹⁷[Mero v. Prieto](#), 557 F. Supp. 2d 357, 372 (E.D.N.Y. 2008) (holding that the child was well-settled because, in the years that she lived in the United States, the child was “healthy,” attended school and church, and “participate[d] in organized after-school activities).

the community,¹⁹⁸ where the abducting parents limit social exposure to a small group of friends and relatives,¹⁹⁹ where the immigration status of parents is uncertain,²⁰⁰ where the children's ties to their habitual residence were considerably stronger than those to the new environment,²⁰¹ or

¹⁹⁸ *David S. v. Zamira S.*, 574 N.Y.S.2d 429, 433 (N.Y. Fam. Ct. 1991) (finding that children at ages three and one and one-half were not yet involved in school or other forms of social activities which might establish that children were settled); *Lachhman v. Lachhman*, No. 08-CV-04363 (CPS), 2008 WL 5054198, at *6, *10 (E.D.N.Y. Nov. 21, 2008) (holding that child was not well-settled because child was moved to several different locations in the United States at various times and evidence did not “unequivocally demonstrate” that child had acclimated to her new location); *Lutman v. Lutman*, No. 1:10-CV-1504, 2010 WL 3398985, at *5-6 (M.D. Pa. Aug. 26, 2010) (holding that because “substantial evidence” was necessary to apply the defense and respondent’s efforts were lacking, the well-settled defense did not apply); *Blanc v. Morgan*, 721 F. Supp. 2d 749, 764-65 (W.D. Tenn. 2010) (holding that evidence was lacking with regards to whether child was involved in community activities or developed connections to community such that return to habitual residence would be unduly disruptive).

¹⁹⁹ *In re Coffield*, 644 N.E.2d 662, 666 (Ohio Ct. App. 1994) (holding that child was not well-settled where abducting father did not enroll child in school or any other activities and limited child’s exposure to prior friends and relatives, “i.e., people whom [father] could trust”).

²⁰⁰ See *Cabrera v. Lozano (In re Cabrera)*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004) (requiring child to return where mother’s immigration status and job stability were uncertain, there had been five residence changes and one school change in two-and-a-half years, and there was a lack of family support system beyond mother and aunt in United States, notwithstanding child’s fluency in English, maintenance of friends, and participation in extracurricular activities); *Giampaolo v. Ermeta*, 390 F. Supp. 2d, 1269, 1282 (N.D. Ga. 2004) (finding that child was not well-settled where mother and child were illegal immigrants and had lived in at least three different residences, child had attended three schools in two-and-a-half years, child had no ties to mother’s family, father’s family was in Argentina, and mother’s husband was convicted felon). But see *Silvestri*, 403 F. Supp. 2d at 388 (arguing that immigration status need not be weighed as importantly as in *In re Cabrera*); cf. *In re B. Del C.S.B.*, 559 F.3d 999, 1010 (9th Cir. 2009) (holding that the fact that child and her mother were not legal United States residents did not, by itself, mandate conclusion that child was not settled in United States, within meaning of Hague Convention, and thus child had to be returned to her father in Mexico for custody proceedings, absent showing that there was immediate, concrete threat of removal”). See also Catherine Norris, *Note: Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction*, 98 Calif. L. Rev. 159 (2010).

²⁰¹ See *Gonzalez v. Nazor Lurashi*, 2004 WL 1202729, at *9 (D.P.R. May 20, 2004) (finding that social ties to family and friends after twelve years in Argentina outweighed ties formed in sixteen months in Puerto Rico, that father’s lack of marriage to girlfriend and history of unstable employment created unstable home environment, and child’s actual home address was unclear); see also *Bocquet*, 225 F. Supp. 2d at 1349 (finding that child was not settled where there was a lack of evidence of child’s social activity or family ties in new environment (as opposed to family and school ties to France) and father had unstable employment and several different living addresses).

where the children have lived in multiple locations in a short span of time.²⁰² Also, regardless of whether concealment of the children leads to equitable tolling of the one-year period, there is some indication that a court may consider the stresses and instabilities inherent in such concealment in determining whether the children are well-settled.²⁰³ In [Antunez-Fernandes v. Connors-Fernandes](#),²⁰⁴ for example, the court exercised its discretion to return the children to their former habitual residence even after finding that the children were well-settled in order to prevent the abducting parent from benefiting from erecting multiple barriers to prevent the left-behind parent from recovering or further interacting with the children.²⁰⁵

Evidence that children have become well-settled also may be relevant to whether returning the children to their former residence could create a grave risk of psychological harm under [Article 13\(b\)](#). The Second Circuit has addressed this issue²⁰⁶ and provided that, while the issue of settlement could be considered in determining whether a grave risk existed under [13\(b\)](#), it could never be the sole element in making that determination.²⁰⁷ Other courts have expressed

²⁰² See [Mendez Lynch v. Mendez Lynch](#), 220 F. Supp. 2d 1347, 1363-64 (M.D. Fla. 2002) (finding the fact that children had lived in seven different locations, including a domestic violence shelter, with the longest time spent at any location being seven months, precluded determination that children were “well-settled”).

²⁰³ See [id.](#); see also [Coffield](#), 664 N.E.2d at 665-66.

²⁰⁴ 259 F. Supp. 2d 800 (N.D. Iowa 2003).

²⁰⁵ [Id.](#) at 815 (where parent “knowingly and successfully created language, cultural, distance and financial barriers” to parent’s efforts to seek return of children, court exercised its discretion to return children despite their “well-settled” status).

²⁰⁶ See [Blondin v. Dubois](#), 189 F.3d 240, 248 (2d Cir. 1999), [aff’d](#), 238 F.3d 153 (2d Cir. 2001) (court stated in dicta that it did not rule out the possibility of such a case but noted that the record at hand did not constitute such a case).

²⁰⁷ See [Blondin v. Dubois](#), 238 F.3d 153, 164 (2d Cir. 2001) (court stated that consideration of child’s settlement into his or her new environment is only one factor in an Article 13(b) analysis).

hesitation about mixing the well-settled and grave risk defenses to avoid returning the children to their former residence.²⁰⁸ See [Section III.C](#).

B. THE ARTICLE 13 CONSENT OR ACQUIESCENCE DEFENSE: PETITIONERS CONSENTED TO OR ACQUIESCED IN THE REMOVAL OR RETENTION.

Under [Article 13\(a\)](#) of the Hague Convention, the court is not bound to return a child if the respondent establishes that the petitioner consented to or subsequently acquiesced in the removal or retention. Both defenses turn on the petitioner's subjective intent, but they are distinctly different. The defense of consent relates to the petitioner's conduct *before* the child's removal or retention, whereas the defense of acquiescence relates to "whether the petitioner *subsequently* agreed to or accepted the removal or retention."²⁰⁹ The respondent must prove these defenses by a preponderance of the evidence,²¹⁰ however, even if one of these defenses is proven successfully, the court nonetheless retains discretion to order the child's return.²¹¹

Courts have expressed that such consent can be proved successfully with relatively informal statements or conduct.²¹² Because consent requires little formality, courts will look beyond the words of the consent to the nature and scope of the consent, keeping in mind any conditions or limitations imposed by the petitioner.²¹³ Conversely, the [Friedrich v. Friedrich](#)

²⁰⁸See, e.g., [Silverman v. Silverman](#), 338 F.3d 886, 901 (8th Cir. 2003) ("A removing parent 'must not be allowed to abduct a child and then – when brought to court – complain that the child has grown used to the surroundings to which they were abducted.'") (quoting [Friedrich v. Friedrich \(Friedrich II\)](#), 78 F.3d 1060, 1068 (6th Cir. 1996)); [McManus v. McManus](#), 354 F. Supp. 2d 62, 69 (D. Mass. 2005) ("A grave risk of harm is not 'established by the mere fact that removal would unsettle the children who have now settled in the United States. That is an inevitable consequence of removal.'") (quoting [Walsh v. Walsh](#), 221 F.3d 204, 220 n.14 (1st Cir. 2000)).

²⁰⁹[Baxter v. Baxter](#), 423 F.3d 363, 371 (3d Cir. 2005).

²¹⁰[42 U.S.C. § 11603\(e\)\(2\)\(B\)](#).

²¹¹[Moreno v. Martin](#), No. 08-22432-CIV, 2008 WL 4716958, at *10 (S.D. Fla. Oct. 23, 2008) (citing [Bocquet v. Ouzid](#), 225 F. Supp. 2d 1337, 1347 (S.D. Fla. 2002)).

²¹²[Nicolson v. Pappalardo](#), 605 F.3d 100, 105 (1st Cir. 2010).

²¹³[Id.](#)

[*Friedrich II*](#)²¹⁴ court held that acquiescence requires “an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time.”²¹⁵ The following are some of the most common arguments and actions that parents use in their attempts to prove or disprove the defenses of consent and acquiescence.

1. Authorization To Travel.

Often, a respondent produces a signed “Authorization to Travel” document as evidence that the petitioner gave consent for the child to change residences.²¹⁶ Courts rarely accept this as evidence that the other parent consented to the child’s removal. In [*Mendez Lynch v. Mendez Lynch*](#),²¹⁷ the court held that an Authorization to Travel, which allowed the children to travel freely, did not indicate that the other parent gave up his legal rights of custody. There, a father signed a broad Authorization to Travel that allowed the mother of the children to take the children out of Argentina.²¹⁸ The court held that the “evidence [was] clear that the written

²¹⁴78 F.3d 1060 (6th Cir. 1996).

²¹⁵[*Id.*](#) at 1070.

²¹⁶*See, e.g., Giampaolo v. Ernetta*, 390 F. Supp. 2d 1269, 1283 (N.D. Ga. 2004) (citing Argentine Civil Code, art. 264 where an Authorization to Travel agreement required both Respondent and Petitioner’s consent for child to leave Argentina). Authorization to Travel agreements are typically executed under the guise of allowing the child to travel abroad either for a family emergency or vacation. They typically state that the child can travel to another country and then return home. As such, they normally will not show that the petitioner consented to a change of the child’s residence.

²¹⁷220 F. Supp. 2d 1347, 1358-59 (M.D. Fla. 2002).

²¹⁸[*Id.*](#) at 1358.

consents to travel were given to facilitate family vacation-related travel, not as consent to unilaterally remove the children from Argentina at the sole discretion of Respondent.”²¹⁹

2. Words And Actions Of Left-Behind Parents.

Courts frequently echo the warning of the *Friedrich II* court that “[e]ach of the words and actions of a parent during the separation are not to be scrutinized for a possible waiver of custody rights.”²²⁰ Here, a third party claimed that Mr. Friedrich stated that he was not seeking custody of his child because he lacked the means to support the child.²²¹ The Sixth Circuit responded that, even if the statement was made, it is “insufficient evidence of subsequent acquiescence.”²²² Additionally, “isolated statements to third parties are not sufficient to establish consent or acquiescence.”²²³

3. Nature Of Children’s Removal.

When the abducting parent removes the child in a secretive fashion – for example, during the night, while the other parent is away, or without informing the other parent²²⁴ – a court is more likely to find that the other parent did not consent or acquiesce to the child’s removal. In

²¹⁹*Id.*; see also *Moreno v. Martin*, No. 08-22432-CIV, 2008 WL 4716958, at *11 (S.D. Fla. Oct. 23, 2008) (finding that the “Permission to Travel” signed by the father supported his claim that he did not consent to his daughter’s removal to the United States because the document says nothing about the child permanently moving or relocating); *Asvesta v. Petroutsas*, 580 F.3d 1000, 1019 (9th Cir. 2009) (holding that the father’s consent for the mother to travel with the child “directly contradict[ed]” a finding that the father consented to the child’s indefinite stay in Greece).

²²⁰78 F.3d at 1070.

²²¹*Id.* at 1069.

²²²*Id.* at 1070; see also *Asvesta*, 580 F.3d at 1019 (declining to read only excerpted statement from an e-mail that might have suggested that the father consented to his child’s removal, and instead considered the statement in the context of the entire e-mail, which suggested that he did not consent to his child’s removal).

²²³*Moreno*, 2008 WL 4716958, at *15.

²²⁴See, e.g., *Simcox v. Simcox*, 511 F.3d 594, 603 (6th Cir. 2007) (noting that the mother “left with the children at midnight after her husband had fallen asleep . . . [and had] taken his passport and identification papers to prevent his pursuit of the fleeing family, and . . . once he realized they were gone, he engaged in a ‘desperate search’ for the children”).

[Friedrich II](#), the Sixth Circuit stated that “[t]he deliberately secretive nature of [the mother’s] actions is extremely strong evidence that [the father] would not have consented to the removal of [the child].”²²⁵ One court referenced the abducting parent’s “deception,” which prevented any acquiescence by the left-behind parent.²²⁶

4. Filing Of Hague Convention Petition.

Several courts have identified the left-behind parent’s filing of a Hague Convention petition in and of itself as evidence that the parent did not consent or acquiesce to the child’s removal and retention. In [Moreno v. Martin](#),²²⁷ the Southern District of Florida specified that the father’s filing of a request for his daughter’s return was an “act inconsistent with consent.”²²⁸ Similarly, in [Tabacchi v. Harrison](#),²²⁹ the court identified the father’s pursuit of a Hague Convention petition as the “most important[.]” evidence that he had “been fighting to get his daughter back since the day she was taken from Italy,” and did not consent or acquiesce to her removal.²³⁰

5. Other Considerations.

Courts have evaluated a multitude of other considerations and arguments in determining whether a parent consented or acquiesced to the child’s removal. One court found that a father’s assent to an order (issued in the U.S. after the child’s arrival) that granted temporary parental

²²⁵78 F.3d at 1069. See also [Moreno v. Martin](#), No. 08-22432-CIV, 2008 WL 4716958, at *14 (S.D. Fla. Oct. 23, 2008) (“Rather, the secretive nature of [the abducting parent’s] departure with [the child] suggests that [the left-behind parent] did not consent.”)

²²⁶[Baran v. Beaty](#), 479 F. Supp. 2d 1257, 1269 (S.D. Ala. 2007), *aff’d*, 526 F.3d 1340 (11th Cir. 2008).

²²⁷No. 08-22432-CIV, 2008 WL 4716958 (S.D. Fla. Oct. 23, 2008).

²²⁸*Id.*, 2008 WL 4716958, at *13.

²²⁹No. 99 C 4130, 2000 WL 190576 (N.D. Ill. Feb. 10, 2000).

²³⁰*Id.* at *11; see also [Bocquet v. Ouzid](#), 225 F. Supp. 2d 1337, 1350 (S.D. Fla. 2002) (“Ms. Bocquet’s application for Noe’s return under the Hague Convention is further evidence that she did not consent to his removal.”).

rights and responsibilities to the mother did not amount to acquiescence because it was not a clear and unequivocal renunciation of parental rights by the father.²³¹ Another court held that, where the respondent had removed and concealed the child from the petitioner for an extended period of time, the petitioner's failure to exercise his parental rights over the child did not indicate that he acquiesced to the child's removal and retention, because his failure to do so was involuntary.²³²

As illustrated above, successfully establishing either defense is a difficult feat. However, in *Gonzalez-Caballero v. Mena*,²³³ the respondent successfully proved that the petitioner consented to the child's removal from Panama to the United States. There, the court reasoned that the petitioner did not object to the child becoming a United States citizen and had told the respondent that she could no longer care for the child.²³⁴ No witnesses testified that they understood the child's visit to the United States to be temporary, and the petitioner provided the respondent with all of the child's paperwork and helped obtain exit papers for the child.²³⁵

C. THE ARTICLE 13 GRAVE RISK DEFENSE: THERE IS A GRAVE RISK THAT THE CHILD WOULD BE EXPOSED TO PHYSICAL OR PSYCHOLOGICAL HARM OR AN INTOLERABLE SITUATION IF RETURNED.

Under [Article 13](#), a respondent may raise the defense that the child should not be returned due to the grave risk of either "physical or psychological harm" or the existence of an

²³¹ *Nicolson*, 605 F.3d at 108-09.

²³² *Stirzaker v. Beltran*, No. CV09-667-N-EJL, 2010 WL 1418388, at *7 (D. Idaho Apr. 6, 2010).

²³³ 251 F.3d 789 (9th Cir. 2001).

²³⁴ *Id.* at 793.

²³⁵ *Id.* (indicating that other relevant factors in the analysis included: father paid for a round-trip ticket for himself and a one-way ticket for child to come to the United States; mother testified that she regretted her decision to let father take the child; a witness testified that mother told her that she regretted turning over custody of child to the father; and father tried to help mother come to the United States).

“intolerable situation.”²³⁶ Either prong of this defense must be established by clear and convincing evidence.²³⁷ As with other exceptions, courts consider the grave risk defense to be a narrowly drawn exception.²³⁸ Indeed, at least one court has cautioned that “[t]he exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest.”²³⁹

1. Grave Risk Of Physical Or Psychological Harm.

As a preliminary matter, courts often struggle with the distinction between a “risk of harm” and a “grave risk of harm.” This requires a subjective judgment by the fact finder. The Seventh Circuit opined that “[t]he gravity of a risk involves not only the *probability* of harm, but also the *magnitude* of the harm if the probability materializes.”²⁴⁰ Thus, a court may not only consider the probability of the threat of harm, but also the nature of the possible harm to the child.

Concepts of “magnitude” and “probability” of harm are relative and abstract, but courts have provided more concrete definitions. In [Friedrich v. Friedrich \(Friedrich II\)](#),²⁴¹ the court characterized grave risk as placing the child in imminent danger before the custody dispute was resolved in the country of habitual residence or at grave risk for serious abuse, neglect or “extraordinary emotional dependence” where the country of habitual residence could provide the

²³⁶[Hague Convention, supra note 2, art. 13.](#)

²³⁷[42 U.S.C. § 11603\(e\)\(2\).](#)

²³⁸See [In re Application of Adan](#), 437 F.3d 381, 395 (3d Cir. 2006) (explaining that the defense is drawn narrowly because to do otherwise would “frustrate” the intent of the Convention); [In re D.D.](#), 440 F. Supp. 2d 1283, 1298-99 (M.D. Fla. 2006) (same).

²³⁹[Friedrich v. Friedrich \(Friedrich II\)](#), 78 F.3d 1060, 1068 (6th Cir. 1996); see also [Gaudin v. Remis](#), 415 F.3d 1028, 1035 (9th Cir. 2005) (quoting [Friedrich II](#)).

²⁴⁰[Van De Sande v. Van De Sande](#), 431 F.3d 567, 570 (7th Cir. 2005) (emphasis added).

²⁴¹78 F.3d 1060 (6th Cir. 1996).

child with adequate protection.²⁴² In [Gaudin v. Remis](#),²⁴³ the Ninth Circuit stated that an analysis of the grave risk defense “should be concerned only with the degree of harm that could occur in the immediate future.”²⁴⁴ However, in [Walsh v. Walsh](#),²⁴⁵ the First Circuit rejected the requirement that danger be imminent in order to establish the defense.²⁴⁶

The “physical or psychological harm” exception requires that the alleged harm be “a great deal more than minimal.”²⁴⁷ Courts will deny return of a child only when the child’s danger is “grave” or “severe” and not just “serious.” “The harm must be greater than what is normally expected when taking a child away from one parent and passing the child to another parent,” and normal adjustment problems are not sufficient.²⁴⁸ “[E]ven incontrovertible proof of a risk of harm will not satisfy” this defense if the “risk of harm proven lacks gravity.”²⁴⁹ In addition, the removing parent cannot complain that a child has grown used to the surroundings to which he or she was abducted and use those circumstances to deny return: “Under the logic of the Convention, it is the *abduction* that causes the pangs of subsequent return.”²⁵⁰

²⁴² [Id.](#) at 1069.

²⁴³ 415 F.3d 1028 (9th Cir. 2005).

²⁴⁴ [Id.](#) at 1037; *see also* [Sullivan v. Sullivan](#), No. CV-09-545-S-BLW, 2010 WL 227924, at *7 (D. Idaho Jan. 13, 2010) (fact that parent had engaged in prostitution did not demonstrate harm in the immediate future, in absence of other factors).

²⁴⁵ 221 F.3d 204 (1st Cir. 2000).

²⁴⁶ [Id.](#) at 218.

²⁴⁷ [In re D.D.](#), 440 F. Supp. 2d 1283, 1298 (M.D. Fla. 2006); [Gaudin](#), 415 F.3d at 1035; *see also* [Karpenko v. Leendert](#), No. 09-03207, 2010 WL 831269, at *8 (E.D. Pa. Mar. 4, 2010) (“‘Concern’ that the child would be permanently alienated from her father if returned to the Netherlands simply does not constitute clear and convincing evidence of the ‘grave risk’ standard.”).

²⁴⁸ [Id.](#)

²⁴⁹ [Laguna v. Avila](#), No. 07-CV-5136 (ENV), 2008 WL 1986253, at *8 (E.D.N.Y. May 7, 2008) (citing [Blondin v. Dubois](#), 238 F.3d 153 (2d Cir. 2001)). The court concluded that the abducting parent did not prove with clear and convincing evidence the existence of a “grave risk” if the child was returned to Colombia. [Id.](#)

²⁵⁰ [Friedrich v. Friedrich \(Friedrich II\)](#), 78 F.3d 1060, 1068 (6th Cir. 1996) (emphasis added).

The prospect of sexual abuse generally will qualify as a “grave risk” of physical or psychological harm.²⁵¹ It also will qualify as an “intolerable situation.”²⁵² With respect to other types of abuse, the result will depend on the facts of the case.

In [*Reyes Olguin v. Cruz Santana*](#),²⁵³ the court held that there was a great risk of “severe” psychological harm upon the child’s return to Mexico.²⁵⁴ Based on the testimony of a child psychologist, the court concluded that if repatriated, the child would experience “suicidal impulses generated by his prior trauma” of witnessing his father beat his mother, as well as his own experience of abuse.²⁵⁵ However, in [*McManus v. McManus*](#),²⁵⁶ the court concluded that the psychological harm to the children if returned would be “serious,” but not “grave” under [Article 13\(b\)](#), because any previous abuse to the children was sporadic.²⁵⁷ In [*In re Application of Adan*](#), the court held that a totality of circumstances test may apply in determining the credibility of child abuse allegations.²⁵⁸ In the end, even if the child may be exposed to psychological harm if repatriated, the court may nonetheless order the child’s return if the psychological harm would not be grave.

²⁵¹[*Simcox v. Simcox*](#), 511 F.3d 594 (6th Cir. 2007). *But see* [*Seaman v. Peterson*](#), 762 F. Supp. 2d 1363 (M.D. Ga. 2011) (denying grave risk defense on grounds that allegations of potential sexual abuse, including petitioner’s membership in a cult that allegedly tolerated child sexual abuse and alleged possession of child pornography by maternal family member, was too far removed to be a credible risk).

²⁵²*See infra* [Section III.C.2](#).

²⁵³No. 03 CV 6299(JG), 2005 WL 67094 (E.D.N.Y. Jan. 13, 2005).

²⁵⁴2005 WL 67094, at *7.

²⁵⁵[*Id.*](#)

²⁵⁶354 F. Supp. 2d 62, 70 (D. Mass. 2005).

²⁵⁷[*Id.*](#) at 70; *see also* [*Blanc v. Morgan*](#), 721 F. Supp. 2d 749, 766 (W.D. Tenn. 2010) (citation to one prior instance of overconsumption of alcohol was not enough to trigger grave risk defense).

²⁵⁸*See* [*In re Application of Adan*](#), 437 F.3d 381, 398 (3d Cir. 2006) (remanding case to district court because the court “explained away [child abuse allegations] in isolation” rather than examining the totality of the circumstances).

Although a clear judicial consensus has not emerged, the issue of domestic and family violence as it relates to the grave risk defense has been raised repeatedly in recent years. There are not yet any specific comprehensive statistics on how often respondents are fleeing domestic violence or raising allegations of domestic violence,²⁵⁹ but statistics indicate that the incidence of successful grave risk defenses has increased globally²⁶⁰ and in the United States.²⁶¹ Scholars and advocates have highlighted the difference between the stereotypical abductor envisioned by the drafters of the Hague Convention and the reality that abductors are most commonly women who act as primary caretakers for the children.²⁶² In alleging grave risk to the children, litigants are increasingly raising the issue of domestic abuse,²⁶³ in addition to emphasizing the decades of

²⁵⁹See Hague Permanent Bureau, Domestic and Family Violence and the [Article 13](#) “Grave Risk” Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper (May 2011), page 4, <http://www.hcch.net/upload/wop/abduct2011pd09e.pdf>.

²⁶⁰See 2011 Hague Global Statistical Analysis, page 30, <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf> (studying year 2008 and noting that the [Article 13\(b\)](#) defense has remained, globally, the most common reason for courts to refuse a return).

²⁶¹2011 Hague Statistical Analysis National Reports, page 205, <http://www.hcch.net/upload/wop/abduct2011pd08c.pdf> (indicating that U.S. courts have higher than average judicial return rates and fall below the global average in applying the grave risk defense as a basis for refusing a return).

²⁶²Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593 (2000), *but see* 2011 Hague Statistical Analysis National Reports, *supra* note 251, p. 199 (indicating that for incoming cases to the United States the percentage of abducting mothers has decreased from 67% in 1999, to 64% in 2003, to 59% in 2008, and overall remains less pronounced than the global average).

²⁶³See *Charalambous v. Charalambous*, 627 F.3d 462, 468-69 (1st Cir. 2010) (respondent waived other factual claims to her grave risk defense on appeal and focused solely on the spousal abuse she suffered and was likely to face in the future).

scholarship addressing the harmful effects of domestic violence on children in the home.²⁶⁴ Counsel on both sides of a case must be prepared to address this issue when litigating a Hague Convention case.

In assessing grave risk, some courts examine whether the country of habitual residence has the means to protect the child from potential abuse.²⁶⁵ However, in 2008, the Eleventh Circuit concluded that neither the Hague Convention, ICARA nor the Perez-Vera Report require a court to review evidence of whether the habitual residence can protect at-risk children.²⁶⁶ The court noted that such an analysis requires evidence of the habitual residence's "legal and social service systems" which can lead to "difficult problems of proof" since the respondent left the habitual residence.²⁶⁷ Consequently, the Eleventh Circuit declined to "impose on a responding parent a duty to prove that her child's country of habitual residence is unable or unwilling to ameliorate the grave risk of harm which would otherwise accompany the child's return."²⁶⁸

²⁶⁴ See Hague Permanent Bureau, *supra* note 249, at 3 notes 4-5 (citing Miranda Kaye, *The Hague Convention and the Flight From Domestic Violence: How Women and Children are Being Returned By Coach and Four*, 13 INT'L J. L. POL'Y FAM. 191 (1999); Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000-2001); Jeanine Lewis, Comment, *The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity*, 13 TRANSNAT'L LAW. 391(2000); Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Cases*, 38 FAM. L.Q. 529 (2004-2005); Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, 11 VIOLENCE AGAINST WOMEN 115 (2005); Jeffrey L. Edleson et al., *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the United States for Safety: A Study of Hague Convention Cases* (Nat'l Inst. for Just., Working Paper No. #2006-WG-BX-0006, 2010), available at <http://www.haguedv.org/reports/finalreport.pdf> (last visited May 2011)).

²⁶⁵ *Walsh*, 221 F.3d at 221-22.

²⁶⁶ *Baran v. Beaty*, 526 F.3d 1340, 1347-48 (11th Cir. 2008) (affirming district court's decision not to return child due to a grave risk of harm).

²⁶⁷ *Id.* at 1348.

²⁶⁸ *Id.*

2. Intolerable Situations.

In addition to providing a defense where grave risk of harm is shown, [Article 13](#) provides a defense where it is shown that return would place the child in an “intolerable situation.” Courts give greater scrutiny to cases where an “intolerable situation” may exist. An “intolerable situation” requires “more than a cursory evaluation of [the home country’s] civil stability.”²⁶⁹ The court should conduct a robust evaluation of the people and circumstances awaiting the child in the country of habitual residence.²⁷⁰ For instance, an “intolerable situation” does not “encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State.”²⁷¹ Using this approach, the Middle District of Florida reasoned that, even though there was great economic and governmental turmoil in the home country of Argentina, the home country would be tolerable because:

there were no demonstrations in the streets near [the petitioner’s home] . . . or closed schools due to strikes. . . . [T]his alone or in combination with the other credible evidence in this case does not come within the grave risk exception.²⁷²

Other courts have established a bright line example of an “intolerable situation” as one in which the custodial parent sexually abuses the child and the other parent removes the child as a safeguard against further abuse.²⁷³ In those instances, repatriation to the abusing parent would constitute return to an “intolerable situation.” If there is serious abuse or neglect, a court must

²⁶⁹ [Mendez Lynch v. Mendez Lynch](#), 220 F. Supp. 2d 1347, 1364 (M.D. Fla. 2002).

²⁷⁰ See [In re D.D.](#), 440 F. Supp. 2d 1283, 1299 (M.D. Fla. 2006) (evaluating not only the country involved but also the children’s expected caregivers).

²⁷¹ [Friedrich v. Friedrich \(Friedrich II\)](#), 78 F.3d 1060, 1068-69 (6th Cir. 1996).

²⁷² [Mendez Lynch](#), 220 F. Supp. 2d at 1365-66.

²⁷³ See, e.g., [In re Application of Adan](#), 437 F.3d 381, 395 (3d Cir. 2006); [Friedrich II](#), 78 F.3d at 1069; see also [Simcox v. Simcox](#), 511 F.3d at 607-08 (stating that credible evidence of sexual abuse will qualify as “grave risk”).

consider whether the “court[s] in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.”²⁷⁴

3. Undertakings.

Courts citing potential psychological harm to the child upon return often rely on child psychologists as well as guardians *ad litem*.²⁷⁵ See also [Section IV.A.2.iii](#). The courts will weigh the testimony of these individuals to determine the severity of the harm to the child and whether any measures can be taken to mitigate the risk of psychological or physical harm to the child.²⁷⁶ If the court determines that ameliorative measures (commonly referred to as “undertakings”) can be taken that will allow the child to return safely to the home country, the court will order the child’s repatriation to their home country.²⁷⁷ Whether undertakings can be implemented requires a realistic inquiry into the abilities of the court in the country to which the child is returned.

In [Simcox v. Simcox](#),²⁷⁸ the Sixth Circuit has outlined three “broad categories [of] cases” and the role of undertakings in analyzing the grave risk defense.²⁷⁹ First, there are “cases in

²⁷⁴[In re Application of Adan](#), 437 F.3d at 395 (alteration in original).

²⁷⁵See [Reyes Olguin v. Cruz Santana](#), No. 03 CV 6299(JG), 2005 WL 67094, at *1 (E.D.N.Y. Jan. 13, 2005) (court appointed a guardian *ad litem* to advise the court of any potential psychological harm).

²⁷⁶[Id.](#) at *7; see [Van De Sande v. Van De Sande](#), 431 F.3d 567, 572 (7th Cir. 2005) (remanding decision to district court to determine whether any conditions could be applied to protect the children if ordered to return to their home country); [In re Tsarbopoulos](#), 243 F.3d 550 (Table), No. 00-35393, 2000 WL 1721800, at *2 (9th Cir. Nov. 17, 2000) (remanding the decision to district court to determine whether respondent can prove a “grave risk” defense and whether district court could impose “appropriate protective measures as a condition of the children[‘s] return”).

²⁷⁷[Reyes Olguin](#), 2005 WL 67094, at *7. Some courts do not consider such a determination to be dispositive in cases of child abuse. See [Van De Sande](#), 431 F.3d at 572 (“[I]n cases of child abuse the balance may shift against [undertakings] . . . it would seem less appropriate for the court to enter extensive undertakings than to deny the return request.”).

²⁷⁸511 F.3d 594 (6th Cir. 2007).

²⁷⁹[Id.](#) at 607-08.

which the abuse is relatively minor.”²⁸⁰ In such cases, a grave risk of harm is unlikely, and undertakings will be “largely irrelevant.”²⁸¹ Second, in cases where there is evidence of a “clearly grave” risk of harm, undertakings likely will be insufficient.²⁸² Finally, there are cases that “fall somewhere in the middle,” where the abuse is “substantially more than minor, but is less obviously intolerable.”²⁸³ These cases will involve a fact-intensive inquiry with a focus on (a) “the nature and frequency of the abuse,” (b) “the likelihood of its recurrence,” and (c) “whether there are any enforceable undertakings that would sufficiently ameliorate the risk of harm to the child[ren] caused by [their] return.”²⁸⁴ The court should satisfy itself that the parties are likely to obey the undertakings.²⁸⁵

Some of examples of the first category include [McManus v. McManus](#),²⁸⁶ where the court held that two incidents of a mother hitting her children and a generally chaotic home

²⁸⁰ [Id.](#)

²⁸¹ [Id.](#) at 607.

²⁸² [Id.](#)

²⁸³ [Id.](#) at 608.

²⁸⁴ [Id.](#)

²⁸⁵ Case law suggests that a court can order undertakings to protect the child’s return without a proven grave risk defense under [Article 13](#). In [Kufner v. Kufner](#), 519 F.3d 33, 40 (1st Cir. 2008), the First Circuit affirmed the district court’s granting of the father’s petition to return the children to Germany and the lower court’s conclusion that the mother did not prove the children would experience a grave risk of harm if returned. However, the First Circuit further affirmed the district court’s undertakings “even in the absence of a grave risk of harm,” including the ordering of the father to dismiss the German criminal charges against the mother, to obtain medical care for one of the children and to allow the mother access and visitation until a German court ordered otherwise. A mother in [Krefter v. Wills](#), 623 F. Supp. 2d 125, 137 (D. Mass. 2009), was unable to prove a grave risk of harm to her child; however, the court ordered the father to pay for the airplane tickets to Germany for the child and mother; provide the mother three months of child support for the child; and procure “suitable housing” for the mother and child in Germany. [Id.](#) The court explained that after these undertakings were satisfied by the father, the mother must return to Germany with the child. [Id.](#) The court further ordered both parents to “use reasonable efforts to schedule court proceedings” in Germany to “require minimal disruption” to the child’s schooling. [Id.](#)

²⁸⁶ 354 F. Supp. 2d 62 (D. Mass. 2005).

environment were not enough to satisfy the grave risk defense.²⁸⁷ In *Whallon v. Lynn*,²⁸⁸ a shoving incident and verbal abuse were not enough.²⁸⁹ In *In re D.D.*,²⁹⁰ evidence of verbal abuse was insufficient to trigger the defense.²⁹¹

On the opposite end of the spectrum are cases where the abuse is so severe as to make undertakings insufficient. *Blondin v. Dubois*²⁹² is an example of such a case. There, the court faced uncontroverted testimony that the child, if returned to France, would most certainly suffer a recurrence of post-traumatic stress disorder caused by their father's abusive treatment of them while in France.²⁹³ The Second Circuit determined that no undertakings could ameliorate the danger to the children and thus affirmed the district court's finding of the intolerable situation defense.²⁹⁴ In *Danaipour v. McLarey*,²⁹⁵ the First Circuit affirmed the district court's finding that the mere return of the child to the father's country, where he had sexually abused the child, would cause grave harm and held that the district court was not required to explore the availability of ameliorative actions in that country to protect the child.²⁹⁶ The court found that proposed undertakings would protect the child for only a very limited time and thus were not sufficient to defeat the grave risk defense.²⁹⁷

²⁸⁷ *Id.* at 69.

²⁸⁸ 230 F.3d 450 (1st Cir. 2000).

²⁸⁹ *Id.* at 460.

²⁹⁰ 440 F. Supp. 2d 1283 (M.D. Fla. 2006).

²⁹¹ *Id.* at 1299.

²⁹² 238 F.3d 153 (2d Cir. 2001).

²⁹³ *Id.* at 161- 63.

²⁹⁴ *Id.*

²⁹⁵ 386 F.3d 289 (1st Cir. 2004).

²⁹⁶ *Id.* at 301-03.

²⁹⁷ *Id.* at 303.

The [Simcox](#) case itself is an example of the third category. The court found the abuse to be serious in nature, both physically and psychologically. The incidents were not “isolated or sporadic,” but happened with “extreme frequency.” Additionally, there was a “reasonable likelihood” that the abuse would happen again without sufficient protection. The court found undertakings to be relevant, but found that the undertakings fashioned by the district court were “unworkable.”²⁹⁸

Even in “middle cases,” in order to find that the undertakings are sufficient to overcome the grave risk defense, courts often will assess the potential effectiveness of the undertakings. Not all courts assume that a country’s laws will be sufficient to protect the child.²⁹⁹ In [Walsh v. Walsh](#),³⁰⁰ the First Circuit suggested that the undertakings approach enables the court to explore the options available in the country of habitual residence in order to ensure sufficient guarantees of performance of the undertakings. In that case, however, the Court found that the left-behind father’s past acts and violation of court orders provided the Court “every reason to believe” that he would violate the undertakings as well, and thus allowed the 13(b) grave risk defense and refused to return the child.³⁰¹ In [Simcox v. Simcox](#),³⁰² the court observed that a court may find undertakings insufficient where they are difficult to enforce.³⁰³

If confronted with a grave risk defense, the petitioner should assemble as much information as possible about the foreign country’s child protective services and other

²⁹⁸ [Simcox v. Simcox](#), 511 F.3d 594, 609-10 (6th Cir. 2007).

²⁹⁹ [Van De Sande v. Van De Sande](#), 431 F.3d 567, 572 (7th Cir. 2005) (rejecting the [Friedrich II](#) assumption that the views of the abducted-from country would protect the children in such a situation). Cf. [Friedrich v. Friedrich \(Friedrich II\)](#), 78 F.3d 1060, 1069 (6th Cir. 1996) (assuming in dicta that a receiving country’s courts would be capable of protecting the returning children).

³⁰⁰ 221 F.3d 204, 221 (1st Cir. 2001).

³⁰¹ [Id.](#)

³⁰² 511 F.3d 594 (6th Cir. 2007).

³⁰³ [Id.](#) at 610.

organizations that could assist the taking parent's and child's safe return to the country. The petitioner should be prepared to present proposed undertakings to the court, especially if the respondent submits credible evidence of grave risk of harm to the child. Finally, a petitioner also should be prepared to present information about the enforceability of the undertakings.

D. THE ARTICLE 13 MATURE CHILD OBJECTION TO REMOVAL DEFENSE.

[Article 13](#) of the Hague Convention specifically provides that the court may 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.”³⁰⁴ The Convention does not specify what it considers to be an appropriate age. Therefore, some courts have determined that the child's objection will be considered regardless of age:

The Convention did not establish a specific age that must be reached before a court could find that the child's objection was sufficient in and of itself to decline repatriation. Even if a child is not old enough so that his objection could be dispositive, a court may consider his testimony as part of the broader analysis under Article 13(b).³⁰⁵

Because the inquiry concerning the mature child objection is “fact-intensive” and “idiosyncratic,” decisions applying this exception are “understandably disparate.”³⁰⁶ In [Diaz Arboleda v. Arenas](#),³⁰⁷ the court held that twelve- and fourteen-year-old children sufficiently objected to return where they expressed preference for staying with their mother and believed they would have better opportunities in the United States.³⁰⁸ In [Man v. Cummings](#),³⁰⁹ after an in-

³⁰⁴[Hague Convention, supra note 2, art. 13.](#)

³⁰⁵[Reyes Olguin v. Cruz Santana](#), No. 03 CV 6299(JG), 2005 WL 67094, at *8 n.19 (E.D.N.Y. Jan. 13, 2005).

³⁰⁶[de Silva v. Pitts](#), 481 F.3d 1279, 1287 (10th Cir. 2007); *see also* [Laguna v. Avila](#), No. 07-CV-5136, 2008 WL 1986253, at *9 (E.D.N.Y. May 7, 2008) (the “child's maturity is a question for the district court to be determined upon the specific facts of each case”).

³⁰⁷311 F. Supp. 2d 336 (E.D.N.Y. 2004).

³⁰⁸[Id.](#) at 336.

camera interview, the court honored the wishes of a thirteen-year-old girl to remain with her mother in the United States.³¹⁰ In [de Silva v. Pitts](#),³¹¹ the Tenth Circuit affirmed a district court's decision that a thirteen-year-old had satisfied the objection defense when the child stated that he had made friends in the United States, described his house as "really big" and "a great place" where he has a computer and everything he needs for school, and indicated that he thought the school was better here.³¹² Conversely, in [Simcox v. Simcox](#),³¹³ the Sixth Circuit stated that "simply because other eight-year[-]olds have been found to be sufficiently mature does not mean that the district court erred in not finding the same with regard to [the child]."³¹⁴ Similarly, in [Dietz v. Dietz](#),³¹⁵ the Fifth Circuit found that the district court did not err in holding that children aged nine and thirteen had not attained the age and degree of maturity at which it was appropriate to take account of their view in deciding whether to return them to Mexico.³¹⁶

These decisions demonstrate that there is no hard-and-fast rule regarding the age at which it is appropriate for a court to take into account a child's views. For example, although the [Simcox](#) court refused to deny return of an objecting eight-year-old, at least one court has denied a petition for return where five- and eight-year-old children objected to being returned.³¹⁷ On the

³⁰⁹No. CV 08-15-PA, 2008 WL 803005 (D. Or. Mar. 21, 2008).

³¹⁰[Id.](#), 2008 WL 803005, at *2.

³¹¹481 F.3d 1279 (10th Cir. 2007).

³¹²[Id.](#) at 1287.

³¹³511 F.3d 594 (6th Cir. 2007).

³¹⁴[Id.](#) at 604.

³¹⁵349 Fed. App'x 930 (5th Cir. 2009).

³¹⁶[Id.](#) at 1.

³¹⁷[Reyes Olguin v. Cruz Santana](#), No. 03 CV 6299(JG), 2005 WL 67094, at *10 (E.D.N.Y. Jan. 13, 2005).

other hand, at least one court has ordered return of a fifteen-year-old child, despite the child's "expressed preference to remain in the United States."³¹⁸

It is important to note that the mature child objection defense requires a different evidentiary standard than the grave risk defense and therefore must be raised separately.³¹⁹ The mature child objection defense must be proven only by a preponderance of the evidence, and not by clear and convincing evidence.³²⁰ The *McManus* court recognized that:

Congress has added to the Convention's endorsement of the exception the codicil that the factual predicate for finding that a mature objection has been made need only be established by the customary civil action standard of a preponderance of the evidence. In contrast to . . . the prospect of a "grave risk" of physical or psychological harm to the child if returned, establishing the "objection" exception to return is not subject to a stringent burden of proof, and thus a court may more readily find a valid objection than it could find the existence of a grave risk. This difference in stringency of examination is expressly mandated by ICARA, 42 U.S.C. § 11603(e)(2).³²¹

Nevertheless, the defense is "meant to be narrow."³²²

In *McManus*, the court held that the respondent's retention of the children was wrongful under the Convention. However, the court denied the petition to return the four children to

³¹⁸ *Casimiro v. Chavez*, No. Civ.A.1:06CV1889-ODE, 2006 WL 2938713, at *6 (N.D. Ga. Oct. 13, 2006).

³¹⁹ See *Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001) ("We agree with the government that the unnumbered provision of Article 13 provides a *separate* ground for repatriation and that, under this provision, a court may refuse repatriation *solely* on the basis of a considered objection to returning by a sufficiently mature child.").

³²⁰ [42 U.S.C. § 11603\(e\)\(2\)](#) provides:

(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.

³²¹ *McManus v. McManus*, 354 F. Supp. 2d 62, 72 (D. Mass. 2005).

³²² *Laguna v. Avila*, No. 07-CV-5136, 2008 WL 1986253, at *9 (E.D.N.Y. May 7, 2008).

Northern Ireland because the fourteen-year-old twins objected to their return.³²³ The court relied heavily on the advice of the guardian *ad litem*, a clinical psychologist.³²⁴ The psychologist, among other things, testified that the children were emotionally and cognitively mature, a factor the court seemed to weigh heavily when determining the children’s ability to object coherently to their return.³²⁵

Because this defense involves the child’s testimony, there often is an issue of whether this testimony is the product of undue influence by the abducting parents.³²⁶ A court may not afford much weight to the child’s objection if the court considers the testimony to be tainted or unduly influenced.³²⁷ Because there is a tendency for a child to be influenced by the preferences of the parent with whom he or she lives, courts “caution[] that an abducting parent should not be rewarded, in effect, for wrongfully retaining the child for an extensive period of time.”³²⁸ In [Robinson v. Robinson](#),³²⁹ the court held that a ten-year-old child’s objection was the “product of the abductor parent’s undue influence,” and therefore was not dispositive.³³⁰

³²³The court also denied the return of the younger children in the family based on the guardian *ad litem*’s opinion that they would be impacted negatively if they were returned without their older siblings. [McManus](#), 354 F. Supp. 2d at 71-72.

³²⁴[Id.](#) at 71-73.

³²⁵[Id.](#)

³²⁶[Laguna](#), 2008 WL 1986253, at *10; [Tsai-Yi Yang v. Fu-Chiang Tsui](#), 499 F.3d 259, 279 (3d Cir. 2007).

³²⁷See [Giampaolo v. Ernetta](#), 390 F. Supp. 2d 1269, 1285 (N.D. Ga. 2004) (concluding that child’s objection was not determinative because child “appear[ed] to have internalized Respondent’s views about the possibility of being returned to Argentina and being around Petitioner”).

³²⁸[Laguna](#), 2008 WL 1986253, at *10 (citing [Giampaolo](#), 390 F. Supp. 2d 1269). In [Giampaolo](#), the court ordered the return of the child where the child lived exclusively with the respondent in the United States for over two years. 390 F. Supp. 2d at 1285.

³²⁹983 F. Supp. 1339 (D. Colo. 1997).

³³⁰[Id.](#) at 1343-44.

Courts also may find that other considerations will overcome the mature child's preferences. In [Casimiro v. Chavez](#),³³¹ the court found the uncertain immigration status of the child "troubling" and noted that "[o]ther courts have cited illegal or uncertain immigration status among their reasons for refusing to recognize an exception under the Hague Convention or for sending a child back to her state of habitual residence despite her preference to remain in the United States."³³²

E. THE ARTICLE 20 PUBLIC POLICY DEFENSE: RETURNING THE CHILD WOULD VIOLATE PUBLIC POLICY.

[Article 20](#) of the Hague Convention allows a court to refuse to return a child "if doing so would violate fundamental principles relating to the protection of human rights and fundamental freedoms."³³³ An [Article 20](#) defense must be proven by clear and convincing evidence.³³⁴

[Article 20](#) is almost never invoked. [Hazbun Escaf v. Rodriquez](#)³³⁵ is one of the only reported decisions in which a court conducted an analysis of [Article 20](#). That court noted that [Article 20](#) was meant to be "restrictively interpreted and applied . . . on the rare occasion that return of a child would utterly shock the conscience of the Court or offend all notions of due process":

The parties have not cited, nor has the Court found, any authority applying the Article 20 exception to return based on "fundamental principles of the [United States] relating to the protection of human rights and fundamental freedoms." This seldom cited and somewhat obscure provision was adopted as a compromise between those countries that wanted a public policy exception in the Convention and those that did not. It was meant to be "restrictively interpreted and applied . . . on the rare occasion that

³³¹No. Civ.A.1:06CV1889-ODE, 2006 WL 2938713 (N.D. Ga. Oct. 13, 2006).

³³²*Id.*, 2006 WL 2938713, at *6.

³³³[Hague Convention, supra note 2, art. 20.](#)

³³⁴[42 U.S.C. § 11603\(e\)\(2\)\(A\).](#)

³³⁵200 F. Supp. 2d 603 (E.D. Va. 2002), *aff'd*, 52 F. App'x 207 (4th Cir. 2002).

return of a child would utterly shock the conscience of the court or offend all notions of due process.”³³⁶

The [Article 20](#) defense must be proven by clear and convincing evidence and never has been invoked successfully in the United States; it has been invoked successfully in only a handful of cases internationally where the constitutionality of the Convention itself was challenged.³³⁷ One commentator has noted that [Article 20](#) has “nearly faded without a trace,”³³⁸ apparently because [Article 20](#) and [Article 13\(b\)](#) appear to be redundant in that, if returning the child would violate fundamental United States principles related to human rights, returning the children also would place them in an intolerable situation.³³⁹

F. THE OFTEN-USED BUT INVALID DEFENSE: BEST INTERESTS OF THE CHILD.

As discussed previously, an action under the Hague Convention is purely jurisdictional. [Article 19](#) of the Convention states that “[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.” The implementing statute, ICARA, mirrors this: “[t]he Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.”³⁴⁰

Despite the clear purpose of the Hague Convention, counsel may approach the defense of a client as if the case were a “typical” custody dispute, in part due to lack of familiarity with the Hague Convention and in part because traditional custody arguments may be beneficial to their

³³⁶ *Id.* at 614 (quoting [Public Notice 957, supra note 6, at 10510](#)); see also [Aldinger v. Segler](#), 263 F. Supp. 2d 284, 290 (D.P.R. 2003) (rejecting the [Article 20](#) defense and noting that [Article 20](#) is to be “restrictively interpreted and applied”).

³³⁷ *Id.* at 614 n.36.

³³⁸ *Id.* at n.37.

³³⁹ *Id.*

³⁴⁰ [42 U.S.C. § 11601\(b\)\(4\)](#).

client's positions. In the United States, the "best interests of the child" is the fundamental principle courts apply when determining custody of children. The respondent likely will advance arguments that advocate the child's best interests, particularly if the hearing is in state court. A petitioner also may make implicit best interests arguments by presenting evidence of the abducting parent's bad actions. It is paramount to preserve objections regarding a best interests defense because a best interests defense is not permitted by the Hague Convention.

In Public Notice 957,³⁴¹ the State Department made clear its view that the best interests of the child, beyond the narrow provisions of the Convention's affirmative defenses, are not to influence a court's determination of whether a child should be returned to his or her country of habitual residence. The State Department reasoned that "[t]he Convention is premised upon the notion that the child should be promptly restored to his or her country of habitual residence so that a court there can examine the merits of the custody dispute and award custody in the child's best interests."³⁴²

The State Department also addressed the "best interests" argument when examining [Article 13\(b\)](#)'s "grave risk of harm/intolerable situation" affirmative defense to a return action.

The State Department found that:

This provision was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests. Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious.³⁴³

³⁴¹ [Public Notice 957](#), *supra* note 6.

³⁴² *Id.* at 10505.

³⁴³ *Id.* at 10510.

When apprised of the purpose and goals of the Hague Convention, most courts will follow closely, with the understanding that “[i]n determining whether an affirmative defense applies, the Court must resist the temptation to engage in a custody determination under the traditional ‘best interests’ test.”³⁴⁴ The Sixth Circuit stated that courts applying the Convention have “jurisdiction to decide the merits of an abduction claim, but not the merits of the underlying custody dispute,”³⁴⁵ and further noted that “the Hague Convention is generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court.”³⁴⁶ United States courts also have held that “it is not relevant . . . who is the better parent in the long run, or whether the absconding parent had good reason to leave[.]”³⁴⁷

However, while courts reject broad “best interests” analyses as a means of avoiding returns under the Hague Convention, they recognize that certain affirmative defenses – as provided by the Convention – may well overlap with the child’s best interests. Consider the following excerpt from the district court’s opinion in [*McManus v. McManus*](#):³⁴⁸

It may be objected that this is simply a “best interests of the child” analysis masquerading as a “mature child’s objection” analysis. The answer to that objection is that while the former is forbidden in proceedings under the Convention, the latter is invited. The Convention clearly contemplates that the objections of a mature child should be taken account of and can be relied on to override the return that would otherwise be mandated. Obviously, there may be some overlap between the two inquiries. One can easily appreciate that giving effect to the mature objection may in any given case also be thought to be in the child’s best interest. But that coincidence surely should not defeat application of the [Article 13](#) “objection” exception. It would be absurd to conclude that the

³⁴⁴ [*Elyashiv v. Elyashiv*](#), 353 F. Supp. 2d 394, 403 (E.D.N.Y. 2005) (citations omitted).

³⁴⁵ [*Friedrich v. Friedrich \(Friedrich II\)*](#), 78 F.3d 1060, 1063 (6th Cir. 1996).

³⁴⁶ [*Id.*](#) at 1064.

³⁴⁷ [*Elyashiv*](#), 353 F. Supp. 2d at 403 (citations and quotations omitted).

³⁴⁸ 354 F. Supp. 2d 62 (D. Mass. 2005).

child's mature objection should be honored *unless* it is in the child's best interest.³⁴⁹

However, keep in mind that these two defenses are analytically distinct: The mature child's objection is a legitimate defense enumerated under the Hague Convention, whereas the best interests of the child defense should not be considered by the court.

IV. PROCEDURAL ISSUES

A. PROCEDURES FOR FILING AND LITIGATING A HAGUE CONVENTION RETURN CASE.

1. Choice Of Court - Whether To File In Federal Or State Court.

The procedures that apply to a Hague Convention case are determined by the choice between federal or state court.³⁵⁰ Of course, the Federal Rules of Civil Procedure apply to cases filed in federal court. For cases filed in state court, state procedural rules will apply. Counsel also must be familiar with the local rules applicable to the particular court in which the Hague Convention case will be filed.

Many practitioners recommend that Hague Convention return cases be filed in federal district court, not state court, for the simple reason that a Hague Convention return case is not supposed to focus on the best interests of the child but on the proper forum in which such a

³⁴⁹*Id.* at 72.

³⁵⁰See [42 U.S.C. § 11603\(a\)](#) ("The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention."); *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005) (explaining that "[t]he Hague Convention proceedings can in fact be held in either state or federal court. ICARA vests concurrent jurisdiction over Hague Convention Petitions in both court systems. [42 U.S.C. § 11603\(a\)](#). Thus, a state court custody proceeding can include consideration of a Hague Convention Petition. But the petitioner is free to choose between state or federal court.").

decision should be made.³⁵¹ Federal judges are considered by many to be better equipped to analyze that issue, as opposed to state court judges, who are accustomed to making best interests of the child determinations and who may be more inclined to do so in Hague Convention cases.³⁵² Accordingly, the discussion below focuses primarily on federal procedure.

For a comprehensive review of the procedures that apply in federal court in a Hague Convention case, review the orders entered in [Robles Antonio v. Barrios Bello](#),³⁵³ a case litigated in the Northern District of Georgia and the Eleventh Circuit Court of Appeals. These orders, attached as Exhibit G, detail each important procedural step in a Hague Convention case, from

³⁵¹See, e.g., [Asvesta v. Petroutsas](#), 580 F.3d 1000, 1015 (9th Cir. 2009) (holding that “the Convention is clear that a court considering a Hague petition should not consider matters relevant to the merits of the underlying custody dispute such as the best interests of the child, as these considerations are reserved for the courts of the child’s habitual residence”); [Kufner v. Kufner](#), 519 F.3d 33, 40 (1st Cir. 2008) (stating, in dicta, that “the best interests of the child standard applies in custody matters and, as we previously noted, custody is not the issue in a Hague Convention case”); [Simcox v. Simcox](#), 511 F.3d 594, 607 (6th Cir. 2007) (ruling that “an inquiry that focuses on too lengthy a period of time runs the risk of turning into a ‘child’s best interests’ analysis, which is not the proper standard under the Convention”); [Yang v. Tsui](#), 416 F.3d 199, 203 (3d Cir. 2005) (clarifying that “[c]ustody litigation in state court revolves around findings regarding the best interest of the child, relying on the domestic relations law of the state court. An adjudication of a Hague Convention Petition focuses on findings of where the child was habitually located and whether one parent wrongfully removed or retained the child.”).

³⁵²Other considerations may lead to the opposite choice of court, and the practitioner should take into account all relevant factors (e.g., client’s needs, docketing speed, familiarity, and knowledge of local rules) when making this decision.

³⁵³No. Civ. A.1:04-CV-1555-T, 2004 WL 1895125 (N.D. Ga. June 2, 2004).

the initial grant of an *ex parte* temporary restraining order through the disposition of an emergency appeal.³⁵⁴

A litigant in a Hague Convention dispute may not be afforded all the discovery tools and procedures that are provided by the Federal Rules of Civil Procedure. Neither ICARA nor the Hague Convention require discovery or an evidentiary hearing.³⁵⁵ As one court stated, the purpose behind this denial is that “[t]he rules of procedure applicable to ordinary civil cases would seem to be at odds with the Convention and ICARA’s premium on expedited decision-making.”³⁵⁶ The court concluded that discovery devices, including interrogatories and depositions, are “at cross-purposes to the [Hague Convention] objective of prompt disposition.”³⁵⁷ The court treated the Hague petition as a petition for writ of *habeas corpus* and ordered the respondent to show cause as to why the child should not be returned.³⁵⁸

2. The Petition For Relief Under The Hague Convention.

(a) Preparation Of The Complaint.

[Federal Rule of Civil Procedure 8](#) requires a “short and plain statement” of the Hague Convention claim. However, if the petitioner seeks emergency equitable relief, he or she will

³⁵⁴*Id.*, 2004 WL 1895125, at *3 (N.D. Ga. June 2, 2004) (granting *ex parte* TRO and emergency equitable relief) (“*Robles I*”); *Robles Antonio v. Barrios Bello*, No. Civ. A.1:04-CV-1555-T, 2004 WL 1895124, at *2 (N.D. Ga. June 4, 2004) (granting order placing child in temporary custody of Hague petitioner, imposing necessary conditions, and appointing guardian *ad litem* (“*Robles II*”); *Robles Antonio v. Barrios Bello*, No. Civ. A.1:04-CV-1555-T, 2004 WL 1895126, at *1 (N.D. Ga. June 7, 2004) (granting final relief under the Hague Convention and the International Child Abduction Remedies Act, including findings of fact and conclusions of law) (“*Robles III*”); *Robles Antonio v. Barrios Bello*, No. Civ. A.1:04-CV-1555-T, 2004 WL 1895127, at *2 (N.D. Ga. June 7, 2004) (granting order denying respondent’s motion to stay the district court’s order granting relief) (“*Robles IV*”); *Robles Antonio v. Barrios Bello*, No. 04-12794-GG, 2004 WL 1895123, at *1 (11th Cir. June 10, 2004) (denying respondent’s emergency motion for stay pending appeal) (“*Robles V*”).

³⁵⁵See *March v. Levine*, 136 F. Supp. 2d 831, 834 (M.D. Tenn. 2000) (granting father’s petition for the return of his children to Mexico based on cross-motions for summary judgment).

³⁵⁶See *Zajackowski v. Zajackowska*, 932 F. Supp. 128, 130 (D. Md. 1996).

³⁵⁷*Id.*

³⁵⁸See *id.*; see also *Miller v. Miller*, 240 F.3d 392 (4th Cir. 2001).

need to submit evidence to support a grant of injunctive relief. Such requests generally are governed by [Federal Rule of Civil Procedure 65](#). All local rules governing emergency motions also must be considered.

A verified complaint is a useful vehicle for presenting evidence to support a request for emergency relief; it may be styled as a “Verified Complaint/Petition Under the Hague Convention.” The factual statements in a complaint may be verified in accordance with [28 U.S.C. § 1746](#) without the need of obtaining an affidavit, which must be sworn before a notary public. The ability to submit a verified statement without needing to obtain an executed affidavit can be very helpful, especially if the left-behind parent is in a foreign country when counsel is preparing the complaint.

Counsel should consider attaching the following types of documents to the verified complaint: (1) a copy of the Hague Convention Application;³⁵⁹ (2) a copy of the marriage certificate (if applicable); (3) a copy of the child’s birth certificate; (4) any report of the abduction from the child’s country of habitual residence, including police reports, INTERPOL notices or other foreign documents that could support the occurrence of an abduction; (5) copies of documents showing divorce or custody proceedings in other countries including, importantly, custody orders; (6) copies of relevant family law codes in the foreign country that establish custodial rights and/or that prohibit removal of the child from the foreign country; and (7) any other documents, such as photographs and correspondence or sworn statements from family members, neighbors, teachers, clergy members, and the like that support the material assertions in the verified complaint.

³⁵⁹Counsel should verify the completeness and accuracy of all statements in the Hague Application prior to submitting it as part of the verified complaint. If the Hague Application is incomplete or additional information should be included, the petitioner may need to complete a separate sworn statement.

(b) Provisional Remedies.

[Article 7\(b\)](#) of the Hague Convention requires Central Authorities (or their intermediaries) to “take all appropriate measures . . . to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures.”³⁶⁰ A court’s authority to grant provisional relief pending the final disposition of a Hague Convention case is codified in ICARA, which provides:

any court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child’s further removal or concealment before the final disposition of the petition.³⁶¹

This section of ICARA has been interpreted to allow a broad range of provisional measures, including issuance of temporary restraining orders, orders directing law enforcement to locate and immediately pick up the child, orders requiring the surrender of passports for both the child and abducting parents, and interim visitation orders for the left-behind parent.

(i) Temporary Restraining Orders/Preliminary Injunctions.

As noted above, in federal court, the granting of injunctive relief is governed by [Federal Rule of Civil Procedure 65](#). As a general matter, counsel will need to present a motion and supporting brief, as well as evidence supporting the request for injunctive relief. The evidence can be in the form of a verified complaint, declarations pursuant to [28 U.S.C. § 1746](#) or affidavits, or all of the above. Again, counsel should ensure that pleadings comply with the district court’s rules governing the presentation of emergency motions.

The circumstances governing Hague Convention cases sometimes demand requests for *ex parte* emergency relief. The standards governing such extraordinary requests are set out in

³⁶⁰ See [Hague Convention, supra note 2, art. 7\(b\)](#).

³⁶¹ [42 U.S.C. § 11604\(a\)](#).

[Federal Rule of Civil Procedure 65\(b\)](#). In [Robles I](#), *ex parte* emergency relief was granted to prevent irreparable harm where: (1) the respondent already had abducted the child from the familial home in Mexico and smuggled the child into the United States; (2) the respondent faced the risk of apprehension in the United States; and (3) there was the possibility if the child was not removed from the respondent's custody that the respondent would further secret the child and herself.³⁶²

Requests for emergency relief must be presented to and resolved by the trial court on an expedited basis. As a general matter, counsel will need to file a proper emergency motion with the court before an emergency hearing can be scheduled. Some courts, however, will schedule emergency hearings on the representation of counsel that the emergency motion will be filed in advance of the hearing. As noted above, the main procedural vehicles for presenting an emergency motion are either a motion for an *ex parte* TRO (a restraining order entered without notice to the adverse party) or a motion for a TRO or preliminary injunction (emergency injunctive relief entered with notice to the adverse party). In some courts, the procedure for obtaining *ex parte* relief is referred to as an "order to show cause" or "rule nisi." Whatever the label, counsel must be familiar with the proper vehicle through which to present a request for emergency relief before attempting to schedule an emergency hearing with the trial court.

Regarding preliminary injunctions, keep in mind that the court can be asked to consolidate the hearing on the preliminary injunction motion with a hearing on the merits of the case pursuant to [Rule 65\(a\)\(2\) of the Federal Rules of Civil Procedure](#). The district court did so in [Robles Antonio v. Barrios Bello](#).³⁶³

³⁶² [Robles I](#), 2004 WL 1895125, at *3 ("*Robles I*").

³⁶³ [Id.](#)

(ii) Obtaining Custody of the Child.

The decision whether to seek emergency custody of the child often is a difficult and important aspect of an emergency Hague Convention case. Courts are usually very hesitant to order the immediate location and pick up of child absent credible evidence that the child is in danger or may be removed from the jurisdiction. ICARA states that “[n]o court exercising jurisdiction of [a Hague action] . . . may . . . order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.”³⁶⁴ Federal and state judges usually look to the provisions of their state’s Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)³⁶⁵ for authority to request emergency relief and specifically for the ability to issue a warrant for the pick up of the child. The provisions of the UCCJEA vary from state to state, but typically require a showing that the child will suffer imminent physical harm or will be removed from the state immediately.³⁶⁶ For more information about the UCCJEA, *see* [Section V](#).

Generally, the United States Marshals Service is the agency that executes federal warrants and is accustomed to taking people into custody and presenting them to federal judges in federal district court proceedings.³⁶⁷ They are not, however, in the business of caring for children. Ideally, the petitioner will be present to care for the child after the child is taken into custody. In practice, however, this is not always possible. Counsel for the petitioner should plan for this possibility by proposing to the court several alternative persons or entities to whom law

³⁶⁴[42 U.S.C. § 11604\(b\)](#).

³⁶⁵UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, 9(1A) U.L.A. 657 (1999).

³⁶⁶*Id.* at § 311(a) (“Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this State.”).

³⁶⁷*E.g.*, [Fawcett v. McRoberts](#), 168 F. Supp. 2d 595, 597 (W.D. Va. 2001) (following an *ex parte* hearing, the court ordered the United States Marshals to locate the child and abducting parent, take them into custody and present them to the Court for an initial hearing).

enforcement can turn over the child. In the event that no family members are available, the petitioner may propose appropriate friends or adults who have a pre-existing relationship with the child. If no other options exist, law enforcement may need to place the child in the care of the appropriate child protective services agency. In that situation, counsel should propose orders clearly indicating that the placement is temporary and lasts only until the petitioner or one of the above named persons is available to care for the child. Child protective service agencies are accustomed to providing temporary care to children when a parent or guardian is unavailable. It is important for the practitioner to use advance communication and provide clear judicial instructions in the context of a pending Hague petition, where there may not be traditional facts requiring the agency to take protective custody (*e.g.*, abandonment, abuse, or neglect) to help prevent the situation from becoming a full-blown dependency proceeding. See [Section IV.C.6](#) for additional information.

In [Robles Antonio v. Barrios Bello](#), the relief was structured in a way consistent with the function of the United States Marshals Service. The district court ordered the Marshals to take physical custody of the child and bring the child to the magistrate judge. The magistrate judge then was required to arrange for the child to be placed in the temporary physical custody of the petitioner (the biological father) under appropriate conditions.³⁶⁸ The magistrate judge required the petitioner to surrender his passport, make the minor child available for a private interview with the appointed guardian *ad litem*, and appear at the preliminary injunction hearing with the child on pain of contempt.³⁶⁹

³⁶⁸ [Robles I](#), 2004 WL 1895125, at *3.

³⁶⁹ [Id.](#)

(iii) Guardian *Ad Litem* Appointments.

Frequently, the abducting parent will ask the court to appoint a guardian *ad litem* to safeguard the interests of the child during the pendency of the litigation, or the court will make such appointment *sua sponte*. State court judges, who regularly hear contested custody matters, often rely on guardians *ad litem* to provide the court with an independent and unbiased source of information about the child so that they can determine how the child's best interests will be served. Federal court judges, who are unaccustomed to hearing parental disputes over children, often are even more inclined to seek the advice of someone who is not beholden to either parent. The lawyer representing the left-behind parent is placed in the position of either opposing such an appointment and seeming insensitive to the child's needs or addressing a guardian *ad litem*'s recommendation that may encompass best interests factors or other issues pertaining to the child that are outside the scope of a Hague Convention case.

There are many factors that make this a valid concern. Often, the child's country of habitual residence cannot provide the child with a standard of living comparable to that in the United States. There may be greater political unrest in the child's home country than here. The abducting parent may not have the resources to return to the habitual residence to see the child or to litigate custody there. The child's state of mind about return to the home country and relationship to the left-behind parent may be affected by the separation and/or influenced by the abducting parent. Unless instructed otherwise, these issues naturally will concern a guardian *ad litem*.

There are few cases that discuss the propriety of appointing a guardian *ad litem*. The case of [*Hasan v. Hasan*](#)³⁷⁰ is helpful when seeking to oppose such an appointment. In that case,

³⁷⁰No. Civ. A. 03-11960-GAO, 2004 WL 57073 (D. Mass. Jan. 13, 2004).

the court refused to designate a guardian *ad litem*, finding that “it would be inappropriate for this court to litigate the best interests of the children or to decide the merits of any underlying custody dispute.”³⁷¹

Although there is a real possibility that a guardian *ad litem* recommendation will include best interests factors, it may be a better practice not to oppose such appointments, particularly if the judges in the jurisdiction are likely to appoint a guardian *ad litem* anyway. Instead, counsel may assist the court with narrowly defining the role of the guardian *ad litem* to focus on specific appropriate inquiries within the context of the Hague Convention. Even with appropriate direction and focus, a guardian *ad litem*'s opinion is likely to have a powerful influence on a judge's decision and may or may not be beneficial to the client's case.

In [McManus v. McManus](#),³⁷² the court relied upon the guardian *ad litem*'s assessment of the children's maturity in deciding whether to consider their wishes to remain in the United States. Where the defense included the mature children's objection, the guardian *ad litem* found the two older children (ages fourteen and fifteen) to be “cognitively and emotionally mature” and “capable of independent thought,” which the court relied upon in refusing to return the children to their country of habitual residence.³⁷³ The court also denied the return of the younger children in reliance upon the guardian *ad litem*'s opinion that the younger children in the family would be impacted negatively if they were returned without their older siblings.³⁷⁴ In [Casimiro v. Chavez](#),³⁷⁵ the guardian *ad litem* was asked to evaluate a fifteen-year-old's capability for mature decision-making. Although the guardian *ad litem* and the court both found the teen to be

³⁷¹[Id.](#) at *4.

³⁷²354 F. Supp. 2d 62 (D. Mass. 2005).

³⁷³See [id.](#) at 70-71.

³⁷⁴See [id.](#) at 71-72.

³⁷⁵No. Civ. A. 1:06CV1889-ODE, 2006 WL 2938713 (N.D. Ga. Oct. 13, 2006).

sufficiently mature, the court returned her after finding that the abducting family had influenced her.³⁷⁶

The guardian *ad litem* can be a powerful ally for the petitioner or can complicate the petitioner's position. A guardian *ad litem* in a Hague Convention case is working at an accelerated rate, and it is important to provide that person with as much information as quickly as possible so that they can understand the petitioner's and the child's positions. If an unfavorable recommendation based on the best interests of the child is made, careful cross-examination designed to elicit an impermissible focus may help mitigate that influence.

(c) Notice and Service of the Hague Convention Petition.

Notice and service of Hague Convention petitions are governed by the normal rules for service of process.³⁷⁷ While proper service of process is necessary for a court to obtain personal jurisdiction over the respondent and requires the respondent to answer the complaint, keep in mind that, as a general matter, it is not necessary that a complaint be formally served before a trial court can order injunctive relief.³⁷⁸

In emergency situations, counsel can ask the district court to order the United States Marshals Service to serve the complaint and emergency papers, as was done in [Robles](#). As mentioned previously, this service can be simultaneous to or following the pick-up of the children. However, ideally, pick up should occur just prior to service to prevent confrontation or flight.

³⁷⁶See *id.* at *5-7.

³⁷⁷See [Fed. R. Civ. P. 4](#).

³⁷⁸See [Fed. R. Civ. P. 65\(a\)\(1\)](#) (“The court may issue a preliminary injunction only on notice to the adverse party.”).

(d) **Discovery.**

The normal discovery rules apply in Hague Convention cases; however, if discovery is necessary, the petitioners or the respondents may need to request expedited discovery.³⁷⁹ Federal district courts have the discretion to order expedited discovery.³⁸⁰ Expedited discovery is particularly appropriate in cases involving requests for emergency equitable relief, such as preliminary injunctions.³⁸¹ As a general matter, the standard for obtaining expedited discovery is the showing of good cause.³⁸² In seeking expedited discovery in a Hague Convention case, counsel should cite to language in the Hague Convention directing the prompt resolution of these matters as well as similar language in Hague Convention cases. Expedited discovery is appropriate where it would “better enable the court to judge the parties’ interests and respective chances for success on the merits” at a preliminary injunction hearing.³⁸³

³⁷⁹As discussed earlier in this Manual, litigants in Hague Conventions disputes often are not permitted to engage in a full discovery process. *See supra*, p. 68.

³⁸⁰*See Fimab-Finanziaria Maglificio Biellese Fratelli Fila S.p.A. v. Helio Import/Export, Inc.*, 601 F. Supp. 1, 3 (S.D. Fla. 1983) (“Expedited discovery should be granted when some unusual circumstances or conditions exist that would likely prejudice the party if he were required to wait the normal time.”).

³⁸¹*See Fed. R. Civ. P. 26 Adv. Comm. Note* (“Discovery can begin earlier if authorized . . . This will be appropriate in some cases, such as those involving requests for a preliminary injunction. . . .”); *see also Pod-Ners LLC v. N. Feed & Bean of Lucerne LLC*, 204 F.R.D. 675, 676 (D. Colo. 2002) (stating that expedited discovery may be appropriate in cases where the plaintiff seeks a preliminary injunction); *Ellsworth Assoc., Inc. v. United States*, 917 F. Supp. 841, 844 (D.D.C. 1996) (stating that “expedited discovery is particularly appropriate when a plaintiff seeks injunctive relief because of the expedited nature of injunctive proceedings”); *Ga. Gazette Publ’g Co. v. U.S. Dep’t of Def.*, 562 F. Supp. 1000, 1004 (S.D. Ga. 1983) (granting plaintiff’s request for expedited discovery to prepare evidence in support of motion for injunctive relief).

³⁸²*Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275 (N.D. Cal. 2002).

³⁸³*Edudata Corp. v. Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn. 1984) (granting a motion for expedited discovery allowing depositions of corporate officers and the production of affidavits, documents, and exhibits for further development of the record before a preliminary injunction hearing).

Aside from requests for expedited discovery, Hague Convention requests might make it appropriate to seek more non-typical forms of discovery, such as telephonic depositions. Telephone depositions may be taken pursuant to a stipulation of the parties or a court order.³⁸⁴

(e) Evidentiary Issues.

The normal rules of evidence apply in Hague Convention cases, even though the overall objective of the Hague Convention and ICARA – to return abducted children to their habitual residence as soon as practicable – is not typical litigation.³⁸⁵ In fact, the Sixth Circuit has gone so far as to uphold a trial court’s decision that:

[t]here is no requirement under the Hague Convention or under the ICARA that discovery be allowed or that an evidentiary hearing be conducted. Thus, under the guidance of the Convention and the statutory scheme, the court is given the authority to resolve these cases without resorting to a full trial on the merits or a plenary evidentiary hearing.³⁸⁶

Going one step further, the Sixth Circuit held that the Convention “provides that a court may order return of a child at any time, notwithstanding proof of treaty defenses.”³⁸⁷

The Hague Convention and ICARA have a number of provisions ensuring that return proceedings are handled in the most efficient manner possible. For example, the Hague

³⁸⁴See [Fed. R. Civ. P. 30\(b\)\(7\)](#).

³⁸⁵To ensure that judges have as much information as possible regarding procedural issues arising in Hague Convention cases, both the U.S. State Department and the Hague Permanent Bureau offer articles, fact sheets, best practice guides, and other judicial guidance regarding Hague Convention cases. See State Department Information for Attorneys and Judges (http://travel.state.gov/abduction/attorneysjudges/attorneysjudges_4306.html) and Hague Permanent Bureau Child Abduction Section Information (http://www.hcch.net/index_en.php?act=text.display&tid=21). The Hague Permanent Bureau also maintains up-to-date listings of the members of the International Hague Network of Judges who are available to assist in judicial communications regarding Hague Convention cases (<http://www.hcch.net/upload/haguenetwork.pdf>), as well as publishing the quarterly Judge’s Newsletter on International Child Protection (http://www.hcch.net/index_en.php?act=publications.listing&sub=5).

³⁸⁶See *March v. Levine*, 136 F. Supp. 2d 831, 833-34 (M.D. Tenn. 2000).

³⁸⁷See *March v. Levine*, 249 F.3d 462, 475 (6th Cir. 2001) (citing Hague Convention, art. 18 (“The provisions of this Chapter [pertaining to return of children] do not limit the power of a judicial or administrative authority to order the return of the child at any time.”)).

Convention provides flexible rules regarding authentication of documents and judicial notice.³⁸⁸ The implementing legislation also provides a generous authentication rule.³⁸⁹ These provisions serve to expedite rulings on petitions and return wrongfully removed or retained children to their habitual residence.³⁹⁰ Many courts attempt to resolve evidentiary issues that arise in Hague Convention cases pragmatically.³⁹¹ It is not uncommon for a magistrate judge to handle the evidentiary hearing in an effort to expedite the calendaring of the hearing and resolution of the case.³⁹²

(f) Witnesses (Including Experts).

As a factual matter, the showing that petitioners must make to establish a case of wrongful removal is straightforward.³⁹³ The showing that respondents are required to make, however, might require the introduction of expert testimony, such as establishing that the return of children would “expose [them] to physical or psychological harm or otherwise place [them] in an intolerable situation.”³⁹⁴ Under the Federal Rules, parties are required to disclose the identity

³⁸⁸See [Hague Convention, supra note 2, art. 14](#).

³⁸⁹See [42 U.S.C. § 11605](#) (“[N]o authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.”).

³⁹⁰[March v. Levine](#), 249 F.3d at 474-75.

³⁹¹[Holder v. Holder](#), No. C001927C, 2003 WL 24091906, at *1 (W.D. Wash. June 13, 2003) (holding that an evidentiary hearing would best reconcile the need for presentation of live testimony with the Hague Convention’s objective of speedy review of petitions).

³⁹²See [Bekier v. Bekier](#), 248 F.3d 1051, 1054 (11th Cir. 2001) (noting that district court adopted magistrate’s recommendation to grant Hague petition); see also [Aldinger v. Segler](#), 263 F. Supp. 2d 284 (D.P.R. 2003) (adopting magistrate’s recommendation to grant the Hague petition).

³⁹³[Robles III](#), 2004 WL 1895126, at *1-2 (granting final relief under the Hague Convention and the International Child Abduction Remedies Act, including findings of fact and conclusions of law).

³⁹⁴[Id.](#) at *2 (citation omitted).

of expert witnesses, such as expert psychiatrists and psychologists, and disclose the nature of the anticipated testimony.³⁹⁵

In terms of securing the testimony of witnesses, the normal rules apply. Depositions of witnesses may be taken and used in accordance with [Federal Rule of Civil Procedure 32\(a\)](#). For live testimony, whether at a live hearing, such as a hearing on a preliminary injunction motion, or at trial, it might be necessary to serve witnesses with a subpoena to compel their attendance. As a practical matter, testimony often extends the length of the trial and can place an extra burden on the petitioner to produce rebuttal witnesses, which often can be costly and difficult to procure in a short period of time, especially if supporting witnesses reside in the foreign country. The court should be reminded that the introduction of expert witnesses may undermine the goal of expeditious litigation of Hague Convention disputes and may be unnecessary and irrelevant, depending on the scope of the witnesses' testimony.

3. Article 16 Stay Of Pending State Court Action.

[Article 16](#) supplements and reinforces the basic mandate of the Hague Convention: custody disputes should be decided in the country of habitual residence only after a Hague petition is decided.³⁹⁶ [Article 16](#) explicitly provides, among other things, that once a court receives notice of a potential wrongful removal or pending Hague application, “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.”³⁹⁷ For purposes of this

³⁹⁵ See [Fed. R. Civ. P. 26\(a\)\(2\)](#).

³⁹⁶ See [Ruiz v. Tenorio](#), 392 F.3d 1247, 1250 (11th Cir. 2004) (holding that “[t]he court’s inquiry is limited to the merits of the abduction claim and not the merits of the underlying custody battle.”).

³⁹⁷ [Hague Convention, supra note 2, art. 16](#).

Manual, this issue most often arises when Hague Convention Applications are filed during the pendency of state court custody proceedings.³⁹⁸

In cases where federal Hague Convention proceedings and state custody proceedings are concurrent, it is the state court, not federal court, proceedings that should “be held in abeyance.”³⁹⁹ Even assuming, *arguendo*, the state court moves forward and issues a custody determination, it is of no import to a pending federal court Hague Convention case.⁴⁰⁰ As a practical matter, state court custody cases often do not reach the merits or render decisions on critical elements of any Hague Convention case, such as whether a removal was “wrongful.”⁴⁰¹

At least one court has held, however, that federal jurisdiction over Hague Convention proceedings does not translate into the power to enjoin concurrent state court custody proceedings.⁴⁰² In short, the plain language of [Article 16](#) provides enough authority for a state court *sua sponte* to suspend any custody determination pending a Hague Convention hearing.

³⁹⁸More often than not, cases involving concurrent state and federal proceedings result in detailed analyses involving abstention doctrines or preclusion principles. We do not explore these issues in this Manual.

³⁹⁹See *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005); *Griffin v. Sebuliba*, No. 08c0952, 2009 WL 972862, at *1 (E.D. Wis. Apr. 9, 2009) (“[P]laintiff cites to Article 16 of the Convention as legal authority for me to stay the state court decision. However, Article 16 applies to custody determinations made by courts in the state to which a child was wrongfully removed or is wrongfully retained, not the state of habitual residence. Here, the custody determination was made by a Wisconsin state court, the United States is alleged to be the state of habitual residence for purposes of the Convention, and therefore Article 16 is inapplicable.”).

⁴⁰⁰*Silverman v. Silverman*, 338 F.3d 886, 894-95 (8th Cir. 2003) (rejecting application of *Rooker-Feldman* doctrine to Hague state court custody interplay); *Holder v. Holder*, 305 F.3d 854, 864-65 (9th Cir. 2002) (federal courts have power to vacate state custody orders); *Rigby v. Damant*, No. 07-10179, 2007 WL 1417437, at *4 (D. Mass. May 15, 2007) (holding that state court custody determinations are not binding on federal court); *Lockhart v. Smith*, No. 06-CV-160, 2006 WL 3091295, at *2 (D. Me. Oct. 20, 2006) (stating that “ex parte [custody] order [is of] no consequence in light of Article 16”).

⁴⁰¹See *Silverman*, 338 F.3d at 895; *Yang*, 416 F.3d at 203-04.

⁴⁰²*Rigby*, 2007 WL 1417437, at *3-5 (ruling that the Anti-Injunction Act forbids issuance of federal injunction). *But see Friedrich v. Thompson*, No. 00772, 1999 WL 33954819, at *3 (M.D.N.C. Nov. 26, 1999) (ordering state court proceeding be stayed).

Even in the absence of the exercise of that restraint, federal courts are not bound by any state court custody determination.⁴⁰³

4. Checklist Of Activities.

Counsel should consider the following items in preparing for the first hearing:

- (1) Obtain copies of the following documents:
 - (a) the Hague Application or petition;
 - (b) the Hague Convention;
 - (c) ICARA;
 - (d) the child's birth certificates;
 - (e) any marriage, divorce, and custody documents;
 - (f) any relevant civil code documents pertaining to custody (certified documentation is preferable);
 - (g) an abduction report from the child's country of habitual residence, if one exists;
 - (h) all supporting documents if the complaint is verified, including photographs and school and medical records for the child;
 - (i) proof of service; and
 - (j) financial information to support a waiver of court fees.
- (2) If filing for emergency relief, file the petition as an emergency motion and schedule an emergency hearing, which requires: an *ex parte* TRO or motion for a TRO for a preliminary injunction and a supporting brief with evidence supporting the need for a TRO, *e.g.*, an affidavit. Consider requesting that the TRO be

⁴⁰³ [Rigby](#), 2007 WL 1417437, at *3-5.

consolidated with a hearing on the merits. Samples of common pleadings and filings in Hague cases, including sample TRO motions and briefs, are attached as [Exhibit H](#).

- (3) To obtain physical custody of the children:
 - (a) file a motion for the court to order the United States Marshals Service (or other law enforcement agency, if filing in state court) to take physical custody of the child and bring the child before the court to arrange for temporary custody; and
 - (b) file a motion to oppose or limit the appointment of a guardian *ad litem* (see [Section IV.A.2.\(b\)\(iii\)](#)).
- (4) If applicable, file the following motions:
 - (a) motion requesting waiver of court fees based on indigency of client;
 - (b) motion requesting expedited discovery;
 - (c) motion requesting telephonic depositions/testimony;
 - (d) motion opposing expert witnesses;
 - (e) motion requesting interim visitation with the child; and
 - (f) motion to stay a custody action filed by respondent.
- (5) File a sample return order for the court. Include specific timelines for return and purchase of airline tickets to ensure that the abducting parent does not flee with the child following the issuance of the return order.

B. APPEALS.

[Article 11](#) of the Hague Convention instructs judicial authorities to “act expeditiously in proceedings for the return of children.”⁴⁰⁴ As applied to appellate practice, the Judges’ Seminar on the 1980 Convention on the Civil Aspects of International Child Abduction concluded that “[t]he obligation to process return applications expeditiously extends also to appeal procedures” and “appellate courts should set and adhere to timetables that ensure a speedy determination of return applications.”⁴⁰⁵ Accordingly, appellate courts are charged expressly with expediting the appeals process.

1. Standard Of Review.

Appellate courts review the lower court’s factual findings for clear error and the lower court’s interpretation of the Hague Convention and application of the Hague Convention to the facts *de novo*.⁴⁰⁶

2. If The Trial Court Stays Its Order Returning The Child.

If the trial judge issues an order granting the return of the child, the respondent likely will appeal the order in open court and move for an emergency order staying the judgment pending appeal. This is necessary both to prevent the child from leaving the country and to preserve the party’s right to move the appellate court for a stay of the judgment pursuant to [Rule 8 of the Federal Rules of Appellate Procedure](#).⁴⁰⁷ Obtaining a stay of the lower court’s judgment is essential for the respondent because, unless otherwise provided by the court, the order granting

⁴⁰⁴[Hague Convention, *supra* note 2, art. 11.](#)

⁴⁰⁵HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, CONCLUSIONS, JUDGES’ SEMINAR ON THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, NOORDWIJK (Oct. 30, 2003), available at <http://www.hcch.net/upload/nwk2003e.pdf>.

⁴⁰⁶[Danaipour v. McLarey](#), 286 F.3d 1, 13 (1st Cir. 2002); [Gitter v. Gitter](#), 396 F.3d 124, 129 (2d Cir. 2005).

⁴⁰⁷[Walsh v. Walsh](#), 221 F.3d 204, 213 (1st Cir. 2000).

the return of a child is effective immediately, with no ten-day automatic stay pursuant to [Rule 62 of the Federal Rules of Civil Procedure](#).⁴⁰⁸ According to the Sixth Circuit, “staying the return of a child in an action under the [Hague] Convention should hardly be a matter of course” because “[t]he aim of the Convention is to secure prompt return of the child to the correct jurisdiction and any unnecessary delay renders the subsequent return more difficult for the child, and subsequent adjudication more difficult for the foreign court.”⁴⁰⁹

If the trial court denies the motion to stay the order to return the child, the respondent might file an emergency motion for stay pending appeal with the appellate court to prevent the child from being removed. A stay pending appeal has been described as an “exceptional” remedy and will be granted only upon evaluating the following factors on a sliding scale: (1) the movant is likely to prevail on the merits on appeal; (2) absent a stay, the movant will suffer irreparable damage; (3) the nonmovant will suffer no substantial harm from the issuance of the stay; and (4) the public interest will be served by issuing the stay.⁴¹⁰ The first factor necessarily places the court in a difficult position because a court ““would not have ruled as [it] did in the first place”” if it believed an appeal would be successful.⁴¹¹ Therefore, the party seeking an appeal can satisfy this factor by showing that it has “a substantial case on the merits.”⁴¹² The second factor, irreparable harm, can be shown by demonstrating that the child could be at risk of being harmed physically, or that the movant will suffer irreparable harm because the court likely

⁴⁰⁸ [March v. Levine](#), 136 F. Supp. 2d 831, 861 (M.D. Tenn. 2000).

⁴⁰⁹ [Friedrich v. Friedrich \(Friedrich II\)](#), 78 F.3d 1060, 1063 (6th Cir. 1996).

⁴¹⁰ [Robles V](#), 2004 WL 1895123, at *1 (citing [Garcia-Mir v. Meese](#), 781 F.2d 1450, 1453 (11th Cir. 1986)).

⁴¹¹ [Vale v. Avila](#), No. 06-1246, 2008 WL 2246929, at *2 (C.D. Ill. May 29, 2008) (quoting [Thomas v. City of Evanston](#), 636 F. Supp. 587, 590 (N.D. Ill. 1986)).

⁴¹² *Id.* (citing [Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.](#), 559 F.2d 841, 843-44 (D.C. Cir. 1977)).

would find that the return of the child moots the appeal. The third factor merely requires the moving party to demonstrate that no other party will suffer substantial injury should the court decide to issue a stay. The final factor, which relates to the public interest, is perhaps the most difficult to overcome, because “[a]llowing for a stay pending appeal would run contrary to the public interest of securing the prompt return of wrongfully removed children.”⁴¹³ In spite of the difficulty of demonstrating any of the four factors, if an appellate court grants such a motion, it may enter an order temporarily granting the motion for stay and temporarily enjoining the removal of the child pending its review of the trial court’s order.⁴¹⁴

3. Appeals May Be Mooted By The Child’s Return.

The appellate courts are in disagreement regarding an appeal’s mootness once the child has been returned to the country of his or her habitual residence. This analysis is linked closely with “irreparable injury,” one of the factors courts use to weigh the appropriateness of granting a stay.

If the case is in a circuit following the rule that return of the child does not moot an appeal, the petitioner should argue that a stay of the trial court’s order is unnecessary to preserve the appeal because a return of the child will not moot the appeal. If the case is in a circuit following the rule that return of the child moots an appeal, the respondent may argue that he or she would suffer irreparable harm if the request for a stay is denied, since a refusal to stay the case will effectively end the case if the child is returned. Such an analysis is closely linked with “irreparable injury,” factor number two above. The petitioner should respond by arguing that the respondent will not succeed on the merits on appeal, and thus the return should be prolonged by granting a stay.

⁴¹³ *Id.* at *3.

⁴¹⁴ *Id.*

Below is a discussion of the split among the appellate courts regarding whether return of the child moots appeal.

(a) Return of the Child Moots an Appeal.

In [*Bekier v. Bekier*](#),⁴¹⁵ the Eleventh Circuit ruled that the removal of the child from the court's jurisdiction mooted the appeal, thus requiring that the appeal be dismissed. The court explained that a reversal of the district court's order would not provide the petitioning party with actual affirmative relief because the child already had been returned to the country of habitual residence.⁴¹⁶ Therefore, the [*Bekier*](#) court found that to avoid dismissal of an appeal as moot, the party appealing a judgment ordering the return of a child must obtain a stay of that judgment.

Making a slight departure from the Eleventh Circuit's analysis, the Tenth Circuit also held that an appeal was rendered moot after a child was returned to England in [*Navani v. Shahani*](#).⁴¹⁷ However, the Tenth Circuit emphasized that the appeal was moot not only because the child had been returned to England, but also, and perhaps more importantly, because the English court – which maintained jurisdiction to decide the custody matter – subsequently issued a new custody order.⁴¹⁸ The court's reasoning leads the reader to believe that the appeal might not have been considered moot had the English court failed to decide the custody matter on the merits.

While not directly answering the question of whether the child's return moots an appeal, the decision to order a brief stay occasionally suggests that the return of the child would moot an

⁴¹⁵248 F.3d 1051 (11th Cir. 2001).

⁴¹⁶[*Id.*](#) at 1054-55 (citation omitted).

⁴¹⁷496 F.3d 1121 (10th Cir. 2007).

⁴¹⁸[*Id.*](#) at 1127-29.

appeal. For example, in [Haimdas v. Haimdas](#),⁴¹⁹ the court stated that it was “inclined to *deny* a stay pending appeal” just prior to staying the enforcement of the judgment for a month, in an effort to enable the respondent to request an emergency stay and expedited treatment of his appeal.⁴²⁰ Similarly, the court in [Olesen-Frayne v. Olesen](#)⁴²¹ found that a stay was inappropriate just prior to granting a limited, week-long stay “in order to give respondent the opportunity to seek a stay from the appropriate appellate court, should he choose to do so.”⁴²² Both of these courts failed to specify expressly that the children’s returns, which already had been ordered, would moot the appeals; however, both courts recognized the need for the appealing parents to take action prior to the children’s returns.

(b) Return of the Child *does not* Moot an Appeal.

In trying to decipher which way the courts are shifting in the “moot” or “not moot” debate, the past few years have illustrated a slight shift toward holding that the return of the child *does not* moot an appeal. For example, in [Whiting v. Krassner](#),⁴²³ the Third Circuit held that where a father failed to win a stay pending appeal and his child was returned to her mother in Canada, the appeal was not moot. The court explained “nothing [had] occurred during the pendency of this appeal that [made] it impossible for the court to grant any effectual relief what[so]ever.”⁴²⁴ This sentiment was echoed by the court in [Wasniewski v. Grzelak-Johannsen](#),⁴²⁵ where it stated that “[a]n appeal from a decision under the Hague Convention does

⁴¹⁹720 F. Supp. 2d 183 (E.D.N.Y. 2010).

⁴²⁰*Id.* at *23-24 (emphasis added).

⁴²¹No. 2:09-CV-49-FTM-29DNF, 2009 WL 1184686 (M.D. Fla. May 1, 2009).

⁴²²*Id.* at *2.

⁴²³391 F.3d 540, 542 (3d Cir. 2004).

⁴²⁴*Id.* at 545.

⁴²⁵No. 5:06-CV-2548, 2007 WL 2462643 (N.D. Ohio Aug. 27, 2007).

not become moot merely because a child is returned to the custody of the petitioner in a foreign country...Rather, the appeal may proceed as any other appeal. Because [Respondent] may proceed with her appeal absent a stay, Respondent, as the movant, faces no irreparable harm absent a stay.’’⁴²⁶

4. Post-Appeal Considerations.

Most importantly, once an order for return has been entered, the party requesting the child’s return should begin making travel arrangements so that the client and the child can leave the country as soon as possible. Even if the appeal technically is not mooted by the return of the child, it would be significantly more difficult to enforce an order from an appellate court reversing the lower court’s judgment once the child has been returned to a foreign country. Practitioners in this situation must be mindful of their professional duties to the court when a client willfully disregards an appellate court’s reversal of an order to return the child. If a client is held in contempt for violating an appellate court order, the practitioner may have to move to withdraw or consider other measures regarding their representation.

C. THE LOGISTICS OF HANDLING A HAGUE CONVENTION CASE.

1. Introduction.

The logistics of handling a Hague Convention case can be as complex, challenging and time-consuming as analyzing the legal aspects. This Section provides insight on how to

⁴²⁶ *Id.* at *7 (internal citations omitted); see also *Kufner v. Kufner*, 519 F.3d 33, 38 (1st Cir. 2008) (rejecting father’s motion to dismiss mother’s appeal as moot because “the appeal presents a live controversy”); *Vale*, 2008 WL 2246929, at *3 (“there is no basis for this Court to conclude that Respondent’s appeal would be moot after the children were returned to Venezuela”). Also, in *Sasson v. Shenhar*, the Supreme Court of Virginia dismissed a father’s appeal of the denial of his Hague Convention petition because the father absconded to Spain with the child and refused to return the child to the United States. 667 S.E.2d 555 (Va. 2008). The court dismissed the appeal, relying on the Fugitive Disentitlement Doctrine.

anticipate, prepare for, and resolve common logistical issues that arise in both return and access cases.

2. The Investigation.

The top priority is locating the child. After the Office of Children's Issues of the State Department receives a Hague Application, a case officer is assigned to help the left-behind parent with locating the child. The State Department collaborates with various entities and agencies to help with the process, including Non-Governmental Organizations ("NGOs") such as International Social Service ("ISS"), the Federal Bureau of Investigation, the International Criminal Police Organization ("INTERPOL"), and individual states' missing-child clearinghouses. The State Department also works with The National Center for Missing and Exploited Children to create media awareness that can be highly useful in locating abducted children. The left-behind parent must provide the Office of Children's Issues with as much helpful information as possible, such as whereabouts of relatives and places of employment, business connections, etc. regarding the abducting parent. The accuracy of the information regarding the potential location(s) of a missing child or an abducting parent is dependent upon many factors. Information regarding a potential location can become stale due to the passage of time between the State Department's location of the abducting parent and missing child and the retention of counsel by the left-behind parent. The abducting parent also may move frequently due to a lack of resources, have transitory living accommodations with relatives and friends, have difficulty enrolling children in school, have illegal immigration status, and have a general fear of detection by law enforcement. These are additional factors that counsel should consider.

Judges faced with the unique circumstances of Hague Convention cases may demand verification of the parents' and child's presence within the court's jurisdiction. It therefore is best to conduct an independent investigation in anticipation of the court's questions. At a

minimum, counsel should verify the identification of the abducting parent, the presence of the child in the jurisdiction, any school or day care attended by the child, and the existence of any public records confirming their presence in the jurisdiction (such as criminal or property records).

Private investigators may be a valuable resource as well. Larger law firms frequently have private investigators with law enforcement experience in their employ or under contract. They may be able to tap into their contacts to locate the child quickly, although law enforcement agencies and NGOs may have limitations on the information they are able to share with private investigators. Local law enforcement officers also can be a great asset to such an investigation, as they have in-depth knowledge of the community, the power of the badge, subpoena power to obtain public records, and ultimately wield arrest authority. However, the benefits of law enforcement assistance should always be balanced against the possibility of alerting the abducting parents that law enforcement is interested in the child.

3. Initial Conversation/Interview With Clients.

Before helping prospective clients to find an affordable or a *pro bono* attorney, the State Department tries to achieve a voluntary return of the child. If that fails, the State Department sends outreach letters to attorneys who have agreed to consider representation. The outreach letters contain basic information, such as the country involved, the gender of the parent seeking representation, and whether the particular case is an access or return case. Generally, the State Department does not provide attorneys with additional information about cases before the attorneys speak to the potential client. However, if attorneys request additional information before speaking to a potential client, the State Department will release additional information from the file if the Application expressly permits such a release. Next, the left-behind parent is

walked through the legal process in the United States and provided with a list of potential attorneys who have agreed to speak to him or her and the attorneys' contact information.

The first communication with the left-behind parent will be the opportunity to establish an attorney-client relationship. If the client does not speak English, it is essential to have a translator present during that initial phone conversation between counsel and the prospective client. The translator can be anyone who is fluent in both languages and does not have to be certified or sanctioned by the court. The State Department also will aid in coordinating the initial call through the Language Line, a telephonic interpretation service.

Counsel should aim to provide the parent with concise but clear information regarding the Hague Convention and the legal process, setting aside two hours for the first communication with the left-behind client. This may need to occur outside of normal business hours so that the client can have the conversation privately and away from co-workers. It is critical however, to obtain a detailed timeline of events and identify the existence of any supporting documents during the very first call. This will help both counsel and the client become familiar with the specifics of the case and required efforts. Counsel also should explain the best and worst case scenarios, as well as the available remedies. It is essential to inquire about the child's birth certificate and any court documents concerning parentage or custody. Also consider whether any court documents will need to be translated. Discuss gathering documentation of the child's habitual residence in that country, including school and doctor records, photographs and videos of the child with family and friends, and evidence of any involvement in extracurricular activities.

It is important to gain an understanding of the relationship between the parents, between the clients and the child, and amongst the relatives. It is important to probe the client about the

likely substance of the respondent's case. Inquire about criminal records, domestic violence, immigration issues, and other legal issues that may be raised. Request any documents that may be relevant to these issues. Counsel should take an opportunity during the follow-up call to prepare the client for the potentially explosive allegations that the abductor may make at trial. Although these issues may not be relevant to a Hague Convention case, the abductor may allege them nonetheless.

Counsel also should address the petitioner's ability to travel to the United States for a hearing. Does the client have a passport? Are there visa requirements? Are there any immigration-related impediments to the client's ability to travel to the hearing? Is the client financially able to travel? Does the client have work or family obligations that affect the ability to travel on short notice? Efforts to expedite the visa process for the left-behind parent once a hearing is scheduled may be necessary. Consulates and Embassies become key players and can provide significant help to resolve these issues in a prompt manner. If the client cannot travel, are there relatives or other persons who can travel instead? These persons must have detailed knowledge of the family, authority to act on the petitioner's behalf, and must be familiar to the child for their presence to be effective.

Counsel also should discuss the petitioner's ability to pay for their travel or that of a substituting relative and for the return of the child. Does the client have relatives or friends in the jurisdiction, or will a hotel be needed? Are there any special medical, work-related, or other issues that will impact the client's travel?

After the initial call, the State Department will provide additional case information to counsel so that counsel can decide whether to accept the representation. Generally, the State Department provides the Hague Application and custody documents such as the custody order.

If the State Department sent a return letter on behalf of the left-behind parent, the State Department will provide counsel with the return letter and any response received. Counsel also may request additional information such as a birth certificate or marriage certificate.

Once counsel is retained and the engagement letter is signed, the State Department provides counsel with the entire file.

4. Checklist Of Items To Discuss During The Client Call For Retention Of Counsel.

Counsel should consider the following items relating to the first client call:

- (1) Get an interpreter, if necessary.
- (2) Explain the following:
 - (a) characteristics of the court procedures of a Hague Convention case so the client is aware of the general timeline;
 - (b) best and worst case scenarios;
 - (c) lack of service;
 - (d) civil and criminal remedies; and
 - (e) the jurisdictional, not custodial, focus of the Hague Convention case.
- (3) Ask the client if he or she has emotional support and consider offering referrals to support services in the United States such as NCMEC's Team HOPE (Help Offering Parents Empowerment)⁴²⁷ and referrals to reunification specialists, and other non-profit organizations. Check with NCMEC and the State Department for up-to-date information on this matter.

⁴²⁷The official website for NCMEC's Team HOPE is <http://www.teamhope.org>. NCMEC's Team HOPE may be contacted at 1-866-305-HOPE.

- (4) Ask the left-behind parent for a detailed timeline of events and a summary leading up to the abduction, including:
 - (a) a timeline of the child's previous residences from birth to present;
 - (b) all contact the client has had with the child;
 - (c) the relationship among the parents, child, and other relatives;
 - (d) any law enforcement or social services intervention with the family, including any complaints made by the taking parent relating to abuse, neglect or domestic violence;
 - (e) the immigration status and other legal issues;
 - (f) supporting documents, including: the child's birth certificates, the parents' divorce and/or marriage certificates (if applicable); and any custody orders, mediated agreements, or civil codes relating to custodial rights.
- (5) Ask the client for all documents supporting a habitual residence determination, including travel authorizations or other signed agreements, school and medical records, photos and/or videos of the child, and evidence of participation in extracurricular activities including day care, sports and church activities.
- (6) If the child may be in danger or the taking parent is a flight risk, ask the client if emergency relief should be sought to take the child from the taking parent; gather substantiating information of flight risk (*i.e.*, emails with taking parent or relatives indicating plans to move, log of phone calls, or text messages threatening the same).
- (7) Ask the client if he or she can travel to the United States for court hearings.

- (8) Ask the client if he or she have or can obtain a passport/visa for travel to the United States.
- (9) Give the client a comprehensive list of all contacts at the firm and, if possible, include anyone who speaks the native language of the left-behind parent.
- (10) Obtain all available contact information for the client, including relatives' contact information.

5. Filing The Petition/Communicating With The Court.

If the petition will be filed in a jurisdiction with a single judge, it is helpful to contact chambers before filing to discuss the logistics. In a jurisdiction with more than one judge, contact chambers after the judge is assigned. Advise the law clerk about the nature of Hague Convention cases and the referral from the State Department, if applicable. Offer collaboration, as these are unusual cases. Consider e-mailing drafts of pleadings to a receptive clerk. Inform the court of judges in the same or nearby jurisdictions who previously have presided over Hague Convention cases. Consider filing all papers under seal to protect the safety of the child until the case is resolved.

Discuss the need for an official translator, if necessary. Inquire about the Court's preference for a particular translator or determine if there is an approved list of translators from which a translator must be selected. Try to coordinate the preliminary hearing with the client's anticipated arrival into the jurisdiction. If the client has low income, advise the court of this and request a very short turnaround for the second hearing to conserve resources. Address the need for a hearing by phone or video conference if the client is not able to travel to the initial hearing.⁴²⁸ This is not ideal, but it should be sought as a last resort.

⁴²⁸It may be possible for a client to access a video conferencing system via a United States embassy or a local law firm that is willing to provide its video conferencing system *pro bono*.

The State Department will send a letter to the judge (with a copy to all counsel) that explains the State Department's role as U.S. Central Authority for the Hague Convention and refers to key provisions of the Hague Petition and documents regarding the history of the Hague Convention (*i.e.*, the Perez-Vera Report). The judge's letter also clarifies that the letter should not be construed by the court as constituting an opinion of the United States or the Department of State regarding the merits of the case.

Judges who have not presided over Hague Convention cases previously also have other resources available. The State Department will provide the names of other judges in the same or nearby jurisdictions who have presided over Hague Convention cases and who would be willing to provide basic information to judges regarding the Hague Convention process. Additionally, the International Hague Network of Judges facilitates collaboration between judges in Hague signatory countries. Judges from the United States who are members of the International Hague Network of Judges are called U.S. Network Judges, and may be able to offer advice to judges presiding over Hague Convention Cases. The State Department has contact information for U.S. Network Judges. Additionally, the State Department's judge's letter referenced in the preceding paragraph will contain information regarding the International Hague Network of Judges.

6. Perfecting Service On The Abducting Parent.

The critical decision in this process is whether the court will be asked to take custody of the child when the abducting parent is served (or before). Expect that a judge will be uncomfortable with ordering law enforcement to take custody of the child, and that counsel will need to make a compelling case to persuade a judge to do so. It is important to assess the likelihood that the abducting parent will flee the jurisdiction prior to the second hearing. The left-behind parent's testimony about the abducting parent's lack of ties to the jurisdiction, history of flight, or avoidance of prosecution will be pivotal, along with any information that the State

Department has gathered in its search for the abducting parent and the child. The abducting parent's illegal immigration status may lend support to the argument that the child's presence should be secured by the court. Counsel should fashion the request in a manner that will be familiar to the court, such as having a United States Marshal seize the child and bring the child before the judge.

If clients (or family members) will be present in the jurisdiction to testify at the preliminary hearing and can take custody of the child pending the second hearing, and the child will feel safe with those persons, it may be compelling to ask the court for the seizure of the child prior to the initial hearing. Consequently, after the initial hearing, the client or family members immediately can take custody of the child until the second hearing on the merits of the petition. If this is not possible, taking possession of the child and placing him or her in the custody of social services is also an alternative, albeit not preferable, when there is no one to take custody of the child, the child is in danger, and/or there is a flight risk.

If the court is persuaded to order recovery of the child, collaboration with the United States Marshals Service and/or law enforcement is essential. There should be an order specifically directing the United States Marshals or other appropriate law enforcement agency to pick up the child. Suggest that the Marshals be present in court or chambers to discuss this procedure. Address any fees that will be charged for this service. If the child attends school or daycare, the order should specify where and how the Marshals should pick up the child. This should occur before service upon the abducting parent to avoid a confrontation or flight. Local law enforcement can bridge the gap between school officials and the court.

In order to minimize trauma to the child, suggest that a Marshal who is specifically-trained to deal with children participate in the service. Involve local law enforcement

departments, many of whom have a section, squad or individual officer who deals with matters involving children. Have the client nearby to minimize the time between the pick up of the child and placement with the designated adults who will care for him or her pending the court's further order. Bring toys or appropriate distractions for the child. Have warm clothes or a blanket for the child if the weather is cold.

After the child is taken into custody, the Marshals generally are instructed to bring the child and the client back to the courthouse for an appearance before a federal judge. Suggesting this procedure in advance may reassure the court that it will have an opportunity to assess the child's comfort with the client. The client should be prepared to surrender to the court all travel documents for himself or herself and the child pending the outcome of the case.

7. Travel And Accommodations.

Counsel should expect to assist the client in arranging travel to the United States for hearings. Accommodations must be sought on a case-by-case basis. Consolidators often provide airfares on major airlines at vastly-reduced prices. Seek donations of frequent flyer miles from colleagues, which have the added advantage of flexibility. Unless frequent flyer miles are used, anticipate a higher-than-usual ticket price due to the last-minute booking, the one-way fare for the child's return, and the need for a flexible return schedule, as well as Consulate fees for passports, visas, and other travel requirements depending on the country of which the client and child are nationals. In *pro bono* cases, law firms frequently bear the cost of the client's travel.

If the client does not have relatives in the vicinity of the court's jurisdiction, he or she will rely upon counsel to recommend or make hotel arrangements (and in *pro bono* cases, to pay the expense). When making reservations, direct contact with the hotel rather than using a national reservations system may result in greater discount flexibility. Hotels used by firms for housing recruits often will provide a greatly reduced rate under the circumstances. In some

cities, social service or religious agencies might assist the client in locating or paying for inexpensive housing.

The hotel management should be advised of the client's situation to ensure a friendly reception. It also is advisable to remind the client of security issues, such as not disclosing information to anyone unless strictly necessary, to prevent the taking parent from finding the client's location. Choose a hotel that offers a free breakfast and accommodations such as a microwave or small refrigerator if possible. Collect donations of snacks from colleagues. Ideally, the hotel should be near a grocery store and public transportation. Select a location appropriate for children, with proximity to a park or mall and affordable (and if possible, appropriately ethnic) food.

Discuss with the client the necessary travel documents for him or her and the child. Check that no documents will expire during the expected stay in the United States. Recommend that the client gather telephone numbers for family members, employer, and co-workers back home in case of emergencies and contact information for relatives in the United States in the event that the child has been moved. Remind the client to refill all prescriptions and to bring an adequate supply for longer than is expected. The client should bring a credit card (if possible) and cash (to be changed into United States currency before arrival).

Advise the client about expected weather and appropriate clothing for court and out-of-court time for them and the child. Suggest that the client bring toys, pictures, and other favorite items that will make the child feel safe and familiar. It will be helpful for the child to have objects that evoke good memories and happy moments, given the change of circumstances and situation he or she will be facing. Photos of other family members and friends will be reassuring

to the child and evidence of family and the home environment. A collapsible suitcase or duffel should be brought to transport the child's items upon return.

Counsel should consider purchasing a disposable cell phone for the client's use while in the United States. This ensures that counsel can reach their client at all times, particularly because service on the abducting parent and court dates are fluid in these cases. The client should have an international calling card for communication with family and employers at home.

Provide the client with a comprehensive list of contacts at counsel's law firm, along with phone numbers. Identify, if possible, a liaison to coordinate miscellaneous logistics – preferably someone who speaks the client's language. Advise the client who will pick up him or her at the airport and, if possible, send a picture of that person in advance. Plan to provide transportation to and from court.

8. Pending The Second Hearing.

If the child is not recovered when the abducting parent is served with the petition, consider trying to arrange visitation for the client and child in a public place prior to the second hearing. While not ideal, the courthouse might serve as a central location. Other potential locations would include a park or a fast-food restaurant. This will reassure the client and will give the child an opportunity to re-familiarize themselves with the left-behind parent. The value of this cannot be underestimated. Children often are told untrue stories about the left-behind parent, sometimes rising to the level of brainwashing and alienation, causing children to fear returning with those parents. Depending on the age of the child at abduction, the child may not have clear memories of the other parent or speak the left-behind parent's language. If the child is an appropriate age, the court may hear their wishes regarding return to his or her home country, and the opportunity to reconnect with the left-behind parent will assist in a positive resolution.

NCMEC or the State Department also can arrange referrals for reunification specialists who can assist in reuniting the left-behind parent and the child.

During this time, it is important that the client understand the timetable and what to expect from the process. This is particularly difficult when the client has no family or friends nearby while the case is pending in court. To the extent that there are cultural, religious, or other communities in which the client might feel comfortable, consider making the appropriate introduction.

9. Court Order.

Counsel should provide the court with an order for return immediately or as soon as possible after the hearing. The order should provide specific information for the child to travel internationally with his or her parent – this will be sufficient in most circumstances. NCMEC or the State Department can provide sample orders that counsel can review. It may be helpful to get an apostille (an international recognition) from the court in English and the client's foreign language. Regardless of whether the jurisdiction considers the return of the child to the foreign country to moot a subsequent appeal, it always makes sense to move quickly to get the client and the child out of the United States. Be aware that several abducting parents have absconded with the children a second time after the court issued a return order. Take precautions to secure the child leading up to his or her return to the home country.

10. Mediation.

Mediation is another option to resolve the dispute between the abducting and left-behind parents. An objective mediation, even after an international abduction, can lead to a quick resolution that benefits both the parents and the child. An effective mediation is:

- (1) Expedient;
- (2) Inexpensive;

- (3) Less invasive for the child and the parents; and
- (4) Effective because the results are tailored to the situation and circumstances affecting the child.

Disadvantages of a mediation occur when a mediation is used as a tactic to delay or prevent parents' access to the United States courts or when parents fail to receive a court order binding the parties to the mediation.

Upon a request of the parties or based on the jurisdiction's local rules, a court could order the parties to participate in a mediation. This option ensures that, if the mediation is successful, the court will issue an order binding the parties to the resolution. If the court asks the parties to provide a list of suggested mediators, NCMEC or the State Department are resources to provide information concerning attorneys or judges who are familiar with Hague Convention cases. If clients decide to participate in a mediation, be sure to set or request a time limit for the discussions to avoid any delay tactics by the abducting parent. If the mediation is not successful, the client needs to rely on the judicial process.

In light of the potential advantages, it is not surprising that research and interest in international child abduction mediation has been expanding in recent years. Although the U.S. does not yet have a nationwide mediation mechanism in place, a number of academics and practitioners have explored the topic of mediating Hague Convention cases. The U.S. State Department also has explored mediation at length and, among other helpful guidance, recommends that parties seeking a long-term solution take special efforts to create an agreement that is enforceable in each country of residence.

V. THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT.

Although the Hague Convention provides a well-established civil legal process for international child abduction cases, practitioners also should be aware of the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”),⁴²⁹ which can supplement the Hague Convention and provide alternative options for responding to family abductions into the United States. Drafted in 1997⁴³⁰ to address the practical inconsistencies of its predecessor statute,⁴³¹ the UCCJEA⁴³² also reconciled the overlapping federal PKPA⁴³³ and provided a substantial enforcement mechanism for interstate custody decrees. Most importantly for the purposes of this guide, the UCCJEA expressly applies to international cases by mandating that a foreign country shall be treated as if it were a state of the United States for all general and jurisdictional purposes (UCCJEA Articles 1 and 2).⁴³⁴ For enforcement purposes (UCCJEA Article 3), a foreign child custody order that substantially conforms to the UCCJEA’s jurisdictional standards shall be recognized and enforced in the same manner as if issued by a U.S. state.⁴³⁵ Finally, the UCCJEA

⁴²⁹UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT (1997), 9(1A) U.L.A. 657 (1999).

⁴³⁰The UCCJEA has been enacted by all states, with the exception of Massachusetts where adopting legislation is pending, and also has been enacted in Guam, USVI, and DC. Adopting legislation is pending in Puerto Rico.

⁴³¹For a discussion of the UCCJEA’s relationship to prior statutes see Patricia M. Hoff, *The ABC’s of the UCCJEA: Interstate Child Custody Practice Under the New Act*, 32 Fam. L. Q. 267 (1998).

⁴³²For the specific location and citation of the UCCJEA as adopted by each state, refer to the legal appendix in NCMEC’s Guidebook, Patricia M. Hoff, FAMILY ABDUCTION: PREVENTION AND RESPONSE (6th ed. 2009), http://www.missingkids.com/en_US/publications/NC75.pdf.

⁴³³ [28 U.S.C. § 1738A](#).

⁴³⁴UCCJEA § 105(a).

⁴³⁵*Id.* at § 105(b).

contains an “escape clause” that allows a court to refuse to apply the Act if the child custody law of the foreign country in question “violates fundamental principles of human rights.”⁴³⁶

The UCCJEA’s international component makes it applicable to several common factual scenarios faced by attorneys in Hague Convention cases, including:

- 1) The UCCJEA as an alternative mechanism when the Hague Convention may not fully apply.
- 2) The UCCJEA as a strategic alternative mechanism, even when the Hague Convention does apply.
- 3) The UCCJEA as a supplement to the Hague Convention’s remedies, especially for pick-up remedies.

A. WHEN THE HAGUE CONVENTION DOES NOT APPLY.

The preceding sections described many of the limits of the Hague Convention but, in some situations, the UCCJEA’s provisions may allow a left-behind parent to seek relief beyond these limits. For example, a left-behind parent may have a custody decree that was issued *after* the child was taken (a “chasing order”), which grants them substantial custody rights. As discussed previously, the rights of custody protected by the Hague Convention do not include those obtained after the abduction took place. The parent still may have a remedy under the Convention based upon his or her operation of law custody rights, but the UCCJEA provides an alternative method to enforce the complete range of a left-behind parent’s custody rights.

Article 3 of the UCCJEA lays out the process for registering and seeking enforcement of a foreign child custody order. To register an out-of-state custody determination, a party simply

⁴³⁶*Id.* at § 105(c). For a lengthy discussion and comment on the merits of this provision see Marianne D. Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 Fam. L.Q. 547 (2004).

files a request for registration with a court in the receiving state along with certified copies of the foreign child custody determination and other verified information. Typically, the court then files the order as a foreign judgment and serves notice on any parent or person who is awarded custody or visitation in the order, or otherwise entitled to notice. Any parent who opposes the registration then has twenty days to request a hearing to contest the order. If the parent does not timely request a hearing, then the order is confirmed as a matter of law, and the registered order may be enforced by any means available to enforce a domestic order.

If the registration is contested, only three defenses are available:

1. The issuing court lacked jurisdiction;
2. The underlying custody order has been vacated, stayed or modified; and
3. Lack of notice.⁴³⁷

For appropriate circumstances, the UCCJEA also provides an expedited enforcement process.⁴³⁸ In addition, if the child is in imminent danger of serious physical harm or is imminently likely to be removed from the jurisdiction, the UCCJEA provides a mechanism for petitioning parents to apply for a warrant authorizing law enforcement to take physical custody of the child simultaneously or prior to service upon the taking parent.⁴³⁹

B. STRATEGIC ALTERNATIVE TO THE HAGUE CONVENTION.

There may be situations where parents fully entitled to relief under the Hague Convention choose instead to pursue action in state court under the UCCJEA. For example, the UCCJEA provides a vehicle for enforcement of a pre-existing custody order held by a left-behind parent if that custody order resulted from an agreement between the parties or a judicial proceeding in

⁴³⁷UCCJEA § 305.

⁴³⁸*Id.* at § 308.

⁴³⁹*Id.* at § 311.

which all parties were served and had an opportunity to be heard. A standard or expedited UCCJEA proceeding also may provide a more speedy resolution than a Hague Convention return case in federal court. Additionally, the affirmative defenses available to abducting parents in Hague Convention return cases are not available under the UCCJEA. With one exception, only challenges regarding the providence of the foreign custody order may be raised by the taking parent during the UCCJEA registration process; challenges regarding the substance of the order itself or other factual issues may not be raised.⁴⁴⁰ As noted above, however, a court can decline to recognize or grant enforcement assistance to a foreign order that was issued in a jurisdiction whose child custody laws violate “fundamental principles of human rights.”⁴⁴¹

C. SUPPLEMENT TO THE HAGUE CONVENTION.

In addition to providing alternative remedies to the Hague Convention, the UCCJEA also was designed to complement the Hague Convention by allowing state courts to assist with enforcement of a Hague return order as if it were a child custody order subject to the UCCJEA’s usual enforcement provisions.⁴⁴² The UCCJEA, as drafted and adopted in some states,⁴⁴³ gives prosecutors the power to enforce custody or visitation orders and gives law enforcement officers the power to locate children and follow instructions from prosecutors.⁴⁴⁴ Section 315 of the UCCJEA grants prosecutors statutory authority to take action to locate children or see that children are returned or enforce a child custody determination. A prosecutor may act if one of the following exists:

⁴⁴⁰*Id.* at § 105(c).

⁴⁴¹*Id.* at § 105(b).

⁴⁴²*Id.* at § 302.

⁴⁴³Not every state has adopted the “Prosecutor or Public Official” portion of the UCCJEA. For a listing and statutory citation for any states that have adopted this section, refer to the legal appendix in NCMEC’s Guidebook, *supra* note 433.

⁴⁴⁴UCCJEA § 315.

1. A prior custody determination has been made;
2. A request for such action from a court in a pending child custody proceeding has been made;
3. A reasonable belief exists that a criminal statute has been violated; or
4. A reasonable belief exists that the children have been wrongfully removed or retained in violation of the Hague Convention.⁴⁴⁵

The UCCJEA gives a prosecutor the power to act in cases arising under either the UCCJEA or the Hague Convention.⁴⁴⁶ At the request of a prosecutor acting under this section, the UCCJEA enables law enforcement to take “any lawful action reasonably necessary” to locate a child, locate a parent, or assist the prosecutor in fulfilling their responsibilities.⁴⁴⁷

When Hague Convention proceedings end—because the treaty no longer applies to a child who has reached 16 years old or an order denying the return is issued, for instance—one or both parents may wish to seek a custody determination from a U.S. court. In this situation, the UCCJEA will pick up where the treaty ends and control the content and jurisdictional elements of the child custody case in state court. Finally, as discussed in the following [Section VI](#), the UCCJEA takes center-stage when a request for access is made under the Hague Convention. A petition for access may be filed independently or after a Hague return petition has been denied.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at § 316.

VI. RIGHTS OF ACCESS

In wrongful removal cases, the question of parental rights of access—as opposed to custody and return—is an area ripe with confusion for parents and their legal counsel.⁴⁴⁸ This confusion stems from the scope of the Hague Convention itself and the federal courts’ interpretation of it. [Article 21](#) of the Convention and the International Child Abduction Remedies Act (ICARA) seem to provide for certain rights of access, but the weight of authority from the federal courts is that [Article 21](#) and ICARA offer no tangible remedy. As a result, the federal courts are left with very little power to address and remedy access cases.⁴⁴⁹ Accordingly, access issues are best resolved by the state courts that traditionally deal with this relatively specialized area of the law. Counsel for parents seeking only access rights should proceed in the state courts to avoid a potential dismissal of the action by a federal court. State courts also are most familiar with the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), which is a powerful option to use in access cases.⁴⁵⁰

One of the most instructive decisions addressing “rights of access” in the context of the Hague Convention is [Bromley v. Bromley](#).⁴⁵¹ A primary issue addressed in [Bromley](#) was whether the court possessed the authority to enforce rights of access under the Convention. Petitioner argued that both his access and visitation rights were governed by [Article 21](#) of the Convention. The court declined to address the right of access issue, holding that the rights of the petitioner

⁴⁴⁸The Hague Convention provides that “rights of access” “include the right to take a child for a limited period of time to a place other than the child’s habitual residence.” [Hague Convention, supra note 2, art. 5\(b\)](#).

⁴⁴⁹[Jenkins v. Jenkins](#), 569 F.3d 549, 555 (6th Cir. 2009) (holding that “[u]nder the Convention, the remedy of return is available for a wrongful removal or retention but not for a breach of the right to access.”).

⁴⁵⁰See, e.g., [Paillier v. Pence](#), 50 Cal. Rptr. 3d 459, 461 (Cal. Ct. App. 2006) (holding that California trial court lacked jurisdiction under the UCCJEA to enforce or modify child French visitation order).

⁴⁵¹30 F. Supp. 2d 857 (E.D. Pa. 1998).

“may not be addressed by this court because there is no *remedy* under the Convention for obstacles to rights of access absent a ‘wrongful’ removal of a child.”⁴⁵² The court reasoned that because [Article 21](#) is limited to filing an application with the Central Authorities for access rights, it “does not provide the courts with independent authority to remedy such a situation.”⁴⁵³

In [Bromley](#), the court drew a clear distinction between [Article 21](#) access rights and the Convention’s [Article 21](#) return language. According to the court, the “silence of the Convention as to any remedy for access rights is in sharp contrast to [Article 21](#) which clearly provides authority for judicial authorities to order the return of a child ‘wrongfully’ removed.”⁴⁵⁴ In support, the [Bromley](#) court cited the State Department’s legal analysis of the Convention (Public Notice 957) addressing remedies for breach of access rights. The State Department found that:

“Access rights,” which are synonymous with “visitation rights,” are also protected by the Convention, but to a lesser extent than custody rights. While the Convention preamble and Article 1(b) articulate the Convention objective of ensuring that rights of access under the law of one state are respected in other Contracting States, the remedies for breach of access rights are those enunciated in Article 21 and do not include the return remedy provided by Article 12.⁴⁵⁵

As the [Bromley](#) court noted, state and foreign courts have reached similar results. For example, in [Viragh v. Foldes](#),⁴⁵⁶ the Massachusetts Supreme Judicial Court held that “the Convention does not mandate any specific remedy when a parent without physical possession has established interference with rights of access.”⁴⁵⁷ Without a breach of custody rights, the

⁴⁵² [Id.](#) at 860.

⁴⁵³ [Id.](#)

⁴⁵⁴ [Id.](#)

⁴⁵⁵ [Public Notice 957, supra note 6, at 10513.](#)

⁴⁵⁶ 612 N.E.2d 241, 247 (Mass. 1993).

⁴⁵⁷ [Id.](#) at 247.

Convention cannot be invoked because removal cannot be considered “wrongful.”⁴⁵⁸ Similarly, in the United Kingdom, [Article 21](#) has been described as toothless because it fails to confer jurisdiction on the British courts to determine matters relating to access.⁴⁵⁹

After the [Bromley](#) decision and its progeny, advocates turned to the plain language of ICARA, thinking that it would permit a federal cause of action over access cases. That hope was dashed by the Fourth Circuit in [Cantor v. Cohen](#).⁴⁶⁰ In holding that ICARA did not confer jurisdiction upon federal courts to hear access cases, the Fourth Circuit began its analysis with the implementing language of section 11601, in which Congress declared that:

[t]he Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

[42 U.S.C. § 11601\(b\)\(4\)](#) (emphasis added).⁴⁶¹

In turning to the Convention, the *Cantor* court noted that [Article 21](#) of the Convention permitted an application seeking access to be made to the Central Authority of a country, which in the case of the United States, was the State Department and not a court. The court further turned to the language of section 11603(b), which provided that a party seeking relief *under the Convention* for access may commence a proceeding in a court which has jurisdiction over that matter and concluded that, under the Convention, a federal court has no such jurisdiction. Thus, in directing applicants for access to the appropriate state court, the Fourth Circuit makes clear

⁴⁵⁸ *Id.*; see also [Wiesel v. Wiesel-Tyrnauer](#), 388 F. Supp. 2d 206, 211 (S.D.N.Y. 2005) (ruling that even where a petitioner appropriately seeks to enforce its custodial rights, the federal courts will not have jurisdiction under the Convention if the ultimate relief sought is an order of visitation, *i.e.*, a right of access).

⁴⁵⁹ See [Re G \(A Minor\) \(Enforcement of Access Abroad\)](#), [1993] All E.R. 657 (stating that “[t]here are no teeth to be found in article 21 and its provisions have no part to play in the decision to be made by the judge”).

⁴⁶⁰ 442 F.3d 196 (4th Cir. 2006).

⁴⁶¹ *Id.* at 199.

that it considers issues of access to be included in the umbrella of “underlying child custody claims” and distinguishable from return cases, which may not address these custody claims.⁴⁶²

In *Viragh v. Foldes*,⁴⁶³ the court interpreted Article 21 as instructing the court “to ‘promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject,’ as well as to ‘take steps to remove, as far as possible, all obstacles to the exercise of such rights.’”⁴⁶⁴ The *Foldes* court recognized that:

A major purpose of the Convention is to protect the access rights of the parent without physical possession when the children reside in a contracting nation other than where the parent without physical possession resides. The Convention provides that the parent who has removed the children from their habitual residence, and made the exercise of access rights more difficult, may be ordered to pay the necessary expenses incurred by the parent without physical possession effectively to exercise rights of access.⁴⁶⁵

The court went on to craft a visitation schedule in the United States to facilitate the petitioner’s exercise of his access rights, given the financial burdens associated with travel between the United States and Hungary.⁴⁶⁶

In *Abbott v. Abbott*,⁴⁶⁷ the United States Supreme Court held that the *ne exeat* right is a custodial right, and therefore, the remedy of return of the child to his or her country of habitual residence is available to the left-behind parent.⁴⁶⁸ In its analysis, the Supreme Court distinguished between the remedies available to a parent with a *ne exeat* right and those available

⁴⁶² See *Krehbiel v. Cooper*, No. 1:08CV276, 2008 WL 5120622, at *4 (M.D.N.C. Dec. 4, 2008).

⁴⁶³ 612 N.E.2d 241 (Mass. 1993).

⁴⁶⁴ *Id.* at 247.

⁴⁶⁵ *Id.* at 249.

⁴⁶⁶ *Id.*

⁴⁶⁷ 130 S.Ct. 1983 (2010).

⁴⁶⁸ *Id.* at 1992.

to a parent who merely had rights of access or visitation.⁴⁶⁹ In doing so, [Abbott v. Abbott](#) reaffirmed that the United States courts have no authority under the Convention to order abducted children returned to their left-behind country when a taking parent has violated a right of access.

An application for access rights is fundamentally different from an application for return because it requires the petitioner to acknowledge that the child will remain in the United States and hence be subject to the jurisdiction of a United States court. A court therefore is permitted to consider the best interests of the child when crafting an appropriate visitation schedule, and as a practical matter, a United States court has continuing jurisdiction to make any modifications to that visitation agreement at a later date.

VII. PRACTITIONERS' CONCLUDING THOUGHTS: WHAT ABOUT THE IMPACT ON THE CHILD?

This Manual was designed to provide a road map for the representation of left-behind parents whose children were brought to or retained in the United States wrongfully by the other parent. The job of counsel for the left-behind parent (in most cases) is to achieve the safe return of the child to the client's country, and we have recommended courses of action to achieve that goal first and foremost. As a matter of law, the child's best interests are not at issue.

Yet, while forbidding an analysis of the child's best interests, the Hague Convention does look to the impact of the abduction and related legal proceedings on the child. The well-settled defense recognizes the potential harm in uprooting a child who has made this country home in a significant way, balancing that against the interests of the parent who did not choose to be separated from his or her child. The mature child objection provides a voice to some children. The grave risk defense protects a child who would be subjected to intolerable abusive

⁴⁶⁹ [Id.](#)

circumstances upon return, but the practitioners' experience shows that this defense can be narrowly interpreted by courts to return a child even when the abducting parent has been subjected to domestic violence in the presence of the child. Counsel for the left-behind parent are responsible for advocating to defeat these defenses.

Practitioners have recognized that in their advocacy and avoidance of a "best interests" analysis, they sometimes lost focus on the impact of the proceeding on the child. A child, caught in the middle of the parents' dispute, cannot help being affected by the adversarial nature of the conflict. The child's state of mind and perception of the respective roles of the parents in his or her life may have been influenced, intentionally or otherwise, by the abducting parent. This is especially true when the child has been separated from the left-behind parent for many months or years. It is very difficult to judge what effect this estrangement may have on an impressionable child, who may believe that the left-behind parent has abandoned or does not love him or her.

When law enforcement picks up a child at school, it ensures that the child does not disappear from the jurisdiction, but this could cause some anxiety for the child. A child is often kept out of the courtroom to avoid exposure to the parents' dispute, but the seclusion also can be stressful. It often is recommended to rush clients and children to the airport and through security once a return order is entered because lingering presents a danger that an appeal will be filed and a stay will be entered. Yet in doing so, as often occurs with the initial abduction, the child may not have a chance to say goodbye to the other parent or friends or collect cherished possessions.

It can be difficult for counsel to balance their responsibility to argue for the safe and efficient return of the child while trying to minimize the negative impact on the child. There are no easy answers, but there are options. Mediation, addressed in [Section IV.C.10](#) of this Manual, is increasingly available, and an agreed-upon resolution may be preferable in some

circumstances.⁴⁷⁰ Counsel can advise their clients about the impact their past and future actions have on their children and suggest ways to ease the transition. Counsel can ask the court to permit the children to say goodbye to the other parent in a private, supervised location. Counseling for the children and clients can be facilitated.⁴⁷¹ Practitioners can offer to send the children's belongings to them after their return if the taking parent will allow it. Also, practitioners can suggest that clients strive to keep lines of communication open between the other parent and the children after the return. By offering this guidance and discussing the pros and cons of any course of action, counsel empower their clients to make informed decisions for themselves and their children.

This Manual is the product of a collaborative effort by The National Center for Missing and Exploited Children and Kilpatrick Townsend & Stockton LLP. Our goal is to familiarize advocates with the Hague Convention, its purposes, and the case law interpreting it. If you have any suggestions for corrections or improvements to the Manual, please forward them to the authors so that we can incorporate them in future editions of this Manual.

⁴⁷⁰Through its attorney network or other resources, NCMEC may be able to provide information and referrals for parents who are interested in mediating a resolution.

⁴⁷¹NCMEC's Family Advocacy Division can provide referrals for reunification services, family support, and counseling services, including the services offered by NCMEC's Team HOPE.

EXHIBITS

- Exhibit A: [List of Cited Cases by Circuit of Origin](#)
- Exhibit B: [Hague Convention](#)
- Exhibit C: [Signatory Countries to Hague Convention](#)
- Exhibit D: [ICARA](#)
- Exhibit E: [Public Notice 957](#)
- Exhibit F: [Perez-Vera Report](#)
- Exhibit G: [*Robles Antonio v. Barrios Bello Orders*](#)
- Exhibit H: [Samples of Common Hague Case Pleadings and Filings](#)

EXHIBIT A— LIST OF CITED CASES BY CIRCUIT OF ORIGIN

UNITED STATES SUPREME COURT

Abbott v. Abbott,

130 S. Ct. 1983 (2010)

Removal/Retention Breached Custody Rights
Rights of Access

FIRST CIRCUIT

Aldinger v. Segler,

263 F. Supp. 2d 284 (D.P.R. 2003)

Article 20 Public Policy Affirmative Defense
Evidentiary Issues in Hague Cases
Exercising Custody Rights at Removal

Charalambous v. Charalambous,

627 F.3d 462, 468-69 (1st Cir. 2010)

Article 13 Grave Risk Affirmative Defense

Currier v. Currier,

845 F. Supp. 916 (D.N.H. 1994)

Exercising Custody Rights at Removal

Danaipour v. McLarey,

286 F.3d 1 (1st Cir. 2002)

Affirmative Defenses of Articles 12, 13 and 20 Generally
Article 13 Grave Risk Affirmative Defense

Danaipour v. McLarey,

386 F.3d 289 (1st Cir. 2004)

Article 13 Grave Risk Affirmative Defense

Falk v. Sinclair,

692 F. Supp. 2d 147 (D. Me. 2010)

Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
Petition Filed Within One Year

Falls v. Downie,

871 F. Supp. 100 (D. Mass. 1994)

Habitual Residence
When Removal/Retention Became Wrongful

Gonzalez Locicero v. Nazor Lurashi,

321 F. Supp. 2d 295 (D.P.R. 2004)

Article 13 Mature Children Affirmative Defense
Tolling the One-Year Period

[Gonzalez v. Nazor Lurashi](#),

No. Civ. 04-1276 (HL), 2004 WL 1202729 (D.P.R. May 20, 2004)
Article 12 Well-Settled Affirmative Defense
Tolling the One-Year Period

[Hasan v. Hasan](#),

No. Civ. A. 03-11960-GAO, 2004 WL 57073 (D. Mass. Jan. 13, 2004)
Guardian *Ad Litem* Issues

[Krefter v. Wills](#),

623 F. Supp. 2d 125 (D. Mass. 2009)
Exercising Custody Rights at Removal

[Kufner v. Kufner](#),

480 F. Supp. 2d 491 (D.R.I. 2007),
[aff'd](#), 519 F.3d 33 (1st Cir. 2008)
Exercising Custody Rights at Removal

[Kufner v. Kufner](#),

519 F.3d 33 (1st Cir. 2008)
Article 13 Grave Risk Affirmative Defense
Article 13 Mature Children Affirmative Defense
Invalid Best Interests Defense

[Lockhart v. Smith](#),

No. 06-CV-160, 2006 WL 3091295 (D. Me. Oct. 20, 2006)
Article 16 Stay of Pending State Court Action

[McManus v. McManus](#),

354 F. Supp. 2d 62 (D. Mass. 2005)
Affirmative Defenses of Articles 12, 13 and 20 Generally
Article 12 Well-Settled Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Article 13 Mature Children Affirmative Defense
Exercising Custody Rights at Removal
Guardian *Ad Litem* Issues
Invalid Best Interests Defense

[Nicolson v. Pappalardo](#),

605 F.3d 100 (1st Cir. 2010)
Article 13 Consent/Acquiescence Affirmative Defense
Habitual Residence

Nicolson v. Pappalardo,

674 F. Supp. 2d 295 (D. Me. 2009)
Exercising Custody Rights at Removal

Rigby v. Damant,

486 F. Supp. 2d 222 (D. Mass. May 15, 2007)
Article 16 Stay of Pending State Court Action

Toren v. Toren,

191 F.3d 23 (1st Cir. 1999)
Tolling the One-Year Period

Toren v. Toren,

26 F. Supp. 2d 240 (D. Mass. 1998)
vacated on other grounds, 191 F.3d 23 (1st Cir. 1999)
Tolling the One-Year Period

Viragh v. Foldes,

612 N.E.2d 241 (Mass. 1993)
Rights of Access

Walsh v. Walsh,

221 F.3d 204 (1st Cir. 2000)
Article 13 Grave Risk Affirmative Defense
Stay of Trial Court's Order Returning the Children

Wanninger v. Wanninger,

850 F. Supp. 78 (D. Mass. 1994)
Exercising Custody Rights at Removal

Whallon v. Lynn,

230 F.3d 450 (1st Cir. 2000)
Article 13 Grave Risk Affirmative Defense
Article 16 – No Consideration of Merits of Underlying Custody Dispute
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

Zuker v. Andrews,

2 F. Supp. 2d 134 (D. Mass. 1998)
Article 12 Well-Settled Affirmative Defense
Habitual Residence
When Removal/Retention Became Wrongful

Zuker v. Andrews,

181 F.3d 81 (Table), No. 98-1622, 1999 WL 525936 (1st Cir. Apr. 9, 1999)
Habitual Residence

SECOND CIRCUIT*Armiliato v. Zaric-Armiliato,*

169 F. Supp. 2d 230 (S.D.N.Y. 2001)
Exercising Custody Rights at Removal

Blondin v. Dubois,

189 F.3d 240 (2d Cir. 1999),
aff'd, 238 F.3d 153 (2d Cir. 2001)
Article 12 Well-Settled Affirmative Defense

Blondin v. Dubois,

238 F.3d 153 (2d Cir. 2001)
Article 12 Well-Settled Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Article 13 Mature Children Affirmative Defense

Brooke v. Willis,

907 F. Supp. 57 (S.D.N.Y. 1995)
Exercising Custody Rights at Removal

Croll v. Croll,

229 F.3d 133 (2d Cir. 2000)
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

David S. v. Zamira S.,

151 Misc. 2d 630, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991)
Article 12 Well-Settled Affirmative Defense

Diaz Arboleda v. Arenas,

311 F. Supp. 2d 336 (E.D.N.Y. 2004)
Article 12 Well-Settled Affirmative Defense
Article 13 Mature Children Affirmative Defense

Diorinou v. Mezitis,

237 F.3d 133 (2d Cir. 2001)
Article 16 – No Consideration of Merits of Underlying Custody Dispute
Habitual Residence

Elyashiv v. Elyashiv,

353 F. Supp. 2d 394 (E.D.N.Y. 2005)
Invalid Best Interests Defense

Gitter v. Gitter,

396 F.3d 124 (2d Cir. 2005)
Habitual Residence
Signatory Countries

Haimdas v. Haimdas,

720 F. Supp. 2d 183 (E.D.N.Y. 2010)

Removal/Retention Breached Custody Rights

Exercising Custody Rights at Removal

Return Moots Appeal

Koc v. Koc (In re Koc),

181 F. Supp. 2d 136 (E.D.N.Y. 2001)

Article 12 Well-Settled Affirmative Defense

Exercising Custody Rights at Removal

Tolling the One-Year Period

Lachhman v. Lachhman,

No. 08-CV-04363 (CPS), 2008 WL 5054198 (E.D.N.Y. Nov. 21, 2008)

Article 12 Well-Settled Affirmative Defense

Exercising Custody Rights at Removal

Laguna v. Avila,

No. 07-CV-5136 (ENV), 2008 WL 1986253 (E.D.N.Y. May 7, 2008)

Article 13 Grave Risk Affirmative Defense

Article 13 Mature Children Affirmative Defense

Matovski v. Matovski,

No. 06 Civ. 4259(PKC), 2007 WL 2600862 (S.D.N.Y. Aug. 31, 2007)

Article 12 Well-Settled Affirmative Defense

Mero v. Prieto,

557 F. Supp. 2d 357 (E.D.N.Y. 2008)

Article 12 Well-Settled Affirmative Defense

Norden-Powers v. Beveridge,

125 F. Supp. 2d 634 (E.D.N.Y. 2000)

Exercising Custody Rights at Removal

Olguin v. Cruz Santana,

No. 03 CV 6299(JG), 2004 WL 1752444 (E.D.N.Y. Aug. 5, 2004)

Article 13 Grave Risk Affirmative Defense

Article 13 Mature Children Affirmative Defense

Exercising Custody Rights at Removal

Poliero v. Centenaro,

373 F. App'x 102 (2d Cir. 2010)

Habitual Residence

Reyes Olguin v. Cruz Santana,

No. 03 CV 6299(JG), 2005 WL 67094 (E.D.N.Y. Jan. 13, 2005)

Article 12 Well-Settled Affirmative Defense

Article 13 Grave Risk Affirmative Defense
Article 13 Mature Children Affirmative Defense

Skrodzki v. Skrodzki (In re Skrodzki),

642 F. Supp. 2d 108 (E.D.N.Y. 2007)
Exercising Custody Rights at Removal

Wiesel v. Wiesel-Tyrnauer,

388 F. Supp. 2d 206 (S.D.N.Y. 2005)
Rights of Access

THIRD CIRCUIT

Baxter v. Baxter,

423 F.3d 363 (3d Cir. 2005)
Article 13 Consent/Acquiescence Affirmative Defense
Exercising Custody Rights at Removal

Bromley v. Bromley,

30 F. Supp. 2d 857 (E.D. Pa. 1998)
Access Cases-Jurisdiction
Rights of Access

Carrascosa v. McGuire,

No. 07-0355 (DRD), 2007 WL 496459 (D.N.J. Feb. 8, 2007)
Exercising Custody Rights at Removal

Castillo v. Castillo,

597 F. Supp. 2d 432 (D. Del. 2009)
Article 12 Well-Settled Affirmative Defense
Article 13 Mature Children Affirmative Defense

Delvoye v. Lee,

329 F.3d 330 (3d Cir. 2003)
Habitual Residence

Distler v. Distler,

26 F. Supp. 2d 723 (D.N.J. 1998)
ICARA

Feder v. Evans-Feder,

63 F.3d 217 (3d Cir. 1995)
Exercising Custody Rights at Removal
Habitual Residence

Harris v. Harris,

No. Civ. A. 03-5952, 2003 WL 23162326 (E.D. Pa. Dec. 12, 2003)
Exercising Custody Rights at Removal

In re Application of Adan,

437 F.3d 381 (3d Cir. 2006)
Article 13 Grave Risk Affirmative Defense

Karpenko v. Leendertz,

619 F.3d 259 (3d Cir. 2010)
Removal/Retention Breached Custody Rights

Karpenko v. Leendertz,

No. 09-03207, 2010 WL 831269 (E.D. Pa. Mar. 4, 2010)
Article 13 Grave Risk Affirmative Defense

Lutman v. Lutman,

No. 1:10-CV-1504, 2010 WL 3398985 (M.D. Pa. Aug. 26, 2010)
Article 12 Well-Settled Affirmative Defense

Miltiadous v. Tetervak,

686 F. Supp. 2d 544 (E.D. Pa. 2010)
Exercising Custody Rights at Removal

Silvestri v. Oliva,

403 F. Supp. 2d 378 (D.N.J. 2005)
Article 12 Well-Settled Affirmative Defense

Tsai-Yi Yang v. Fu-Chiang Tsui,

499 F.3d 259 (3d Cir. 2007)
Article 13 Mature Children Affirmative Defense
Exercising Custody Rights at Removal
Habitual Residence
Invalid Best Interests Defense

Whiting v. Krassner,

391 F.3d 540 (3d Cir. 2004)
Return Does Not Moot Appeal

Yang v. Tsui,

416 F.3d 199 (3d Cir. 2005)
Article 16 Stay of Pending State Court Action
Invalid Best Interests Defense

FOURTH CIRCUIT*Bader v. Kramer,*

484 F.3d 666 (4th Cir. 2007)
Exercising Custody Rights at Removal

Belay v. Getachew,

272 F. Supp. 2d 553 (D. Md. 2003)
Article 12 Well-Settled Affirmative Defense
Tolling the One-Year Period

Cantor v. Cohen,

442 F.3d 196 (4th Cir. 2006)
Rights of Access

Fawcett v. McRoberts,

326 F.3d 491 (4th Cir. 2003)
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights
Return Moots Appeal

Friedrich v. Thompson,

No. 00772, 1999 WL 33954819 (M.D.N.C. Nov. 26, 1999)
Article 16 Stay of Pending State Court Action

Hazbun Escaf v. Rodriquez,

200 F. Supp. 2d 603 (E.D. Va. 2002),
aff'd, 52 F. App'x 207 (4th Cir. 2002)
Article 20 Public Policy Affirmative Defense
Exercising Custody Rights at Removal

Krehbiel v. Cooper,

No. 1:08CV276, 2008 WL 5120622 (M.D.N.C. Dec. 4, 2008)
Rights of Access

Maxwell v. Maxwell,

588 F.3d 245 (4th Cir. 2009)
Habitual Residence

Miller v. Miller,

240 F.3d 392 (4th Cir. 2001)
Article 16 – No Consideration of Merits of Underlying Custody Dispute
Discovery in Hague Cases
Habitual Residence

Sasson v. Shenhar,

667 S.E.2d 555 (Va. 2008)
Return Does Not Moot Appeal

Wiggill v. Janicki,

262 F. Supp. 2d 687 (S.D. W.Va. 2003)
Access Cases-Jurisdiction

Zajackowski v. Zajackowska,

932 F. Supp 128 (D. Md. 1996)
Discovery in Hague Cases

FIFTH CIRCUIT*Dietz v. Dietz*,

349 Fed. App'x 930 (5th Cir. 2009)
Article 13 Mature Children Affirmative Defense

Edoho v. Edoho,

No. H-10-1881, 2010 WL 3257480 (S.D. Tex. Aug. 17, 2010)
Article 12 Well-Settled Affirmative Defense

England v. England,

234 F.3d 268 (5th Cir. 2000)
Article 16 – No Consideration of Merits of Underlying Custody Dispute

Ibarra v. Quintanilla Garcia,

476 F. Supp. 2d 630 (S.D. Tex. 2007)
Removal/Retention Breached Custody Rights

Isaac v. Rice,

No. 1:97CV353, 1998 WL 527107 (N.D. Miss. July 30, 1998)
Habitual Residence

Morrison-Dietz v. Dietz,

No. 07-1398, 2008 WL 4280030 (W.D. La. Sept. 17, 2008),
aff'd, 349 F. App'x 930 (5th Cir. 2009)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

Sealed Appellant v. Sealed Appellee,

394 F.3d 338 (5th Cir. 2004)
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

Stewart v. Marrun,

No. 4:09CV141, 2009 WL 1530820 (E.D. Tex. May 29, 2009)
Exercising Custody Rights at Removal

Van Driessche v. Ohio-Esezeboh,

466 F. Supp. 2d 828 (S.D. Tex. 2006)

Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
Tolling the One-Year Period

Wilchynski v. Wilchynski,

No. 3:10-CV-63-FKB, 2010 WL 1068070 (S.D. Miss. Mar. 18, 2010)
Exercising Custody Rights at Removal

SIXTH CIRCUIT

Anderson v. Acree,

250 F. Supp. 2d 876 (S.D. Ohio 2002)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
Tolling the One-Year Period

Blanc v. Morgan,

721 F. Supp. 2d 749 (W.D. Tenn. 2010)
Article 12 Well-Settled Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Exercising Custody Rights at Removal
When Removal/Retention Became Wrongful

Freier v. Freier,

969 F. Supp. 436 (E.D. Mich. 1996)
Exercising Custody Rights at Removal

Friedrich v. Friedrich,

78 F.3d 1060 (6th Cir. 1996)
Affirmative Defenses of Articles 12, 13 and 20 Generally
Article 12 Well-Settled Affirmative Defense
Article 13 Consent/Acquiescence Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Exercising Custody Rights at Removal
Invalid Best Interests Defense
Stay of Trial Court's Order Returning the Children

Friedrich v. Friedrich,

983 F.2d 1396 (6th Cir. 1993)
Article 16 – No Consideration of Merits of Underlying Custody Dispute
Habitual Residence

In re Coffield,

644 N.E.2d 662 (Ohio Ct. App. 1994)
Article 12 Well-Settled Affirmative Defense

Jenkins v. Jenkins,

569 F.3d 549 (6th Cir. 2009)
Rights of Access

March v. Levine,

136 F. Supp. 2d 831 (M.D. Tenn. 2000)
aff'd, 249 F.3d 462 (6th Cir. 2001)
Evidentiary Issues in Hague Cases
Stay of Trial Court's Order Returning the Children
Article 16 – No Consideration of Merits of Underlying Custody Dispute

Robert v. Tesson,

507 F.3d 981 (6th Cir. 2007)
Exercising Custody Rights at Removal
Habitual Residence

Simcox v. Simcox,

511 F.3d 594 (6th Cir. 2007)
Article 13 Consent/Acquiescence Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Article 13 Mature Children Affirmative Defense
Invalid Best Interests Defense

Stevens v. Stevens,

499 F. Supp. 2d 891 (E.D. Mich. 2007)
Article 12 Well-Settled Affirmative Defense

Wasniewski v. Grzelak-Johannsen,

No. 5:06-CV-2548, 2007 WL 2462643 (N.D. Ohio Aug. 27, 2007)
Return Does Not Moot Appeal

Wojcik v. Wojcik,

959 F. Supp. 413 (E.D. Mich. 1997)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
Petition Filed Within One Year
Tolling the One-Year Period

SEVENTH CIRCUIT*Doudle v. Gause,*

282 F. Supp. 2d 922 (N.D. Ind. 2003)
Exercising Custody Rights at Removal

Fabri v. Pritikin-Fabri,

221 F. Supp. 2d 859 (N.D. Ill. 2001)
Exercising Custody Rights at Removal

Griffin v. Sebuliba,

No. 08c0952, 2009 WL 972862 (E.D. Wis. Apr. 9, 2009)
Article 16 Stay of Pending State Court Action

In re Polson,

578 F. Supp. 2d 1064 (S.D. Ill. 2008)
Exercising Custody Rights at Removal

Koch v. Koch,

450 F.3d 703 (7th Cir. 2006)
Habitual Residence

Koch v. Koch,

416 F.Supp. 2d 645 (E.D. Wis. 2006)
Habitual Residence

Mohamud v. Guuleed,

No. 09-C-146, 2009 WL 1229986 (E.D. Wis. May 4, 2009)
Children Under Sixteen

Tabacchi v. Harrison,

No. 99 C 4130, 2000 WL 190576 (N.D. Ill. Feb. 10, 2000)
Article 13 Consent/Acquiescence Affirmative Defense
Article 13 Grave Risk Affirmative Defense
Exercising Custody Rights at Removal

Thomas v. City of Evanston,

636 F. Supp. 587 (N.D. Ill. 1986)
Stay of Trial Court's Order Returning the Children

Vale v. Avila,

No. 06-1246, 2008 WL 2246929 (C.D. Ill. May 29, 2008)
Stay of Trial Court's Order Returning the Children

Van De Sande v. Van De Sande,

431 F.3d 567 (7th Cir. 2005)
Article 13 Grave Risk Affirmative Defense

EIGHTH CIRCUIT*Antunez-Fernandes v. Connors-Fernandes,*

259 F. Supp. 2d 800 (N.D. Iowa 2003)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
Petition Filed Within One Year
Tolling the One-Year Period

Barzilay v. Barzilay,

600 F.3d 912 (8th Cir. 2010)
Habitual Residence

Edudata Corp. v. Scientific Computers, Inc.,

599 F. Supp. 1084 (D. Minn. 1984)
Discovery in Hague Cases

In re Hague Application,

No. 4:07CV1125SNL, 2007 WL 4593502 (E.D. Mo. Dec. 28, 2007)
Exercising Custody Rights at Removal

Kofler v. Kofler,

No. 07-5040, 2007 WL 2081712 (W.D. Ark. July 18, 2007)
Article 13 Mature Children Affirmative Defense
Exercising Custody Rights at Removal

Neng Nhia Yi Ly v. Heu,

294 F. Supp. 2d 1062 (D. Minn. 2003)
Article 12 Well-Settled Affirmative Defense

Rydder v. Rydder,

49 F. 3d 369 (8th Cir. 1995)
Affirmative Defenses of Articles 12, 13 and 20 Generally
Habitual Residence

Silverman v. Silverman,

338 F.3d 886 (8th Cir. 2003)
Article 12 Well-Settled Affirmative Defense
Article 16 Stay of Pending State Court Action
Habitual Residence

Slagenweit v. Slagenweit,

841 F. Supp. 264 (N.D. Iowa 1993)
When Removal/Retention Became Wrongful

Sorenson v. Sorenson,

559 F.3d 871 (8th Cir. 2009)
Habitual Residence

NINTH CIRCUIT*Asvesta v. Petroutsas,*

580 F.3d 1000 (9th Cir. 2009)
Article 13 Consent/Acquiescence Affirmative Defense
Invalid Best Interests Defense

Duarte v. Bardales,

526 F.3d 563 (9th Cir. 2008)
Petition Filed Within One Year

Etienne v. Zuniga,

No. C10-5061BHS, 2010 WL 2262341 (W.D. Wash. June 2, 2010)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal
When Removal/Retention Became Wrongful

Gaudin v. Remis,

415 F.3d 1028 (9th Cir. 2005)
Article 13 Grave Risk Affirmative Defense

Gonzalez v. Gutierrez,

311 F.3d 942 (9th Cir. 2002)
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

Gonzalez-Caballero v. Mena,

251 F.3d 789 (9th Cir. 2001)
Article 13 Consent/Acquiescence Affirmative Defense

Holder v. Holder,

No. C001927C, 2003 WL 24091906 (W.D. Wash. June 13, 2003)
Evidentiary Issues in Hague Cases

Holder v. Holder,

305 F.3d 854 (9th Cir. 2002)
Article 16 Stay of Pending State Court Action

In re B. Del C.S.B.,

559 F.3d 999 (9th Cir. 2009)
Article 12 Well-Settled Affirmative Defense

In re Tsarbopoulos,

243 F.3d 550 (Table), No. 00-35393, 2000 WL 1721800 (9th Cir. Nov. 17, 2000)
Article 13 Grave Risk Affirmative Defense

Jimenez v. Lozano,

No. C05-5736FDB, 2007 WL 527499 (W.D. Wash. Feb. 14, 2007)
Article 12 Well-Settled Affirmative Defense
Exercising Custody Rights at Removal

Krishna v. Krishna,

No. C 97-0021 SC, 1997 WL 195439 (N.D. Cal. Apr. 11, 1997)
Article 13 Grave Risk Affirmative Defense

Man v. Cummings,

No. CV 08-15-PA, 2008 WL 803005 (D. Or. Mar. 21, 2008)
Article 13 Mature Children Affirmative Defense

Mozes v. Mozes,

239 F.3d 1067 (9th Cir. 2001)
Habitual Residence

Nelson v. Petterle,

782 F. Supp. 2d 1081 (E.D. Cal. 2011)
Removal/Retention Breached Custody Rights

Paillier v. Pence,

50 Cal. Rptr. 3d 459 (Cal. Ct. App. 2006)
Rights of Access

Papakosmas v. Papakosmas,

483 F.3d 617 (9th Cir. 2007)
Habitual Residence

Riley v. Gooch,

No. 09-1019-PA, 2010 WL 373993 (D. Or. Jan. 29, 2010)
Article 12 Well-Settled Affirmative Defense
When Removal/Retention Became Wrongful

Roux v. Roux,

319 F. App'x 569 (9th Cir. 2009)
Exercising Custody Rights at Removal

Semitool, Inc. v. Tokyo Electron Am., Inc.,

208 F.R.D. 273 (N.D. Cal. 2002)
Discovery in Hague Cases

Steffen F. v. Severina P.,

966 F. Supp. 922 (D. Ariz. 1997)
Affirmative Defenses of Articles 12, 13 and 20 Generally

Stirzaker v. Beltran,

No. CV09-667-N-EJL, 2010 WL 1418388 (D. Idaho Apr. 6, 2010)
Article 13 Consent/Acquiescence Affirmative Defense
Exercising Custody Rights at Removal

Sullivan v. Sullivan,

No. CV-09-545-S-BLW, 2010 WL 227924 (D. Idaho Jan. 13, 2010)
Article 13 Grave Risk Affirmative Defense

Von Kennel Gaudin v. Remis,

282 F.3d 1178 (9th Cir. 2002)

Article 16 – No Consideration of Merits of Underlying Custody Dispute

TENTH CIRCUIT*DeSilva v. Pitts,*

481 F.3d 1279 (10th Cir. 2007)

Article 13 Mature Children Affirmative Defense

In re Marriage of Jeffers,

992 P.2d 686 (Colo. Ct. App. 1999)

Affirmative Defenses of Articles 12, 13 and 20 Generally

In re Robinson,

983 F. Supp. 1339 (D. Colo. 1997)

Article 12 Well-Settled Affirmative Defense

Article 13 Mature Children Affirmative Defense

Kanth v. Kanth,

232 F.3d 901 (Table), 2000 WL 1644099 (10th Cir. Nov. 2, 2000)

Habitual Residence

Levesque v. Levesque,

816 F. Supp. 662 (D. Kan. 1993)

Exercising Custody Rights at Removal

Lieberman v. Tabachnik,

625 F. Supp. 2d 1109 (D. Colo. 2008)

Exercising Custody Rights at Removal

Navani v. Shahani,

496 F.3d 1121 (10th Cir. 2007)

Return Moots Appeal

Pod-Ners LLC v. N. Feed & Bean of Lucerne LLC,

204 F.R.D. 675 (D. Colo. 2002)

Discovery in Hague Cases

Robinson v. Robinson,

983 F. Supp. 1339 (D. Colo. 1997)

Article 13 Mature Children Affirmative Defense

ELEVENTH CIRCUIT*Baran v. Beaty,*

479 F. Supp. 2d 1257 (S.D. Ala. 2007),

aff'd, 526 F.3d 1340 (11th Cir. 2008)
Article 13 Consent/Acquiescence Affirmative Defense

Baran v. Beaty,
526 F.3d 1340 (11th Cir. 2008)
Article 13 Grave Risk Affirmative Defense

Bekier v. Bekier,
248 F.3d 1051 (11th Cir. 2001)
Evidentiary Issues in Hague Cases
Return Moots Appeal

Bocquet v. Ouzid,
225 F. Supp. 2d 1337 (S.D. Fla. 2002)
Article 12 Well-Settled Affirmative Defense
Article 13 Consent/Acquiescence Affirmative Defense
Exercising Custody Rights at Removal
Tolling the One-Year Period

Cabrera v. Lozano (In re Cabrera),
323 F. Supp. 2d 1303 (S.D. Fla. 2004)
Article 12 Well-Settled Affirmative Defense
Tolling the One-Year Period
When Removal/Retention Became Wrongful

Casimiro v. Chavez,
No. Civ. A. 1:06CV1889-ODE, 2006 WL 2938713 (N.D. Ga. Oct. 13, 2006)
Article 13 Mature Children Affirmative Defense
Guardian *Ad Litem* Issues

Chechel v. Brignol,
No. 5:10-CV-164-OC-10GRJ, 2010 WL 2510391 (M.D. Fla. June 21, 2010)
When Removal/Retention Became Wrongful

Ellis v. Gen. Motors Acceptance Corp.,
160 F.3d 703 (11th Cir. 1998)
Tolling the One-Year Period

Fimab-Finanziaria Maglificio Biellese Fratelli Fila S.p.A. v. Helio Import/Export, Inc.,
601 F. Supp. 1 (S.D. Fla. 1983)
Discovery in Hague Cases

Furnes v. Reeves,
362 F.3d 702 (11th Cir. 2004)
Exercising Custody Rights at Removal
Prima-Facie Case
Removal/Retention Breached Custody Rights
Tolling the One-Year Period

Ga. Gazette Publ'g Co. v. U.S. Dep't of Def.

562 F. Supp. 1000 (S.D. Ga. 1983)
Discovery in Hague Cases

Garcia-Mir v. Meese,

781 F.2d 1450 (11th Cir. 1986)
Article 16 Stay of Pending State Court Action

Giampaolo v. Erneta,

390 F. Supp. 2d 1269 (N.D. Ga. 2004)
Article 12 Well-Settled Affirmative Defense
Article 13 Consent/Acquiescence Affirmative Defense
Article 13 Mature Children Affirmative Defense
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights
Tolling the One-Year Period

Gil v. Rodriguez,

184 F. Supp. 2d 1221 (M.D. Fla. 2002)
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

Hanley v. Roy,

485 F.3d 641 (11th Cir. 2007)
Exercising Custody Rights at Removal

In re D.D.,

440 F. Supp. 2d 1283 (M.D. Fla. 2006)
Article 13 Grave Risk Affirmative Defense

Lalo v. Malca,

318 F. Supp. 2d 1152 (S.D. Fla. 2004)
Exercising Custody Rights at Removal
Removal/Retention Breached Custody Rights

Leslie v. Noble (In re Leslie),

377 F. Supp. 2d 1232 (S.D. Fla. 2005)
Exercising Custody Rights at Removal

Lops v. Lops,

140 F.3d 927 (11th Cir. 1998)
Article 12 Well-Settled Affirmative Defense
Article 16 – No Consideration of Merits of Underlying Custody Dispute
Tolling the One-Year Period

Mendez Lynch v. Mendez Lynch,

220 F. Supp. 2d 1347 (M.D. Fla. 2002)

- Article 12 Well-Settled Affirmative Defense
- Article 13 Consent/Acquiescence Affirmative Defense
- Article 13 Grave Risk Affirmative Defense
- Exercising Custody Rights at Removal
- Removal/Retention Breached Custody Rights
- Tolling the One-Year Period

Mikovic v. Mikovic,

541 F. Supp. 2d 1264 (M.D. Fla. 2007)

- Habitual Residence

Moreno v. Martin,

No. 08-22432-CIV, 2008 WL 4716958 (S.D. Fla. Oct. 23, 2008)

- Article 12 Well-Settled Affirmative Defense
- Article 13 Consent/Acquiescence Affirmative Defense
- Article 13 Grave Risk Affirmative Defense
- Exercising Custody Rights at Removal

Olesen-Frayne v. Olesen,

No. 2:09-cv-49-FTM-29DNF, 2009 WL 1184686 (M.D. Fla. May 1, 2009)

- Exercising Custody Rights at Removal
- Return Moots Appeal

Robles Antonio v. Barrios Bello (“*Robles I*”),

No. Civ. A.1:04-CV-1555-T, 2004 WL 1895125 (N.D. Ga. June 2, 2004)

- Obtaining Emergency Custody
- Procedural Steps in Hague Cases Generally
- Temporary Restraining Orders/Preliminary Injunction

Robles Antonio v. Barrios Bello (“*Robles II*”),

No. Civ. A.1:04-CV-1555-T, 2004 WL 1895124 (N.D. Ga. June 4, 2004)

- Procedural Steps in Hague Cases Generally

Robles Antonio v. Barrios Bello (“*Robles III*”),

No. Civ. A.1:04-CV-1555-T, 2004 WL 1895126 (N.D. Ga. June 7, 2004)

- Procedural Steps in Hague Cases Generally

Robles Antonio v. Barrios Bello (“*Robles IV*”),

No. Civ. A.1:04-CV-1555-T, 2004 WL 1895127 (N.D. Ga. June 7, 2004)

- Procedural Steps in Hague Cases Generally

Robles Antonio v. Barrios Bello (“*Robles V*”),

No. 04-12794-GG, 2004 WL 1895123 (11th Cir. June 10, 2004)

- Procedural Steps in Hague Cases Generally
- Stay of Trial Court’s Order Returning the Children
- Stay Pending Appeal

Ruiz v. Tenorio,

392 F.3d 1247 (11th Cir. 2004)

Article 16 Stay of Pending State Court Action

Habitual Residence

Seaman v. Peterson,

762 F. Supp. 2d 1363 (M.D. Ga. 2011)

Article 13 Grave Risk Affirmative Defense

D.C. CIRCUIT*Ellsworth Assoc., Inc. v. United States*,

917 F. Supp. 841 (D.D.C. 1996)

Discovery in Hague Cases

Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.,

559 F.2d 841, 843-44 (D.C. Cir. 1977)

Stay of Trial Court's Order Returning the Children

INTERNATIONAL CASES*In re Bates*, No. CA 122-89, High Court of Justice, Fam. Div'n, Ct. Royal of Justice, United Kingdom (1989)

Signatory Countries

Re G (A Minor) (Enforcement of Access Abroad), [1993] All E.R. 657

Rights of Access

EXHIBIT B—HAGUE CONVENTION
HAGUE CONVENTION ON THE CIVIL ASPECTS OF
INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

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

CHAPTER I - SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are -

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

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

Article 3

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

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

and

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

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

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights.

The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention -

- a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
- b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II - CENTRAL AUTHORITIES***Article 6***

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

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

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

- a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d) to exchange, where desirable, information relating to the social background of the child;
- e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

- f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
- g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III - RETURN OF CHILDREN

Article 8

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

The application shall contain -

- a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b) where available, the date of birth of the child;
- c) the grounds on which the applicant's claim for return of the child is based;
- d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by -

- e) an authenticated copy of any relevant decision or agreement;
- f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
- g) any other relevant document.

Article 9

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

Article 10

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

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

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

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

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

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

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

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

Article 14

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

Article 15

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

Article 16

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

Article 17

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

Article 18

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

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be 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 VI - 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 fulfillment 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.

Article 22

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

Article 23

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

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

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

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

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

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

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

Article 28

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

Article 29

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

Article 30

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

Article 31

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

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

Article 32

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

Article 33

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

Article 34

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

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

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

CHAPTER VI - FINAL CLAUSES

Article 37

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

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

Article 38

Any other State may accede to the Convention. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

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

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

Article 41

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

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

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

Thereafter the Convention shall enter into force -

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

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

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

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

- (1) the signatures and ratifications, acceptances and approvals referred to in Article 37;
- (2) the accessions referred to in Article 38;
- (3) the date on which the Convention enters into force in accordance with Article 43;
- (4) the extensions referred to in Article 39;
- (5) the declarations referred to in Articles 38 and 40;
- (6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
- (7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 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.

EXHIBIT C—SIGNATORY COUNTRIES TO HAGUE CONVENTION*(See: http://travel.state.gov/abduction/resources/congressreport/congressreport_1487.html)

Convention Partners* – The dates of entry into force with the United States:	
Argentina	06/01/91
Australia	07/01/88
Austria	10/01/88
Bahamas, The	01/01/94
Belgium	05/01/99
Belize	11/01/89
Bosnia and Herzegovina	12/01/91
Brazil	12/01/03
Bulgaria	01/01/05
Burkina Faso	11/01/92
Canada	07/01/88
Chile	07/01/94
China – (Hong Kong and Macau only)	
• Hong Kong	09/01/97
• Macau	03/01/99
Colombia	06/01/96
Costa Rica	01/01/08
Croatia	12/01/91
Cyprus	03/01/95
Czech Republic	03/01/98
Denmark	07/01/91
Dominican Republic	06/01/07
Ecuador	04/01/92
El Salvador	06/01/07
Estonia	05/01/07
Finland	08/01/94
France	07/01/88
Germany	12/01/90
Greece	06/01/93
Guatemala	01/01/08
Honduras	06/01/94
Hungary	07/01/88

* List of countries as of June 2, 2011.

Convention Partners* – The dates of entry into force with the United States:	
Iceland	12/01/96
Ireland	10/01/91
Israel	12/01/91
Italy	05/01/95
Latvia	05/01/07
Lithuania	05/01/07
Luxembourg	07/01/88
Macedonia, Republic of	12/01/91
Malta	02/01/03
Mauritius	10/01/93
Mexico	10/01/91
Monaco	06/01/93
Montenegro	12/01/91
Netherlands	09/01/90
New Zealand	10/01/91
Norway	04/01/89
Panama	06/01/94
Paraguay	01/01/08
Peru	06/01/07
Poland	11/01/92
Portugal	07/01/98
Romania	06/01/93
Saint Kitts and Nevis	06/01/95
San Marino	01/01/08
Serbia	12/01/91
Slovakia	02/01/01
Slovenia	04/01/95
South Africa	11/01/97
Spain	07/01/88
Sri Lanka	01/01/08
Sweden	06/01/89
Switzerland	07/01/88
Turkey	08/01/00

* List of countries as of June 2, 2011.

Convention Partners* – The dates of entry into force with the United States:	
Ukraine	09/01/07
United Kingdom	07/01/88
• Bermuda	03/01/99
• Cayman Islands	08/01/88
• Falkland Islands	06/01/98
• Isle of Man	09/01/91
• Montserrat	03/01/99
Uruguay	09/01/04
Venezuela	01/01/97
Zimbabwe	08/01/95

* List of countries as of June 2, 2011.

EXHIBIT D—INTERNATIONAL CHILD ABDUCTION REMEDIES ACT

42 U.S.C. § 11601. Findings and declarations

(a) Findings

The Congress makes the following findings:

- (1) The international abduction or wrongful retention of children is harmful to their well-being.
- (2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.
- (3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.
- (4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

- (1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.
- (2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.
- (3) In enacting this chapter the Congress recognizes--
 - (A) the international character of the Convention; and
 - (B) the need for uniform international interpretation of the Convention.
- (4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

42 U.S.C. § 11602. 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 this title;
- (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 11606(a) of this title.

42 U.S.C. § 11603. 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

Reprinted from Westlaw with permission of Thomson/West.

If you wish to check the currency of this material, you may do so using KeyCite on Westlaw by visiting <http://www.westlaw.com/>.

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) of this section 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) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

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

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

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

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

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

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

(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.

42 U.S.C. § 11604. Provisional remedies

(a) Authority of courts

In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

42 U.S.C. § 11605. Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may

be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

42 U.S.C. § 11606. United States Central Authority

(a) Designation

The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

(c) Regulatory authority

The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

(d) Obtaining information from Parent Locator Service

The United States Central Authority may, to the extent authorized by the Social Security Act [42 U.S.C.A. § 301 et seq.], obtain information from the Parent Locator Service.

(e) Grant Authority

The United States Central Authority is authorized to make grants to, or enter into contracts or agreements with, any individual, corporation, other Federal, State, or local agency, or private entity or organization in the United States for purposes of accomplishing its responsibilities under the Convention and this chapter.

(f) Limited liability of private entities acting under the direction of the United States central authority

(1) Limitation on liability

Except as provided in paragraphs (2) and (3), a private entity or organization that receives a grant from or enters into a contract or agreement with the United States Central Authority under subsection (e) of this section for purposes of assisting the United States Central Authority in carrying out its responsibilities and functions under the Convention and this chapter, including any director, officer, employee, or agent of such entity or organization, shall not be liable in any civil action sounding in tort for damages directly related to the performance of such responsibilities and functions as defined by the regulations issued under subsection (c) of this section that are in effect on October 1, 2004.

(2) Exception for intentional, reckless, or other misconduct

The limitation on liability under paragraph (1) shall not apply in any action in which the plaintiff proves that the private entity, organization, officer, employee, or agent described in paragraph (1), as the case may be, engaged in intentional misconduct or acted, or failed to act, with actual malice, with reckless disregard to a substantial risk of causing injury without legal justification, or for a purpose unrelated to the performance of responsibilities or functions under this chapter.

(3) Exception for ordinary business activities

The limitation on liability under paragraph (1) shall not apply to any alleged act or omission related to an ordinary business activity, such as an activity involving general administration or operations, the use of motor vehicles, or personnel management.

42 U.S.C. § 11607. 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 11603 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 11603 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.

42 U.S.C. § 11608. Collection, maintenance, and dissemination of information

(a) In general

In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c) of this section, receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority--

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

(b) Requests for information

Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities

Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a) of this section, the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which--

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of Title 13;

shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a) of this section.

(d) Information available from Parent Locator Service

To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) of this section can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping

The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

42 U.S.C. § 11608a. Office of Children's Issues

(a) Director requirements

The Secretary of State shall fill the position of Director of the Office of Children's Issues of the Department of State (in this section referred to as the "Office") with an individual of senior rank who can ensure long-term continuity in the management and policy matters of the Office and has a strong background in consular affairs.

(b) Case officer staffing

Effective April 1, 2000, there shall be assigned to the Office of Children's Issues of the Department of State a sufficient number of case officers to ensure that the average caseload for each officer does not exceed 75.

(c) Embassy contact

The Secretary of State shall designate in each United States diplomatic mission an employee who shall serve as the point of contact for matters relating to international abductions of children by parents. The Director of the Office shall regularly inform the designated employee of children of United States citizens abducted by parents to that country.

(d) Reports to parents

(1) In general

Except as provided in paragraph (2), beginning 6 months after November 29, 1999, and at least once every 6 months thereafter, the Secretary of State shall report to each parent who has requested assistance regarding an abducted child overseas. Each such report shall include information on the current status of the abducted child's case and the efforts by the Department of State to resolve the case.

(2) Exception

The requirement in paragraph (1) shall not apply in a case of an abducted child if--

(A) the case has been closed and the Secretary of State has reported the reason the case was closed to the parent who requested assistance; or

(B) the parent seeking assistance requests that such reports not be provided.

42 U.S.C. § 11609. Interagency coordinating group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of Title 5 for employees of agencies.

42 U.S.C. § 11610. Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter.

42 U.S.C. § 11611. Report on compliance with the Hague Convention on International Child Abduction

(a) In general

Beginning 6 months after October 21, 1998 and every 12 months thereafter, the Secretary of State shall submit a report to the appropriate congressional committees on the compliance with the provisions of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, by the signatory countries of the Convention. Each such report shall include the following information:

(1) The number of applications for the return of children submitted by applicants in the United States to the Central Authority for the United States that remain unresolved more than 18 months after the date of filing.

(2) A list of the countries to which children in unresolved applications described in paragraph (1) are alleged to have been abducted, are being wrongfully retained in violation of United States court orders, or which have failed to comply with any of their obligations under such convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States.

(3) A list of the countries that have demonstrated a pattern of noncompliance with the obligations of the Convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States to the Central Authority for the United States.

(4) Detailed information on each unresolved case described in paragraph (1) and on actions taken by the Department of State to resolve each such case, including the specific actions taken by the United States chief of mission in the country to which the child is alleged to have been abducted.

(5) Information on efforts by the Department of State to encourage other countries to become signatories of the Convention.

(6) A list of the countries that are parties to the Convention in which, during the reporting period, parents who have been left-behind in the United States have not been able to secure prompt enforcement of a final return or access order under a Hague proceeding, of a United States custody, access, or visitation order, or of an access or

visitation order by authorities in the country concerned, due to the absence of a prompt and effective method for enforcement of civil court orders, the absence of a doctrine of comity, or other factors.

(7) A description of the efforts of the Secretary of State to encourage the parties to the Convention to facilitate the work of nongovernmental organizations within their countries that assist parents seeking the return of children under the Convention.

(b) Definition

In this section, the term “Central Authority for the United States” has the meaning given the term in Article 6 of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

EXHIBIT E—PUBLIC NOTICE 957

DEPARTMENT OF STATE
[Public Notice 957]
51 Fed. Reg. 10494, 1986 WL 133056
March 26, 1986

Hague International Child Abduction Convention; Text and Legal Analysis

***10494** On October 30, 1985 President Reagan sent the 1980 Hague Convention on the Civil Aspects of International Child Abduction to the U.S. Senate and recommended that the Senate give early and favorable consideration to the Convention and accord its advice and consent to U.S. ratification. The text of the Convention and the President's Letter of Transmittal, as well as the Secretary of State's Letter of Submittal to the President, were published shortly thereafter in Senate Treaty Doc. 99-11. On January 31, 1986 the Department of State sent to Senator Lugar, Chairman of the Senate Committee on Foreign Relations to which the Convention was referred, a detailed Legal Analysis of the Convention designed to assist the Committee and the full Senate in their consideration of the Convention. It is believed that broad availability of the Letters of Transmittal and Submittal, the English text of the Convention and the Legal Analysis will be of considerable help also to parents, the bench and the bar, as well as federal, State and local authorities, in understanding the Convention, and in resorting to or implementing it should the United States ultimately ratify it. Thus, these documents are reproduced below for the information of the general public.

Questions concerning the status of consideration of the Convention for U.S. ratification may be addressed to the Office of the Assistant Legal Adviser for Private International Law, Department of State, Washington, D.C. 20520 (telephone: (202) 653-9851). Inquiries on the action concerning the Convention taken by other countries may be addressed to the Office of the Assistant Legal Adviser for Treaty Affairs, Department of State (telephone: (202) 647-8135). Questions on the role of the federal government in the invocation and implementation of the Convention may be addressed to the Office of Citizens Consular Services, Department of State (telephone: (202) 647-3444).

Peter H. Pfund,
Assistant Legal Adviser for Private International Law.

Appendices:

A--Letters of Transmittal and Submittal from Senate Treaty Doc. 99-11

B--English text of Convention

C--Legal Analysis

***10503** Appendix C--Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction consists of six chapters containing forty-five articles. While not formally incorporated into the Convention, a

Reprinted from Westlaw with permission of Thomson/West.

If you wish to check the currency of this material, you may do so using KeyCite on Westlaw by visiting <http://www.westlaw.com/>.

model form was prepared when the Convention was adopted by the Hague Conference on Private International Law and was recommended for use in making application for the return of wrongfully removed or retained children. A copy of that form is annexed to this Legal Analysis. (The form to be used for the return of children from the United States may seek additional information.)

Table of Contents

To facilitate understanding of the Convention by the Senate and the use and interpretation of the Convention by parents, judges, lawyers and public and private agency personnel, the articles are analyzed and discussed in the following categories:

I. Children Protected by the Convention

(Preamble, Article 1)

A. Age (Articles 4, 36, 18, 29, 34, 13)

B. Residence (Article 4)

C. Timing/cases covered (Article 35)

D. Effect of custody order concerning the child

1. Existing custody orders (Articles 17, 3)

2. Pre-decree removals or retentions (Article 3)

II. Conduct Actionable Under the Convention

A. International “child abduction” not criminal: Hague Convention distinguished from extradition treaties (Article 12)

B. “Wrongful removal or retention” (Articles 1, 3, 5(a))

1. Holders of rights protected by the Convention (i.e., with respect to whom the removal or retention is wrongful)

(a) “Person, institution or other body” (Article 3(a), (b))

(b) “Jointly or alone” (Article 3(a), (b))

2. Defined

(a) Breach of “custody rights” (Articles 3(a), 5(a))

(b) “Custody rights” determined by law of child’s habitual residence (Articles 3(a), 31, 32, 33)

(c) Sources of “Custody rights” (Article 3, last paragraph)

i. Operation of law (Articles 3, 15)

ii. Judicial or administrative decision (Article 3)

iii. Agreement having legal effect (Article 3)

(d) “Actually exercised” (Articles 3(b), 5, 8(c), 13)

III Judicial Proceedings for Return of the Child

A. Right to seek return (Articles 29, 12, 34, 8)

- B. Legal advice and costs (Articles 25, 26, 42)
 - C. Pleading requirements (Articles 8, 24)
 - D. Admissibility of evidence (Articles 30, 23)
 - E. Judicial promptitude/status report (Article 11)
 - F. Judicial notice (Article 14)
 - G. Court determination of “wrongfulness” (Articles 15, 3, 11, 12, 14)
 - H. Constraints upon courts in requested states in making substantive custody decisions (Article 16)
 - I. Duty to return not absolute
 - 1. Temporal qualifications
 - (a) Article 4
 - (b) Article 35
 - (c) Article 12
 - 2. Article 13 limitations on return obligation
 - (a) Legislative history (Articles 13, 20)
 - (b) Non-exercise of custody rights (Articles 13(a), 3(b))
 - (c) Grave risk of harm/intolerable situation (Article 13(b))
 - (d) Child’s preference (Article 13)
 - (e) Role of social studies
 - 3. Article 20
 - 4. Custody order no defense to return (Article 17)
 - J. Return of the child (Article 12)
 - 1. Return order not on custody merits (Article 19)
 - 2. Costs, fees and expenses shifted to abductor (Article 26)
- IV. Central Authority*
(Articles 1, 10, 21)
- A. Establishment of Central Authority (Article 6)
 - B. Duties (Article 7)
 - C. Other Tasks (Articles 8, 9, 10, 11, 15, 21, 26, 27, 28)
 - 1. Processing applications (Articles 8, 9, 27, 28)
 - 2. Assistance in connection with judicial proceedings
 - (a) Request for status report (Article 11)
 - (b) Social studies/background reports (Article 13)

- (c) Determination of “wrongfulness” (Article 15)
- (d) Costs (Article 26), reservation (Articles 42, 22)

V. Access Rights--Article 21

- A. Remedies for breach (Articles 21, 12)
- B. Defined (Article 5(b))
- C. Procedure for obtaining relief (Articles 21, 8, 7)
- D. Alternative remedies (Articles 18, 29, 34)

VI. Miscellaneous and Final Clauses

- A. Article 36
- B. Articles 37 and 38
- C. Articles 42, 43 and 44
- D. Articles 39 and 40
- E. Article 41
- F. Article 45

Annexes

--Recommended Return Application Form

--Bibliography

Guide to Terminology Used in the Legal Analysis

“Abduction” as used in the Convention title is not intended in a criminal sense. That term is shorthand for the phrase “wrongful removal or retention” which appears throughout the text, beginning with the preambular language and Article 1. Generally speaking, “wrongful removal” refers to the taking of a child from the person who was actually exercising custody of the child. “Wrongful retention” refers to the act of keeping the child without the consent of the person who was actually exercising custody. The archetype of this conduct is the refusal by the noncustodial parent to return a child at the end of an authorized visitation period. “Wrongful retention” is not intended by this Convention to cover refusal by the custodial parent to permit visitation by the other parent. Such obstruction of visitation may be redressed in accordance with Article 21.

The term “abductor” as used in this analysis refers to the person alleged to have wrongfully removed or retained a child. This person is also referred to as the “alleged wrongdoer” or the “respondent.”

The term “person” as used in this analysis includes the person, institution or other body who (or which) actually exercised custody prior to the abduction and is seeking the child’s return. The “person” seeking the child’s return is also referred to as “applicant” and “petitioner.”

The terms “court” and “judicial authority” are used throughout the analysis to mean both judicial and administrative bodies empowered to make decisions on petitions made pursuant to this Convention. “Judicial decree” and “court order” likewise include decisions made by courts or administrative bodies.

“Country of origin” and “requesting country” refer to the child’s country (“State”) of habitual residence prior to the wrongful removal or retention. “Country addressed” refers to the country (“State”) where the child is located or the country to which the child is believed to have been taken. It is in that country that a judicial or administrative proceeding for return would be brought.

“Access rights” correspond to “visitation rights.”

References to the “reporter” are to Elisa Perez-Vera, the official Hague Conference reporter for the Convention. Her explanatory report is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it. It is referred to herein as the “Perez-Vera Report.” The Perez-Vera Report appears in Actes et ***10504** documents de la Quatorzieme Session (1980), Volume III, Child Abduction, edited by the Permanent Bureau of the Hague Conference on Private International Law, The Hague, Netherlands. (The volume may be ordered from the Netherlands Government Printing and Publishing Office, 1 Christoffel Plantijnstraat, Post-box 20014, 2500 EA The Hague, Netherlands.)

I. Children Protected by the Convention

A fundamental purpose of the Hague Convention is to protect children from wrongful international removals or retentions by persons bent on obtaining their physical and/or legal custody. Children who are wrongfully moved from country to country are deprived of the stable relationships which the Convention is designed promptly to restore. Contracting States are obliged by Article 2 to take all appropriate measures to implement the objectives of the Convention as set forth in Article 1: (1) To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (2) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States. While these objectives are universal in their appeal, the Convention does not cover all children who might be victims of wrongful takings or retentions. A threshold inquiry, therefore, is whether the child who has been abducted or retained is subject to the Convention’s provisions. Only if the child falls within the scope of the Convention will the administrative and judicial mechanisms of the Convention apply.

A. Age

The Convention applies only to children under the age of sixteen (16). Even if a child is under sixteen at the time of the wrongful removal or retention as well as when the Convention is invoked, the Convention ceases to apply when the child reaches sixteen. Article 4.

Absent action by governments to expand coverage of the Convention to children aged sixteen and above pursuant to Article 36, the Convention itself is unavailable as the legal vehicle for securing return of a child sixteen or older. However, it does not bar return of such child by other means.

Articles 18, 29 and 34 make clear that the Convention is a nonexclusive remedy in cases of international child abduction. Article 18 provides that the Convention does not limit the power of a judicial authority to order return of a child at any time, presumably under other laws, procedures or comity, irrespective of the child’s age. Article 29 permits the person who claims a breach of custody or access rights, as defined by Articles 3 and 21, to bypass the Convention completely by invoking any applicable laws or procedures to secure the child’s return. Likewise,

Article 34 provides that the Convention shall not restrict the application of any law in the State addressed for purposes of obtaining the child's return or for organizing visitation rights. Assuming such laws are not restricted to children under sixteen, a child sixteen or over may be returned pursuant to their provisions.

Notwithstanding the general application of the Convention to children under sixteen, it should be noted that the wishes of mature children regarding their return are not ignored by the Convention. Article 13 permits, but does not require, the judicial authority to refuse to order the child returned if 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." The role of the child's preference in return proceedings is discussed further at III.I(2)(d), *infra*.

B. Residence

In order for the Convention to apply the child must have been "habitually resident in a Contracting State immediately before any breach of custody or access rights." Article 4. In practical terms, the Convention may be invoked only where the child was habitually resident in a Contracting State and taken to or retained in another Contracting State. Accordingly, child abduction and retention cases are actionable under the Convention if they are international in nature (as opposed to interstate), and provided the Convention has entered into force for both countries involved. See discussion of Article 38, VI.B, *infra*.

To illustrate, take the case of a child abducted to California from his home in New York. The Convention could not be invoked to secure the return of such child. This is true even if one of the child's parents is an American citizen and the other a foreign national. The Uniform Child Custody Jurisdiction Act (UCCJA) and/or the Parental Kidnapping Prevention Act (PKPA), domestic state and federal law, respectively, would govern the return of the child in question. If the same child were removed from New York to Canada, application under the Convention could be made to secure the child's return provided the Convention had entered into force both for the United States and the Canadian province to which the child was taken. An alternative remedy might also lie under other Canadian law. If the child had been removed from Canada and taken to the United States, the aggrieved custodial parent in Canada could seek to secure the child's return by petitioning for enforcement of a Canadian custody order pursuant to the UCCJA, or by invoking the Convention, or both.

C. Timing/Cases Covered

Article 35 states that the Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States. Following a strict interpretation of that Article, the Convention will not apply to a child who is wrongfully shifted from one Contracting State to another if the wrongful removal or retention occurred before the Convention's entry into force in those States. However, under a liberal interpretation Article 35 could be construed to cover wrongful removal or retention cases which began before the Convention took effect but which continued and were ongoing after its entry into force.

D. Effect of Custody Order Concerning the Child

1. Existing Custody Orders

Children who otherwise fall within the scope of the Convention are not automatically removed from its protections by virtue of a judicial decision awarding custody to the alleged wrongdoer. This is true whether the decision as to custody was made, or is entitled to recognition, in the

State to which the child has been taken. Under Article 17 that State cannot refuse to return a child solely on the basis of a court order awarding custody to the alleged wrongdoer made by one of its own courts or by the courts of another country. This provision is intended to ensure, inter alia, that the Convention takes precedence over decrees made in favor of abductors before the court had notice of the wrongful removal or retention.

Thus, under Article 17 the person who wrongfully removes or retains the child in a Contracting State cannot insulate the child from the Convention's return provisions merely by obtaining a custody order in the country of new residence, or by seeking there to enforce another country's order. Nor may the alleged wrongdoer rely upon a stale decree awarding him or her custody, the provisions of which have been *10505 derogated from subsequently by agreement or acquiescence of the parties, to prevent the child's return under the Convention. Article 3.

It should be noted that Article 17 does permit a court to take into account the reasons underlying an existing custody decree when it applies the Convention.

12. Pre-Decree Removals or Retentions

Children who are wrongfully removed or retained prior to the entry of a custody order are protected by the Convention. There need not be a custody order in effect in order to invoke the Convention's return provisions. Accordingly, under the Convention a child will be ordered returned to the person with whom he or she was habitually resident in pre-decree abduction cases as well as in cases involving violations of existing custody orders.

Application of the Convention to pre-decree cases comes to grips with the reality that many children are abducted or retained long before custody actions have been initiated. In this manner a child is not prejudiced by the legal inaction of his or her physical custodian, who may not have anticipated the abduction, and the abductor is denied any legal advantage since the child is subject to the return provisions of the Convention.

The Convention's treatment of pre-decree abduction cases is distinguishable from the Council of Europe's Convention on Recognition and Enforcement of Decisions Relating to the Custody of Children, adopted in Strasbourg, France in November 1979 ("Strasbourg Convention"), and from domestic law in the United States, specifically the UCCJA and the PKPA, all of which provide for enforcement of custody decrees. Although the UCCJA and PKPA permit enforcement of a decree obtained by a parent in the home state after the child has been removed from that state, in the absence of such decree the enforcement provisions of those laws are inoperative. In contrast to the restoration of the legal status quo ante brought about by application of the UCCJA, the PKPA, and the Strasbourg Convention, the Hague Convention seeks restoration of the factual status quo ante and is not contingent on the existence of a custody decree. The Convention is premised upon the notion that the child should be promptly restored to his or her country of habitual residence so that a court there can examine the merits of the custody dispute and award custody in the child's best interests.

Pre-decree abductions are discussed in greater detail in the section dealing with actionable conduct. See II.B(2)(c)(i).

II. Conduct Actionable Under the Convention

A. *"International Child Abduction" not Criminal: Hague Convention Distinguished From Extradition Treaties*

Despite the use of the term “abduction” in its title, the Hague Convention is not an extradition treaty. The conduct made actionable by the Convention--the wrongful removal or retention of children--is wrongful not in a criminal sense but in a civil sense.

The Hague Convention establishes civil procedures to secure the return of so-called “abducted” children. Article 12. In this manner the Hague Convention seeks to satisfy the overriding concern of the aggrieved parent. The Convention is not concerned with the question of whether the person found to have wrongfully removed or retained the child returns to the child’s country of habitual residence once the child has been returned pursuant to the Convention. This is in contrast to the criminal extradition process which is designed to secure the return of the fugitive wrong-doer. Indeed, when the fugitive-parent is extradited for trial or to serve a criminal sentence, there is no guarantee that the abducted child will also be returned.

While it is uncertain whether criminal extradition treaties will be routinely invoked in international custody cases between countries for which the Hague Convention is in force, nothing in the Convention bars their application or use.

B. Wrongful Removal or Retention

The Convention’s first stated objective is to secure the prompt return of children who are wrongfully removed from or retained in any Contracting State. Article 1(a). (The second stated objective, i.e., to ensure that rights of custody and of access under the law of one Contracting State are effectively exercised in other Contracting States (Article 1(b)), is discussed under the heading “Access Rights,” V., infra.) The removal or retention must be wrongful within the meaning of Article 3, as further clarified by Article 5(a), in order to trigger the return procedures established by the Convention. Article 3 provides that the removal or retention of a child is to be considered wrongful where:

(a) it is in breach of custody rights attributed to a person, an institution or another 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 the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

This Article is a cornerstone of the Convention. It is analyzed by examining two questions:

1. Who holds rights protected by the Convention (or, with respect to whom is the removal or retention deemed to be wrongful); and
2. What are the factual and legal elements of a wrongful removal or retention

1. Holders of Rights Protected by the Convention

(a) “Person, institution or other body”. While the child is the ultimate beneficiary of the Convention’s judicial and administrative machinery, the child’s role under the Convention is passive. In contrast, it is up to the “person, institution or other body” (hereinafter referred to simply as “the person”) who “actually exercised” custody of the child prior to the abduction, or who would have exercised custody but for the abduction, to invoke the Convention to secure the child’s return. Article 3 (a), (b). It is this person who holds the rights protected by the Convention and who has the right to seek relief pursuant to its terms.

Since the vast majority of abduction cases arises in the context of divorce or separation, the person envisioned by Article 3(a) most often will be the child’s parent. The typical scenario

would involve one parent taking a child from one Contracting State to another Contracting State over objections of the parent with whom the child had been living.

However, there may be situations in which a person other than a biological parent has actually been exercising custody of the child and is therefore eligible to seek the child's return pursuant to the Convention. An example would be a grandparent who has had physical custody of a child following the death of the parent with whom the child had been residing. If the child is subsequently removed from the custody of the grandparent by the surviving parent, the aggrieved grandparent could invoke the Convention to secure the child's return. In another situation, the child may be in the care of foster parents. If custody rights exercised by the foster parents are breached, for instance, by abduction of the child by its biological parent, the foster parents ***10506** could invoke the Convention to secure the child's return.

In the two foregoing examples (not intended to be exhaustive) a family relationship existed between the victim-child and the person who had the right to seek the child's return. However, institutions such as public or private child care agencies also may have custody rights the breach of which would be remediable under the Convention. If a natural parent relinquishes parental rights to a child and the child is subsequently placed in the care of an adoption agency, that agency may invoke the Convention to recover the child if the child is abducted by its parent(s).

(b) "Jointly or alone". Article 3 (a) and (b) recognize that custody rights may be held either jointly or alone. Two persons, typically mother and father, can exercise joint custody, either by court order following a custody adjudication, or by operation of law prior to the entry of a decree. The Convention does not distinguish between these two situations, as the commentary of the Convention reporter indicates:

Now, from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties. Perez-Vera Report, paragraph 71 at 447-448.

Article 3(a) ensures the application of the Convention to pre-decree abductions, since it protects the rights of a parent who was exercising custody of the child jointly with the abductor at the time of the abduction, before the issuance of a custody decree.

2. "Wrongful Removal or Retention" Defined

The obligation to return an abducted child to the person entitled to custody arises only if the removal or the retention is wrongful within the meaning of the Convention. To be considered wrongful, certain factual and legal elements must be present.

(a) Breach of "custody rights". The removal or retention must be in breach of "custody rights," defined in Article 5(a) as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."

Accordingly, a parent who sends his or her child to live with a caretaker has not relinquished custody rights but rather has exercised them within the meaning of the Convention. Likewise, a parent hospitalized for a protracted period who places the child with grandparents or other relatives for the duration of the illness has effectively exercised custody.

(b) “Custody rights” determined by law of child’s habitual residence. In addition to including the right to determine the child’s residence (Article 5(a)), the term “custody rights” covers a collection of rights which take on more specific meaning by reference to the law of the country in which the child was habitually resident immediately before the removal or retention. Article 3(a). Nothing in the Convention limits this “law” to the internal law of the State of the child’s habitual residence. Consequently, it could include the laws of another State if the choice of law rules in the State of habitual residence so indicate.

If a country has more than one territorial unit, the habitual residence refers to the particular territorial unit in which the child was resident, and the applicable laws are those in effect in that territorial unit. Article 31. In the United States, the law in force in the state in which a child was habitually resident (as possibly preempted by federal legislation enacted in connection with U.S. ratification of the Convention) would be applicable for the determination as to whether a removal or retention is wrongful.

Articles 32 and 33 also control, respectively, how and whether the Convention applies in States with more than one legal system. Perez-Vera Report, paragraphs 141 and 142 at 470.

(c) Sources of “custody rights”. Although the Convention does not exhaustively list all possible sources from which custody rights may derive, it does identify three sources. According to the final paragraph of Article 3, custody rights may arise: (1) by operation of law; (2) by reason of a judicial or administrative decision; or (3) by reason of an agreement having legal effect under the law of that State.

i. Custody rights arising by operation of law. Custody rights which arise by operation of law in the State of habitual residence are protected; they need not be conferred by court order to fall within the scope of the Convention. Article 3. Thus, a person whose child is abducted prior to the entry of a custody order is not required to obtain a custody order in the State of the child’s habitual residence as a prerequisite to invoking the Convention’s return provisions.

In the United States, as a general proposition both parents have equal rights of custody of their children prior to the issuance of a court order allocating rights between them. If one parent interferes with the other’s equal rights by unilaterally removing or retaining the child abroad without consent of the other parent, such interference could constitute wrongful conduct within the meaning of the Convention. (See excerpts from Perez-Vera Report quoted at II.B.1(b), supra.) Thus, a parent left in the United States after a pre-decree abduction could seek return of a child from a Contracting State abroad pursuant to the Convention. In cases involving children wrongfully brought to or retained in the United States from a Contracting State abroad prior to the entry of a decree, in the absence of an agreement between the parties the question of wrongfulness would be resolved by looking to the law of the child’s country of habitual residence.

Although a custody decree is not needed to invoke the Convention, there are two situations in which the aggrieved parent may nevertheless benefit by securing a custody order, assuming the courts can hear swiftly a petition for custody. First, to the extent that an award of custody to the

left-behind parent (or other person) is based in part upon an express finding by the court that the child's removal or retention was wrongful within the meaning of Article 3, the applicant anticipates a possible request by the judicial authority applying the Convention, pursuant to Article 15, for a court determination of wrongfulness. This may accelerate disposition of a return petition under the Convention. Second, a person outside the United States who obtains a custody decree from a foreign court subsequent to the child's abduction, after notice and opportunity to be heard have been accorded to the absconding parent, may be able to invoke either the Convention or the UCCJA, or both, to secure the child's return from the United States. The UCCJA may be preferable inasmuch as its enforcement provisions are not subject to the exceptions contained in the Convention.

ii. Custody rights arising by reason of judicial or administrative decision. Custody rights embodied in judicial or ***10507** administrative decisions fall within the Convention's scope. While custody determinations in the United States are made by state courts, in some Contracting States, notably the Scandinavian countries, administrative bodies are empowered to decide matters relating to child custody including the allocation of custody and visitation rights. Hence the reference to "administrative decisions" in Article 3.

The language used in this part of the Convention can be misleading. Even when custody rights are conferred by court decree, technically speaking the Convention does not mandate recognition and enforcement of that decree. Instead, it seeks only to restore the factual custody arrangements that existed prior to the wrongful removal or retention (which incidentally in many cases will be the same as those specified by court order).

Finally, the court order need not have been made by a court in the State of the child's habitual residence. It could be one originating from a third country. As the reporter points out, when custody rights were exercised in the State of the child's habitual residence on the basis of a foreign decree, the Convention does not require that the decree have been formally recognized. Perez-Vera Report, paragraph 69 at 447.

iii. Custody rights arising by reason of agreement having legal effect. Parties who enter into a private agreement concerning a child's custody have recourse under the Convention if those custody rights are breached. Article 3. The only limitation is that the agreement have legal effect under the law of the child's habitual residence.

Comments of the United States with respect to language contained in an earlier draft of the Convention (i.e., that the agreement "have the force of law") shed some light on the meaning of the expression "an agreement having legal effect". In the U.S. view, the provision should be interpreted expansively to cover more than only those agreements that have been incorporated in or referred to in a custody judgment. Actes et documents de la Quatorzieme Session, (1980) Volume III. Child Abduction, Comments of Governments at 240. The reporter's observations affirm a broad interpretation of this provision:

As regards the definition of an agreement which has "legal effect" in terms of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities. Perez-Vera Report, paragraph 70 at 447.

(d) “Actually exercised”. The most predictable fact pattern under the Convention will involve the abduction of a child directly from the parent who was actually exercising physical custody at the time of the abduction.

To invoke the Convention, the holder of custody rights must allege that he or she actually exercised those rights at the time of the breach or would have exercised them but for the breach. Article 3(b). Under Article 5, custody rights are defined to include the right to determine the child’s place of residence. Thus, if a child is abducted from the physical custody of the person in whose care the child has been entrusted by the custodial parent who was “actually exercising” custody, it is the parent who placed the child who may make application under the Convention for the child’s return.

Very little is required of the applicant in support of the allegation that custody rights have actually been or would have been exercised. The applicant need only provide some preliminary evidence that he or she actually exercised custody of the child, for instance, took physical care of the child. Perez-Vera Report, paragraph 73 at 448. The Report points out the informal nature of the pleading and proof requirements; Article 8(c) merely requires a statement in the application to the Central Authority as to “the grounds on which the applicant’s claim for return of the child is based.” *Id.*

In the scheme of the Convention it is presumed that the person who has custody actually exercised it. Article 13 places on the alleged abductor the burden of proving the nonexercise of custody rights by the applicant as an exception to the return obligation. Here, again, the reporter’s comments are insightful:

Thus, we may conclude that the Convention, taken as a whole, is built upon the tacit presumption that the person who has care of the child actually exercises custody over it. This idea has to be overcome by discharging the burden of proof which has shifted, as is normal with any presumption (i.e. discharged by the “abductor” if he wishes to prevent the return of the child.) Perez-Vera Report paragraph 73 at 449.

III. Judicial Proceedings for Return of Child

A. *Right To Seek Return*

When a person’s custody rights have been breached by the wrongful removal or retention of the child by another, he or she can seek return of the child pursuant to the Convention. This right of return is the core of the Convention. The Convention establishes two means by which the child may be returned. One is through direct application by the aggrieved person to a court in the Contracting State to which the child has been taken or in which the child is being kept. Articles 12, 29. The other is through application to the Central Authority to be established by every Contracting State. Article 8. These remedies are not mutually exclusive; the aggrieved person may invoke either or both of them. Moreover, the aggrieved person may also pursue remedies outside the Convention. Articles 18, 29 and 34. This part of the report describes the Convention’s judicial remedy in detail. The administrative remedy is discussed in IV, *infra*.

Articles 12 and 29 authorize any person who claims a breach of custody rights within the meaning of Article 3 to apply for the child’s return directly to the judicial authorities of the Contracting State where the child is located.

A petition for return pursuant to the Convention may be filed any time after the child has been removed or retained up until the child reaches sixteen. While the window of time for filing may

be wide in a particular case without threat of technically losing rights under the Convention, there are numerous reasons to commence a return proceeding promptly if the likelihood of a voluntary return is remote. The two most crucial reasons are to preclude adjudication of custody on the merits in a country other than the child's habitual residence (see discussion of Article 16, *infra*) and to maximize the chances for the child's return by reducing the alleged abductor's opportunity to establish that the child is settled in a new environment (see discussion of Article 12, *infra*).

A petition for return would be made directly to the appropriate court in the Contracting State where the child is located. If the return proceedings are commenced less than one year from the date of the wrongful removal or retention, Article 12 requires the court to order the return of the child forthwith. If the return proceedings are commenced a year or more after the alleged wrongful removal or retention, the court remains obligated by Article 12 to order the child returned unless it is demonstrated that the child is settled in its new environment.

Under Article 29 a person is not precluded from seeking judicially-ordered return of a child pursuant to laws and procedures other than the Convention. Indeed, Articles 18 and 34 make clear that nothing in the Convention limits the power of a court to return a child at any time by applying ***10508** other laws and procedures conducive to that end.

Accordingly, a parent seeking return of a child from the United States could petition for return pursuant to the Convention, or in the alternative or additionally, for enforcement of a foreign court order pursuant to the UCCJA. For instance, an English father could petition courts in New York either for return of his child under the Convention and/or for recognition and enforcement of his British custody decree pursuant to the UCCJA. If he prevailed in either situation, the respective court could order the child returned to him in England. The father in this illustration may find the UCCJA remedy swifter than invoking the Convention for the child's return because it is not subject to the exceptions set forth in the Convention, discussed at III.I., *infra*.

B. Legal Advice and Costs

Article 25 provides for the extension of legal aid and advice to foreign applicants on the same basis and subject only to the same eligibility requirements as for nationals of the country in which that aid is sought.

Article 26 prohibits Central Authorities from charging applicants for the cost and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. This provision will be of no help to an applicant, however, if the Contracting State in question has made a reservation in accordance with Articles 26 and 42 declaring that it shall not be bound to assume any costs 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.

It is expected that the United States will enter a reservation in accordance with Articles 26 and 42. This will place at least the initial burden of paying for counsel and legal proceedings on the applicant rather than on the federal government. Because the reservation is nonreciprocal, use of it will not automatically operate to deny applicants from the United States free legal services and judicial proceedings in other Contracting States. However, if the Contracting State in which the child is located has itself made use of the reservation in question, the U.S. applicant will not be eligible for cost-free legal representation and court proceedings. For more information on costs,

including the possibility that the petitioner's costs may be levied on the abductor if the child is ordered returned, see III.J 2 and IV.C (d) of this analysis.

C. Pleading Requirements

The Convention does not expressly set forth pleading requirements that must be satisfied by an applicant who commences a judicial return proceeding. In contrast, Article 8 sets forth the basic requirements for an application placed before a Central Authority (discussed IV.C(1), *infra*) for the return of the child. Since the objective is identical--the child's return--whether relief is sought through the courts or through intercession of the Central Authority, it follows that a court should be provided with at least as much information as a Central Authority is to be provided in a return application filed in compliance with Article 8. To ensure that all necessary information is provided, the applicant may wish to append to the petition to the court a completed copy of the recommended model form for return of a child (see Annex A to this analysis).

In addition to providing the information set forth in Article 8, the petition for return should allege that the child was wrongfully removed or retained by the defendant in violation of custody rights that were actually being exercised by the petitioner. The petition should state the source of the custody rights, the date of the wrongful conduct, and the child's age at that time. In the prayer for relief, the petitioner should request the child's return and an order for payment by the abducting or retaining parent of all fees and expenses incurred to secure the child's return.

Any return petition filed in a court in the United States pursuant to the Convention must be in English. Any person in the United States who seeks return of a child from a foreign court must likewise follow the requirements of the foreign state regarding translation of legal documents. See Perez-Vera Report, paragraph 132 at page 467.

D. Admissibility of Evidence

Under Article 30, any application submitted to the Central Authority or petition submitted to the judicial authorities of a Contracting State, and any documents or information appended thereto, are admissible in the courts of the State. Moreover, under Article 23, no legalization or similar formalities may be required. However, authentication of private documents may be required. According to the official report, "any requirement of the internal law of the authorities in question that copies or private documents be authenticated remains outside the scope of this provision." Perez-Vera Report, paragraph 131 at page 467.

E. Judicial Promptitude/Status Report

Once an application for return has been filed, the court is required by Article 11 "to act expeditiously in proceedings for the return of children." To keep matters on the fast track, Article 11 gives the applicant or the Central Authority of the requested State the right to request a statement from the court of the reasons for delay if a decision on the application has not been made within six weeks from the commencement of the proceedings.

F. Judicial Notice

In ascertaining whether there has been a wrongful removal or retention of a child within the meaning of Article 3, Article 14 empowers the court of the requested State to take notice directly of the law and decisions in the State of the child's habitual residence. Standard procedures for the proof of foreign law and for recognition of foreign decisions would not need to be followed and compliance with such procedures is not to be required.

G. Court Determination of “Wrongfulness”

Prior to ordering a child returned pursuant to Article 12, Article 15 permits the court to request the applicant to obtain from the authorities of the child’s State of habitual residence a decision or other determination that the alleged removal or retention was wrongful within the meaning of Article 3. Article 15 does not specify which “authorities” may render such a determination. It therefore could include agencies of government (e.g., state attorneys general) and courts. Central Authorities shall assist applicants to obtain such a decision or determination. This request may only be made where such a decision or determination is obtainable in that State.

This latter point is particularly important because in some countries the absence of the defendant-abductor and child from the forum makes it legally impossible to proceed with an action for custody brought by the left-behind parent. If an adjudication in such an action were a prerequisite to obtaining a determination of wrongfulness, it would be impossible for the petitioner to comply with an Article 15 request. For this reason a request for a decision or determination on wrongfulness can not be made in such circumstances consistent with the limitation in Article 15. Even if local law permits an adjudication of custody in the absence of the child and defendant (i.e., post-abduction) or would otherwise allow a petitioner to obtain a determination of *10509 wrongfulness, the provisions of Article 15 will probably not be resorted to routinely. That is so because doing so would convert the purpose of the Convention from seeking to restore the factual status quo prior to an abduction to emphasizing substantive legal relationships.

A further consideration in deciding whether to request an applicant to comply with Article 15 is the length of time it will take to obtain the required determination. In countries where such a determination can be made only by a court, if judicial dockets are seriously backlogged, compliance with an Article 15 order could significantly prolong disposition of the return petition, which in turn would extend the time that the child is kept in a state of legal and emotional limbo. If “wrongfulness” can be established some other way, for instance by taking judicial notice of the law of the child’s habitual residence as permitted by Article 14, the objective of Article 15 can be satisfied without further prejudice to the child’s welfare or undue delay of the return proceeding. This would also be consistent with the Convention’s desire for expeditious judicial proceedings as evidenced by Article 11.

In the United States, a left-behind parent or other claimant can petition for custody after the child has been removed from the forum. The right of action is conferred by the UCCJA, which in many states also directs courts to hear such petitions expeditiously. The result of such proceeding is a temporary or permanent custody determination allocating custody and visitation rights, or joint custody rights, between the parties. However, a custody determination on the merits that makes no reference to the Convention may not by itself satisfy an Article 15 request by a foreign court for a determination as to the wrongfulness of the conduct within the meaning of Article 3. Therefore, to ensure compliance with a possible Article 15 request the parent in the United States would be well-advised to request an explicit finding as to the wrongfulness of the alleged removal or retention within the meaning of Article 3 in addition to seeking custody.

H. Constraints Upon Courts in Requested States in Making Substantive Custody Decisions

Article 16 bars a court in the country to which the child has been taken or in which the child has been retained from considering the merits of custody claims once it has received notice of the removal or retention of the child. The constraints continue either until it is determined that the

child is not to be returned under the Convention, or it becomes evident that an application under the Convention will not be forthcoming within a reasonable time following receipt of the notice.

A court may get notice of a wrongful removal or retention in some manner other than the filing of a petition for return, for instance by communication from a Central Authority, from the aggrieved party (either directly or through counsel), or from a court in a Contracting State which has stayed or dismissed return proceedings upon removal of the child from that State.

No matter how notice may be given, once the tribunal has received notice, a formal application for the child's return pursuant to the Convention will normally be filed promptly to avoid a decision on the merits from being made. If circumstances warrant a delay in filing a return petition, for instance pending the outcome of private negotiations for the child's return or interventions toward that end by the Central Authority, or pending determination of the location of the child and alleged abductor, the aggrieved party may nevertheless wish to notify the court as to the reason(s) for the delay so that inaction is not viewed as a failure to proceed under the Convention.

I. Duty To Return not Absolute

The judicial duty to order return of a wrongfully removed or retained child is not absolute. Temporal qualifications on this duty are set forth in Articles 12, 4 and 35. Additionally, Articles 13 and 20 set forth grounds upon which return may be denied.

1. Temporal Qualifications

Articles 4, 35 and 12 place time limitations on the return obligation.

(a) Article 4. Pursuant to Article 4, the Convention ceases to apply once the child reaches age sixteen. This is true regardless of when return proceedings were commenced and irrespective of their status at the time of the child's sixteenth birthday. See I.A., *supra*.

(b) Article 35. Article 35 limits application of the Convention to wrongful removals or retentions occurring after its entry into force between the two relevant Contracting States. But see I.C., *supra*.

(c) Article 12. Under Article 12, the court is not obligated to return a child when return proceedings pursuant to the Convention are commenced a year or more after the alleged removal or retention and it is demonstrated that the child is settled in its new environment. The reporter indicates that "(T)he provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child . . ." Perez-Vera Report, paragraph 109 at page 459.

If the Convention is to succeed in deterring abductions, the alleged abductor must not be accorded preferential treatment by courts in his or her country of origin, which, in the absence of the Convention, might be prone to favor "home forum" litigants. To this end, nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof. Moreover, any claims made by the person resisting the child's return will be considered in light of evidence presented by the applicant concerning the child's contacts with and ties to his or her State of habitual residence. The reason for the passage of time, which may have made it possible for the child to form ties to the new country, is also relevant to the ultimate disposition of the return petition. If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for

the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.

2. Article 13 Limitations on the Return Obligation

(a) Legislative history. In drafting Articles 13 and 20, the representatives of countries participating in negotiations on the Convention were aware that any exceptions had to be drawn very narrowly lest their application undermine the express purposes of the Convention--to effect the prompt return of abducted children. Further, it was generally believed that courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions and allowing their use only in clearly meritorious cases, and only when the person opposing return had met the burden of proof. Importantly, a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory. The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies. Finally, the wording of each exception represents a compromise to accommodate the different legal systems and tenets of family law in effect in the ***10510** countries negotiating the Convention, the basic purpose in each case being to provide for an exception that is narrowly construed.

(b) Non-exercise of custody rights. Under Article 13(a), the judicial authority may deny an application for the return of a child if the person having the care of the child was not actually exercising the custody rights at the time of the removal or retention, or had consented to or acquiesced in the removal or retention. This exception derives from Article 3(b) which makes the Convention applicable to the breach of custody rights that were actually exercised at the time of the removal or retention, or which would have been exercised but for the removal or retention.

The person opposing return has the burden of proving that custody rights were not actually exercised at the time of the removal or retention, or that the applicant had consented to or acquiesced in the removal or retention. The reporter points out that proof that custody was not actually exercised does not form an exception to the duty to return if the dispossessed guardian was unable to exercise his rights precisely because of the action of the abductor. Perez-Vera Report, paragraph 115 at page 461.

The applicant seeking return need only allege that he or she was actually exercising custody rights conferred by the law of the country in which the child was habitually resident immediately before the removal or retention. The statement would normally include a recitation of the circumstances under which physical custody had been exercised, i.e., whether by the holder of these rights, or by a third person on behalf of the actual holder of the custody rights. The applicant would append copies of any relevant legal documents or court orders to the return application. See III. C., supra, and Article 8.

(c) Grave risk of harm/intolerable situation. Under Article 13(b), a court in its discretion need not order a child returned if there is a grave risk that return would expose the child to physical harm or otherwise place the child in an intolerable situation.

This provision was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests. Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable

situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious.

A review of deliberations on the Convention reveals that "intolerable situation" was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an "intolerable situation" and subjected to a grave risk of psychological harm.

(d) Child's preference. The third, unlettered paragraph of Article 13 permits the court to decline to order the child returned if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views. As with the other Article 13 exceptions to the return obligation, the application of this exception is not mandatory. This discretionary aspect of Article 13 is especially important because of the potential for brainwashing of the child by the alleged abductor. A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child.

(e) Role of social studies. The final paragraph of Article 13 requires the court, in considering a respondent's assertion that the child should not be returned, to take into account information relating to the child's social background provided by the Central Authority or other competent authority in the child's State of habitual residence. This provision has the dual purpose of ensuring that the court has a balanced record upon which to determine whether the child is to be returned, and preventing the abductor from obtaining an unfair advantage through his or her own forum selection with resulting ready access to evidence of the child's living conditions in that forum.

3. Article 20

Article 20 limits the return obligation of Article 12. It states: "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."

The best explanation for this unique formulation is that the Convention might never have been adopted without it. The negotiating countries were divided on the inclusion of a public policy exception in the Convention. Those favoring a public policy exception believed that under some extreme circumstances not covered by the exceptions of Article 13 a court should be excused from returning a child to the country of habitual residence. In contrast, opponents of a public policy exception felt that such an exception could be interpreted so broadly as to undermine the fabric of the entire Convention.

A public policy clause was nevertheless adopted at one point by a margin of one vote. That clause provided: "Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed." To prevent imminent collapse of the negotiating process engendered by the adoption of this clause, there was a swift and determined move to

devise a different provision that could be invoked on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process.

The resulting language of Article 20 has no known precedent in other international agreements to serve as a guide in its interpretation. However, it should be emphasized that this exception, like the others, was intended to be restrictively interpreted and applied, and is not to be used, for example, as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed. Two characterizations of the effect to be given Article 20 are recited below for illumination.

The following explanation of Article 20 is excerpted from paragraph 118 of the Perez-Vera Report at pages 461-2:

It is significant that the possibility, acknowledged in article 20, that the child may not be returned when its return ‘would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms’ has been placed in the last article of the chapter: it was thus intended to emphasize the always clearly exceptional nature of this provision’s application. As for the substance of this provision, two comments only are required. Firstly, even if its literal meaning is strongly reminiscent of the terminology used in international texts concerning the protection *10511 of human rights, this particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently, so as to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject-matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles. Secondly, such principles must not be invoked any more frequently, nor must their invocation be more readily admissible than they would be in their application to purely internal matters. Otherwise, the provision would be discriminatory in itself, and opposed to one of the most widely recognized fundamental principles in internal laws. A study of the case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the Convention has in view.

A.E. Anton, Chairman of the Commission on the Hague Conference of Private International Law that drafted the Convention, explained Article 20 in his article, “The Hague Convention on International Child Abduction,” 30 I.C.L.Q. 537, 551-2 (July, 1981), as follows:

Its acceptance may in part have been due to the fact that it states a rule which many States would have been bound to apply in any event, for example, by reason of the terms of their constitutions. The reference in this provision to “the fundamental principles of the requested State” make it clear that the reference is not one to international conventions or declarations concerned with the protection of human rights and fundamental freedoms which have been ratified or accepted by Contracting States. It is rather to the fundamental provisions of the law of the requested State in such matters . . . If the United Kingdom decides to ratify the Hague Convention, it will, of course, be for the implementing legislation or the courts to specify what provisions of United Kingdom law come within the scope of Article 20. The Article, however, is merely permissive and it is to be hoped that States will exercise restraint in availing themselves of it.

4. Custody Order no Defense to Return

See I.D.1, *supra*, for discussion of Article 17.

J. Return of the Child

Assuming the court has determined that the removal or retention of the child was wrongful within the meaning of the Convention and that no exceptions to the return obligation have been satisfactorily established by the respondent, Article 12 provides that “the authority concerned shall order the return of the child forthwith.” The Convention does not technically require that the child be returned to his or her State of habitual residence, although in the classic abduction case this will occur. If the petitioner has moved from the child’s State of habitual residence the child will be returned to the petitioner, not the State of habitual residence.

1. Return Order not on Custody merits

Under Article 19, a decision under the Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue. It follows that once the factual status quo ante has been restored, litigation concerning custody or visitation issues could proceed. Typically this will occur in the child’s State of habitual residence.

2. Costs, Fees and Expenses Shifted to Abductor

In connection with the return order, Article 26 permits the court to direct the person who removed or retained the child to pay necessary expenses incurred by or on behalf of the applicant to secure the child’s return, including expenses, costs incurred or payments made for locating the child, costs of legal representation of the applicant, and those of returning the child. The purposes underlying Article 26 are to restore the applicant to the financial position he or she would have been in had there been no removal or retention, as well as to deter such conduct from happening in the first place. This fee shifting provision has counterparts in the UCCJA (sections 7(g), 8(c), 15(b)) and the PKPA ([28 U.S.C. 1738A](#) note).

IV. Central Authority

In addition to creating a judicial remedy for cases of wrongful removal and retention, the Convention requires each Contracting State to establish a Central Authority (hereinafter “CA”) with the broad mandate of assisting applicants to secure the return of their children or the effective exercise of their visitation rights. Articles 1, 10, 21. The CA is expressly directed by Article 10 to take all appropriate measures to obtain the voluntary return of children. The role of the CA with respect to visitation rights is discussed in V., *infra*.

A. Establishment of Central Authority

Article 6 requires each Contracting State to designate a Central Authority to discharge the duties enumerated in Articles 7, 9, 10, 11, 15, 21, 26, 27, and 28.

In France, the Central Authority is located within the Ministry of Justice. Switzerland has designated its Federal Justice Office as CA, and Canada has designated its Department of Justice. However, each Canadian province and territory in which the Convention has come into force has directed its Attorney General to serve as local CA for cases involving that jurisdiction.

In the United States it is very unlikely that the volume of cases will warrant the establishment of a new agency or office to fulfill Convention responsibilities. Rather, the duties of the CA will be carried out by an existing agency of the federal government with experience in dealing with authorities of other countries.

The Department of State's Office of Citizens Consular Services (CCS) within its Bureau of Consular Affairs will most likely serve as CA under the Hague Convention. CCS presently assists parents here and abroad with child custody-related problems within the framework of existing laws and procedures. The Convention should systematize and expedite CCS handling of requests from abroad for assistance in securing the return of children wrongfully abducted to or retained in the United States, and will provide additional tools with which CCS can help parents in the United States who are seeking return of their children from abroad.

The establishment of an interagency coordinating body is envisioned to assist the State Department in executing its functions as CA. This body is to include representatives of the Departments of State, Justice, and Health and Human Services.

In addition to the mandatory establishment of a CA in the national government, Contracting States are free to appoint similar entities in political subdivisions throughout the country. Rather than mandating the establishment of a CA in every state, it is expected that state governments in the United States will be requested on a case-by-case basis to render specified assistance, consistent with the Convention, aimed at resolving international custody and visitation disputes with regard to children located within their jurisdiction.

B. Duties

Article 7 enumerates the majority of the tasks to be carried out either directly by the CA or through an intermediary. The CA is to take "all appropriate measures" to execute these responsibilities. Although they are free to do so, the Convention does not obligate Contracting States to amend their internal laws to discharge *10512 Convention tasks more efficaciously. See Perez-Vera Report, paragraph 63 at page 444.

The following paragraphs of subsections of Article 7 of the Convention are couched in terms of the tasks and functions of the United States CA. The corresponding tasks and functions of the CA's in other States party to the Convention will be carried out somewhat differently in the context of each country's legal system.

Article 7(a). When the CA in the United States is asked to locate a child abducted from a foreign contracting State to this country, it would utilize all existing tools for determining the whereabouts of missing persons. Federal resources available for locating missing persons include the FBI-operated National Crime Information Center (NCIC) computer (pursuant to Pub. L. No. 97- 292, the Missing Children Act), the Federal Parent Locator Service (pursuant to section 9 of Pub. L. No. 96-611, the Parental Kidnapping Prevention Act) and the National Center for Missing and Exploited Children. If the abductor's location is known or suspected, the relevant state's Parent Locator Service or Motor Vehicle Bureau and the Internal Revenue Service, Attorney General and Secretary of Education may be requested to conduct field and/or record searches. Also at the state level, public or private welfare agencies can be called upon to verify discreetly any address information about the abductor that may be discovered.

Article 7(b). To prevent further harm to the child, the CA would normally call upon the state welfare agency to take whatever protective measures are appropriate and available consistent with that state's child abuse and neglect laws. The CA, either directly or with the help of state authorities, may seek a written agreement from the abductor (and possibly from the applicant as well) not to remove the child from the jurisdiction pending procedures aimed at return of the child. Bonds or other forms of security may be required.

Article 7(c). The CA, either directly or through local public or private mediators, attorneys, social workers, or other professionals, would attempt to develop an agreement for the child's voluntary return and/or resolution of other outstanding issues. The obligation of the CA to take or cause to be taken all appropriate measures to obtain the voluntary return of the child is so fundamental a purpose of this Convention that it is restated in Article 10. However, overtures to secure the voluntary return of a child may not be advisable if advance awareness by the abductor that the Convention has been invoked is likely to prompt further flight and concealment of the child. If the CA and state authorities are successful in facilitating a voluntary agreement between the parties, the applicant would have no need to invoke or pursue the Convention's judicial remedy.

Article 7(d). The CA in the United States would rely upon court personnel or social service agencies in the child's state of habitual residence to compile information on the child's social background for the use of courts considering exceptions to a return petition in another country in which an abducted or retained child is located. See Article 13.

Article 7(e). The CA in the United States would call upon U.S. state authorities to prepare (or have prepared) general statements about the law of the state of the child's habitual residence for purposes of application of the Convention in the country where the child is located, i.e., to determine whether a removal or retention was wrongful.

Articles 7 (f) and (g). In the United States the federal CA will not act as legal advocate for the applicant. Rather, in concert with state authorities and interested family law attorneys, the CA, through state or local bodies, will assist the applicant in identifying competent private legal counsel or, if eligible, in securing representation by a Legal Aid or Legal Services lawyer. In some states, however, the Attorney General or local District Attorney may be empowered under state law to intervene on behalf of the applicant-parent to secure the child's return.

In some foreign Contracting States, the CA may act as the legal representative of the applicant for all purposes under the Convention.

Article 28 permits the CA to require written authorization empowering it to act on behalf of the applicant, or to designate a representative to act in such capacity.

Article 7(h). Travel arrangements for the return of a child from the United States would be made by the CA or by state authorities closest to the case in cooperation with the petitioner and/or interested foreign authorities. If it is necessary to provide short-term care for the child pending his or her return, the CA presumably will arrange for the temporary placement of the child in the care of the person designated for that purpose by the applicant, or, failing that, request local authorities to appoint a guardian, foster parent, etc. The costs of transporting the child are borne by the applicant unless the court, pursuant to Article 26, orders the wrongdoer to pay.

Article 7(i). The CA will monitor all cases in which its assistance has been sought. It will maintain files on the procedures followed in each case and the ultimate disposition thereof. Complete records will aid in determining how frequently the Convention is invoked and how well it is working.

C. Other Tasks

1. Processing Applications

Article 8 sets forth the required contents of a return application submitted to a CA, all of which are incorporated into the model form recommended for use when seeking a child's return pursuant to the Convention (see Annex A of this analysis). Article 8 further provides that an application for assistance in securing the return of a child may be submitted to a CA in either the country of the child's habitual residence or in any other Contracting State. If a CA receives an application with respect to a child whom it believes to be located in another Contracting State, pursuant to Article 9 it is to transmit the application directly to the appropriate CA and inform the requesting CA or applicant of the transmittal.

It is likely that an applicant who knows the child's whereabouts can expedite the return process by electing to file a return application with the CA in the country in which the child is located. The applicant who pursues this course of action may also choose to file a duplicate copy of the application for information purposes with the CA in his or her own country. Of course, the applicant may prefer to apply directly to the CA in his or her own country even when the abductor's location is known, and rely upon the CA to transfer documents and communicate with the foreign CA on his or her behalf. An applicant who does not know the whereabouts of the child will most likely file the return application with the CA in the child's State of habitual residence.

Under Article 27, a CA may reject an application if "it is manifest that the requirements of the Convention are not fulfilled or that the application is otherwise not well founded." The CA must promptly inform the CA in the requesting State, or the applicant directly, of its reasons for such rejection. Consistent with the spirit of the Convention and in the absence of any prohibition on doing so, the applicant should be allowed to correct the defects and refile the application.

Under Article 28, a CA may require the applicant to furnish a written ***10513** authorization empowering it to act on behalf of the applicant, or designating a representative so to act.

2. Assistance in Connection With Judicial Proceedings

(a) Request for status report. When an action has been commenced in court for the return of a child and no decision has been reached by the end of six weeks, Article 11 authorizes the applicant or the CA of the requested State to ask the judge for a statement of the reasons for the delay. The CA in the country where the child is located may make such a request on its own initiative, or upon request of the CA of another Contracting State. Replies received by the CA in the requested State are to be transmitted to the CA in the requesting State or directly to the applicant, depending upon who initiated the request.

(b) Social studies/background reports. Information relating to the child's social background collected by the CA in the child's State of habitual residence pursuant to Article 7(d) may be submitted for consideration by the court in connection with a judicial return proceeding. Under the last paragraph of Article 13, the court must consider home studies and other social background reports provided by the CA or other competent authorities in the child's State of habitual residence.

(c) Determination of "wrongfulness". If a court requests an applicant to obtain a determination from the authorities of the child's State of habitual residence that the removal or retention was wrongful, Central Authorities are to assist applicants, so far as practicable, to obtain such a determination. Article 15.

(d) Costs. Under Article 26, each CA bears its own costs in applying the Convention. The actual operating expenses under the Convention will vary from one Contracting State to the next depending upon the volume of incoming and outgoing requests and the number and nature of the procedures available under internal law to carry out specified Convention tasks.

Subject to limited exceptions noted in the next paragraph, the Central Authority and other public services are prohibited from imposing any charges in relation to applications submitted under the Convention. Neither the applicant nor the CA in the requesting State may be required to pay for the services rendered directly or indirectly by the CA of the requested State.

The exceptions relate to transportation and legal expenses to secure the child's return. With respect to transportation, the CA in the requested State is under no obligation to pay for the child's return. The applicant can therefore be required to pay the costs of transporting the child. With respect to legal expenses, if the requested State enters a reservation in accordance with Articles 26 and 42, the applicant can be required to pay all costs and expenses of the legal proceedings, and those arising from the participation of legal counsel or advisers. However, see III. J 2 of this analysis discussing the possibility that the court ordering the child's return will levy these and other costs upon the abductor. Even if the reservation under Articles 26 and 42 is entered, under Article 22 no security, bond or deposit can be required to guarantee the payment of costs and expenses of the judicial or administrative proceedings falling within the Convention.

Under the last paragraph of Article 26 the CA may be able to recover some of its expenses from the person who engaged in the wrongful conduct. For instance, a court that orders a child returned may also order the person who removed or retained the child to pay the expenses incurred by or on behalf of the petitioner, including costs of court proceedings and legal fees of the petitioner. Likewise, a court that issues an order concerning visitation may direct the person who prevented the exercise of visitation rights to pay necessary expenses incurred by or on behalf of the petitioner. In such cases, the petitioner could recover his or her expenses, and the CA could recover its outlays on behalf of the petitioner, including costs associated with, or payments made for, locating the child and the legal representation of the petitioner.

V. Access Rights--Article 21

A. Remedies for Breach

Up to this point this analysis has focussed on judicial and administrative remedies for the removal or retention of children in breach of custody rights. "Access rights," which are synonymous with "visitation rights", are also protected by the Convention, but to a lesser extent than custody rights. While the Convention preamble and Article 1(b) articulate the Convention objective of ensuring that rights of access under the law of one state are respected in other Contracting States, the remedies for breach of access rights are those enunciated in Article 21 and do not include the return remedy provided by Article 12.

B. Defined

Article 5(b) defines "access rights" as including "the right to take a child for a limited period of time to a place other than the child's habitual residence."

A parent who takes a child from the country of its habitual residence to another country party to the Convention for a summer visit pursuant to either a tacit agreement between the parents or a court order is thus exercising his or her access rights. Should that parent fail to return the child at the end of the agreed upon visitation period, the retention would be wrongful and could give rise

to a petition for return under Article 12. If, on the other hand, a custodial parent resists permitting the child to travel abroad to visit the noncustodial parent, perhaps out of fear that the child will not be returned at the end of the visit, this interference with access rights does not constitute a wrongful retention within the meaning of Article 3 of the Convention. The parent whose access rights have been infringed is not entitled under the Convention to the child's "return," but may request the Central Authority to assist in securing the exercise of his or her access rights pursuant to Article 21.

Article 21 may also be invoked as a precautionary measure by a custodial parent who anticipates a problem in getting the child back at the end of a visit abroad. That parent may apply to the CA of the country where the child is to visit the noncustodial parent for steps to ensure the return of the child at the end of the visit--for example, through appropriate imposition of a performance bond or other security.

C. Procedure for Obtaining Relief

Procedurally Article 21 authorizes a person complaining of, or seeking to prevent, a breach of access rights to apply to the CA of a Contracting State in the same way as a person seeking return of the child. The application would contain the information described in Article 8, except that information provided under paragraph (c) would be the grounds upon which the claim is made for assistance in organizing or securing the effective exercise of rights of access.

Once the CA receives such application, it is to take all appropriate measures pursuant to Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights is subject. This includes initiating or facilitating the institution of proceedings, either directly or through intermediaries, to organize or protect access rights and to secure respect for conditions to which these rights are subject.

***10514** If legal proceedings are instituted in the Contracting State in which the noncustodial parent resides, Article 21 may not be used by the noncustodial parent to evade the jurisdiction of the courts of the child's habitual residence, which retain authority to define and/or condition the exercise of visitation rights. A parent who has a child abroad for a visit is not to be allowed to exploit the presence of the child as a means for securing from the CA (or court) in that country more liberal visitation rights than those set forth in a court order agreed upon in advance of the visit. Such result would be tantamount to sanctioning forum-shopping contrary to the intent of the Convention. Any such application should be denied and the parent directed back to the appropriate authorities in the State of the child's habitual residence for consideration of the desired modification. Pending any such modification, once the lawful visitation period has expired, the custodial parent would have the right to seek the child's return under Article 3.

The Perez-Vera Report gives some limited guidance as to how CA's are to cooperate to secure the exercise of access rights:

. . . it would be advisable that the child's name not appear on the passport of the holder of the right of access, whilst in 'transfrontier' access cases it would be sensible for the holder of the access rights to give an undertaking to the Central Authority of the child's habitual residence to return the child on a particular date and to indicate also the places where he intends to stay with the child. A copy of such an undertaking would then be sent to the Central Authority of the habitual residence of the holder of the access rights, as well as to the Central Authority of the State in which he has stated his intention of staying with the child. This would enable the

authorities to know the whereabouts of the child at any time and to set in motion proceedings for bringing about its return, as soon as the stated time-limit has expired. Of course, none of the measures could by itself ensure that access rights are exercised properly, but in any event we believe that this Report can go no further: the specific measures which the Central Authorities concerned are able to take will depend on the circumstances of each case and on the capacity to act enjoyed by each Central Authority. Perez-Vera Report, paragraph 128 at page 466.

D. Alternative Remedies

In addition to or in lieu of invoking Article 21 to resolve visitation-related problems, under Articles 18, 29 and 34 an aggrieved parent whose access rights have been violated may bypass the CA and the Convention and apply directly to the judicial authorities of a Contracting State for relief under other applicable laws.

In at least one case it is foreseeable that a parent abroad will opt in favor of local U.S. law instead of the Convention. A noncustodial parent abroad whose visitation rights are being thwarted by the custodial parent resident in the United States could invoke the UCCJA to seek enforcement of an existing foreign court order conferring visitation rights. Pursuant to [section 23 of the UCCJA](#), a state court in the United States could order the custodial parent to comply with the prescribed visitation period by sending the child to the parent outside the United States. This remedy is potentially broader and more meaningful than the Convention remedy, since the latter does not include the right of return when a custodial parent obstructs the noncustodial parent's visitation rights, i.e., by refusing to allow the other parent to exercise those rights. It is possible that a parent in the United States seeking to exercise access rights with regard to a child habitually resident abroad may similarly find greater relief under foreign law than under the Convention.

VI. Miscellaneous and Final Clauses

A. Article 36

Article 36 permits Contracting States to limit the restrictions to which a child's return may be subject under the Convention, i.e., expand the return obligation or cases to which the Convention will apply. For instance, two or more countries may agree to extend coverage of the Convention to children beyond their sixteenth birthdays, thus expanding upon Article 4. Or, countries may agree to apply the Convention retroactively to wrongful removal and retention cases arising prior to its entry into force for those countries. Such agreement would remove any ambiguity concerning the scope of Article 35. The Department of State is not proposing that the United States make use of this Article.

B. Articles 37 and 38

Chapter VI of the Hague Convention consists of nine final clauses concerned with procedural aspects of the treaty, most of which are self-explanatory. Article 37 provides that states which were members of the Hague Conference on Private International Law at the time of the Fourteenth Session (October 1980) may sign and become parties to the Convention by ratification, acceptance or approval. Significantly, under Article 38 the Convention is open to accession by non-member States, but enters into force only between those States and member Contracting States which specifically accept their accession to the Convention. Article 38.

C. Articles 43 and 44

In Article 43 the Convention provides that it enters into force on the first day of the third calendar month after the third country has deposited its instrument of ratification, acceptance, approval or accession. For countries that become parties to the Convention subsequently, the Convention enters into force on the first day of the third calendar month following the deposit of the instrument of ratification. Pursuant to Article 43, the Convention entered into force on December 1, 1983 among France, Portugal and five provinces of Canada, and on January 1, 1984 for Switzerland. As of January, 1986 it is in force for all provinces and territories of Canada with the exception of Alberta, the Northwest Territories, Prince Edward Island and Saskatchewan.

The Convention enters into force in ratifying countries subject to such declarations or reservations pursuant to Articles 39, 40, 24 and 26 (third paragraph) as may be made by each ratifying country in accordance with Article 42.

The Convention remains in force for five years from the date it first entered into force (i.e., December 1, 1983), and is renewed tacitly every five years absent denunciations notified in accordance with Article 44.

D. Articles 39 and 40

Article 39 authorizes a Contracting State to declare that the Convention extends to some or all of the territories for the conduct of whose international relations it is responsible.

Under Article 40, countries with two or more territorial units having different systems of law relative to custody and visitation rights may declare that the Convention extends to all or some of them. This federal state clause was included at the request of Canada to take account of Canada's special constitutional situation. The Department of State is not proposing that the United States make use of this provision. Thus, if the United States ratifies the Convention, it would come into force throughout the United States as the supreme law of the land in every state and other jurisdiction.

E. Article 41

Article 41 is another provision inserted at the request of one country, and is best understood by reciting the reporter's explanatory comments:

Finally a word should be said on Article 41, since it contains a wholly novel provision in ***10515** Hague Conventions. It also appears in the other Conventions adopted at the Fourteenth Session, i.e., the Convention on International Access to Justice, at the express request of the Australian delegation.

This article seeks to make it clear that ratification of the Convention by a State will carry no implication as to the internal distribution of executive, judicial and legislative powers in that State.

This may seem self-evident, and this is the point which the head of the Canadian delegation made during the debates of the Fourth Commission where it was decided to insert such a provision in both Conventions (see P.-v. No. 4 of the Plenary Session). The Canadian delegation, openly expressing the opinion of a large number of delegations, regarded the insertion of this article in the two Conventions as unnecessary. Nevertheless, Article 41 was adopted, largely to satisfy the Australian delegation, for which the absence of such a provision

would apparently have created insuperable constitutional difficulties. Perez-Vera Report, paragraph 149 at page 472.

F. Article 45

Article 45 vests the Ministry of Foreign Affairs of the Kingdom of the Netherlands, as depository for the Convention, with the responsibility to notify Hague Conference member States and other States party to the Convention of all actions material to the operation of the Convention.

Annex A

The following model form was recommended by the Fourteenth Session of the Hague Conference on Private International Law (1980) for use in making applications pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction for the return of wrongfully removed or retained children. The version of the form to be used for requesting the return of such children from the United States will probably seek additional information, in particular to help authorities in the United States in efforts to find a child whose whereabouts are not known to the applicant.

Request for Return

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

Requesting Central Authority or Applicant

Requested Authority

Concerns the following child: -----who will attain the age of 16 on -----, 19--.

Note.--The following particulars should be completed insofar as possible.

I--Identity of the Child and its Parents

1 Child

Name and first names.....

Date and place of birth.....

Passport or identity card No., if any.....

Description and photo, if possible (see annexes).....

2 Parents

2.1 Mother:

Name and first names.....

Date and place of birth.....

Nationality.....

Occupation.....

Habitual residence.....

Passport or identity card No., if any.....

2.2 Father:

Name and first names.....

Date and place of birth.....

Nationality.....

Occupation.....

Habitual residence.....

Passport or identity card No., if any.....

2.3 Date and place of marriage.....

II--Requesting Individual or Institution (who actually exercised custody before the removal or retention)

3 Name and first names

Nationality of individual applicant.....

Occupation of individual applicant.....

ADDRESS.....

Passport or identity card No., if any.....

Relation to the child.....

Name and address of legal adviser, if any.....

III--Place Where the Child Is Thought To Be

4.1 Information concerning the person alleged to have removed or retained the child

Name and first names.....

Date and place of birth, if known.....

Nationality, if known

Occupation.....

Last known address.....

Passport or identity card No., if any.....

Description and photo, if possible (see annexes).....

4.2 Address of the child.....

4.3 Other persons who might be able to supply additional information relating to the whereabouts of the child.....

IV--Time, Place, Date and Circumstances of the Wrongful Removal or Retention

V--Factual or Legal Grounds Justifying the Request

VI--Civil Proceedings in Progress

VII--Child Is To Be Returned To:

a. Name and first names

Date and place of birth

ADDRESS

Telephone number

b. Proposed arrangements for return of the child

VIII--Other Remarks

IX--List of Documents Attached*

FN*E.g. Certified copy of relevant decision or agreement concerning custody or access; certificate or affidavit as to the applicable law; information relating to the social background of the child; authorization empowering the Central Authority to act on behalf of applicant.

DATE

Place

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

Annex B.--Bibliography

Explanatory Report by E. Perez-Vera, Hague Conference on Private International Law, Actes et documents de la Quatorzieme session, vol. III, 1980, p. 426.

Anton, A.E.--The Hague Convention on International Child Abduction; 30 Int'l & Comp. L.Q. (1981), p. 537.

Bodenheimer, B.--The Hague Convention on International Child Abduction; XIV Fam. L.Q. (1980), p. 99.

Chatin, L.--Les conflits relatifs a la garde des enfants et au droit de visite en droit international prive; Travaux du Comite francais de droit international prive, Seance du 12 mai 1982, Publication du Ministere de la Justice.

Crouch, R.E.--Effective Measures Against International Child Snatching; 131 New L.J. (1981), p. 592.

Deschenaux, D.--La Convention de La Haye sur les aspects civils de l'enlevement international d'enfants, du 25 octobre 1980; XXXVII Schweizerisches Jahrbuch fur internationale Recht (1981), p. 119.

Dyer, A.--International child abduction by parents; 168 Recueil des Cours de l'Academie de droit international de La Haye (1980), p. 231.

Eekelaar, J.M.--The Hague Convention on the Civil Aspects of International Child Abduction; Explanatory Documentation prepared for Commonwealth Jurisdictions, Commonwealth Secretariat, 1981.

Farquhar, K.B.--The Hague Convention on International Child Abduction Comes to Canada; 4 Can. J. Fam. L. (1983), p. 5.

Frank, R.J.--American and International Responses to International Child Abductions, 16 N.Y.U. J. Int'l L. & Pol. (Winter 1984), p. 415.

Hoff, P., Schulman, J. and Volenik, A.--Interstate Child Custody Disputes and Parental Kidnapping: Policy, Practice and Law. Legal Services Corporation-- American Bar Association, 1982.

Huesstege, R.--Internationale Kindesentfuehrungen und *10516 Landesverfassungsrecht; IPRax (1982), p. 95--Der Uniform Child Custody Jurisdiction Act--Rechtsvergleichende Betrachtungen zu Internationalen Kindesentfuehren, Verlag fur Standesamtswesen, Frankfurt am Main, 1982.

Morgenstern, B.R.--The Hague Convention on the Civil Aspects of International Child Abduction: The Need for Ratification; 10 N.C.J. Int'l L. & Com. Reg. (1985), p. 463.

Reymond, P.H.--Convention de La Haye et Convention de Strasbourg. Aspects comparatifs des conventions concernant l'enlevement d'un enfant par l'un de ses parents; Revue de droit suisse 1981, p. 329.

Schulman, J.--cf. Hoff, P.

Vink, E.L.M.--Enkele civielrechtelijke aspecten van de internationale ontvoeringen van kinderen door een van de ouders; Leiden, mai 1981.

Volenik, A.--cf. Hoff, P.

Westbrook, G.R.--Law and Treaty Responses to International Child Abductions; 20 Va. J. Int'l L. (1980), p. 669.

[FR Doc. 86-6495 Filed 3-25-86; 8:45 am]

51 FR 10494-01, 1986 WL 133056 (F.R.)

EXHIBIT F—PEREZ-VERA REPORT
(See: <http://www.hcch.net/upload/expl28.pdf>)

Explanatory Report by Elisa Pérez-Vera

TRANSLATION OF THE PERMANENT BUREAU

Introduction

I *Results of the work of the Hague Conference on private international law*

1 The Convention on the Civil Aspects of International Child Abduction was adopted on 24 October 1980 by the Fourteenth Session of the Hague Conference on private international law in Plenary Session, and by unanimous vote of the States which were present.¹ On 25 October 1980, the delegates signed the Final Act of the Fourteenth Session which contained the text of the Convention and a Recommendation containing the model form which is to be used in applications for the return of children who have been wrongfully abducted or retained.

On this occasion, the Hague Conference departed from its usual practice, draft Conventions adopted during the Fourteenth Session being made available for signature by States immediately after the Closing Session. Four States signed the Convention then (Canada, France, Greece and Switzerland), which thus bears the date 25 October 1980.

2 As regards the starting point of the proceedings which resulted in the adoption of the Convention, as well as the matter of existing conventions on the subject or those directly related to it, we shall refer to the introduction to the Report of the Special Commission.²

3 The Fourteenth Session of the Conference, which took place between 6 and 25 October 1980, entrusted the task of preparing the Convention to its First Commission, the Chairman of which was Professor A. E. Anton (United Kingdom) and the Vice-Chairman Dean Leal (Canada), who had already been Chairman and Vice-Chairman respectively of the Special Commission. Professor Elisa Pérez-Vera was confirmed in her position as Reporter. Mr Adair Dyer, First Secretary of the Permanent Bureau, who had prepared important documents for the Conference proceedings, was in charge of the scientific work of the secretariat.

4 In the course of thirteen sittings, the First Commission gave a first reading to the Preliminary Draft drawn up by the Special Commission. At the same time, it named the members

¹ Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela and Yugoslavia.

Representatives of the Arab Republic of Egypt, Israel and Italy did not participate in the vote, despite having played an active part in the proceedings of the First Commission. Morocco, the Holy See and the Union of the Soviet Socialist Republics sent observers. In the course of the proceedings, the First Commission also had at its disposal the invaluable assistance of observers from the Council of Europe, the Commonwealth Secretariat and International Social Service.

² Report of the Special Commission, Nos 3 and 7 to 15.

of a Drafting Committee which drafted the text concurrently with the progress of the main proceedings.³ Seven other sittings were devoted to a discussion of the text prepared by the Drafting Committee,⁴ as well as of clauses relating to the application of the Convention to States with non-unified legal systems ('Application Clauses') and of the model form⁵ drafted by *ad hoc* Committees.⁶ The final clauses had been suggested by the Permanent Bureau and were incorporated into the preliminary draft Convention drawn up by the Drafting Committee.

II *Aim and structure of this Report*

5 The Explanatory Report on a text which is destined to become positive law, that is to say a text which will require to be cited and applied, must fulfill at least two essential aims. On the one hand, it must throw into relief, as accurately as possible, the principles which form the basis of the Convention and, wherever necessary, the development of those ideas which led to such principles being chosen from amongst existing options. It is certainly not necessary to take exhaustive account of the various attitudes adopted throughout the period during which the Convention was being drawn up, but the point of view reflected in the Convention will sometimes be more easily grasped by being set opposite other ideas which were put forward.

Now, given the fact that the preliminary draft Convention prepared by the Special Commission enjoyed widespread support⁷ and that the final text essentially preserves the structure and fundamental principles of the Preliminary Draft, this final Report and in particular its first part, repeats certain passages in the Report of the Special Commission prepared in April 1980, for the Fourteenth Session.⁸

6 This final Report must also fulfill another purpose, *viz.* to supply those who have to apply the Convention with a detailed commentary on its provisions. Since this commentary is designed in principle to throw light upon the literal terms of these provisions, it will be concerned much less with tracing their origins than with stating their content accurately.

³ The Drafting Committee, under the chairmanship of Mr Leal as Vice-Chairman of the First Commission, included Messrs Savolainen (Finland), Chatin (France), Jones (United Kingdom) and the Reporter. Mr Dyer and several recording secretaries provided the Committee with extremely valuable assistance.

⁴ Working Documents Nos 45, 66, 75, 78, 79 and 83.

⁵ Working Document No 59, supplemented by the proposal of the Secretariat in Working Document No. 71. The—Subcommittee on 'Application Clauses' decided against changing the terms of the articles on this topic which had been prepared by the Special Commission (Proces-verbal No 12).

⁶ The 'Model Forms' Subcommittee, under the chairmanship of Professor Muller-Freienfels (Federal Republic of Germany) comprised Messrs Deschenaux (Switzerland), Hergen (United States), Barbosa (Portugal), Minami (Japan) and Miss Pripp (Sweden). The Subcommittee on 'Application Clauses', chaired by Mr van Boeschoten (Netherlands), was made up of Messrs Hetu (Canada), Hjorth (Denmark), Creswell (Australia), Salem (Egypt) and Miss Selby (United States).

⁷ See in particular the *Observations of Governments*, Prel. Doc. No 7.

⁸ Prel. Doc. No 6.

7 We can conclude from the foregoing considerations that these two objectives must be clearly distinguished and that even the methods of analysis used cannot be the same for each of them. Nevertheless, the need to refer in both cases to the one text, that of the Convention, implies that a certain amount of repetition will be necessary and indeed inevitable. Despite this risk and in view of the emphasis which is placed on a double objective, the Report has been divided into two parts, the first being devoted to a study of the general principles underlying the Convention, the second containing an examination of the text, article by article.

8 Finally, as Professor von Overbeck emphasized in 1977,⁹ it would be as well to remember that this Report was prepared at the end of the Fourteenth Session, from the *procès-verbaux* and the Reporter's notes. Thus it has not been approved by the Conference, and it is possible that, despite the Rapporteur's efforts to remain objective, certain passages reflect a viewpoint which is in part subjective.

First Part — General characteristics of the Convention

9 The Convention reflects on the whole a compromise between two concepts, different in part, concerning the end to be achieved. In fact one can see in the preliminary proceedings a potential conflict between the desire to protect factual situations altered by the wrongful removal or retention of a child, and that of guaranteeing, in particular, respect for the legal relationships which may underlie such situations. The Convention has struck a rather delicate balance in this regard. On the one hand, it is clear that the Convention is not essentially concerned with the merits of custody rights (article 19), but on the other hand it is equally clear that the characterization of the removal or retention of a child as wrongful is made conditional upon the existence of a right of custody which gives legal content to a situation which was modified by those very actions which it is intended to prevent.

I OBJECT OF THE CONVENTION

10 The title of this chapter alludes as much to the problem addressed by the Convention as to the objectives by which it seeks to counter the increase in abductions. After tackling both of these points, we shall deal with other connected questions which appreciably affect the scope of the Convention's objectives, and in particular the importance which has been placed on the interest of the child and on the possible exceptions to the rule requiring the prompt return of children who have been wrongfully removed or retained.

A A Definition of the Convention's subject-matter

11 With regard to the definition of the Convention's subject-matter,¹⁰ we need only remind ourselves very briefly that the situations envisaged are those which derive from the use of force

⁹ Explanatory Report on the Convention on the Law Applicable to Matrimonial Property Regimes, *Acts and Documents of the Thirteenth Session*, Book II, p. 329.

¹⁰ See in particular the *Questionnaire and Report on international child abduction by one parent*, prepared by Mr Adair Dyer, Prel. Doc. No 1, August 1977, *supra*, pp. 18-25 (hereafter referred to as the 'Dyer Report'), and the Report on the preliminary draft Convention, adopted by the Special Commission, Prel. Doc. No 6, May 1980, *supra*, pp. 172-173.

to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child. The variety of different circumstances which can combine in a particular case makes it impossible to arrive at a more precise definition in legal terms. However, two elements are invariably present in all cases which have been examined and confirm the approximate nature of the foregoing characterization.

12 Firstly, we are confronted in each case with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person. Naturally, a refusal to restore a child to its own environment after a stay abroad to which the person exercising the right of custody had consented must be put in the same category. In both cases, the outcome is in fact the same: the child is taken out of the family and social environment in which its life has developed. What is more, in this context the type of legal title which underlies the exercise of custody rights over the child matters little, since whether or not a decision on custody exists in no way alters the sociological realities of the problem.

13 Secondly, the person who removes the child (or who is responsible for its removal, where the act of removal is undertaken by a third party) hopes to obtain a right of custody from the authorities of the country to which the child has been taken. The problem therefore concerns a person who, broadly speaking, belongs to the family circle of the child; indeed, in the majority of cases, the person concerned is the father or mother.

14 It frequently happens that the person retaining the child tries to obtain a judicial or administrative decision in the State of refuge, which would legalize the factual situation which he has just brought about. However, if he is uncertain about the way in which the decision will go, he is just as likely to opt for inaction, leaving it up to the dispossessed party to take the initiative. Now, even if the latter acts quickly, that is to say manages to avoid the consolidation through lapse of time of the situation brought about by the removal of the child, the abductor will hold the advantage, since it is he who has chosen the forum in which the case is to be decided, a forum which, in principle, he regards as more favourable to his own claims.

15 To conclude, it can firmly be stated that the problem with which the Convention deals — together with all the drama implicit in the fact that it is concerned with the protection of children in international relations — derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial. In fact, resorting to this expedient, an individual can change the applicable law and obtain a judicial decision favourable to him. Admittedly, such a decision, especially one coexisting with others to the opposite effect issued by the other forum, will enjoy only a limited geographical validity, but in any event it bears a legal title sufficient to ‘legalize’ a factual situation which none of the legal systems involved wished to see brought about.

B *The objectives of the Convention*

16 The Convention’s objects, which appear in article 1, can be summarized as follows: since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences. The Convention, in order to bring this about, places at the head of its

objectives the restoration of the *status quo*, by means of ‘the prompt return of children wrongfully removed to or retained in any Contracting State’. The insurmountable difficulties encountered in establishing, within the framework of the Convention, directly applicable jurisdictional rules¹¹ indeed resulted in this route being followed which, although an indirect one, will tend in most cases to allow a final decision on custody to be taken by the authorities of the child’s habitual residence prior to its removal.

17 Besides, although the object stated in sub-paragraph *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’ appears to stand by itself, its teleological connection with the ‘return of the child’ object is no less evident. In reality, it can be regarded as one single object considered at two different times; whilst the prompt return of the child answers to the desire to re-establish a situation unilaterally and forcibly altered by the abductor, effective respect for rights of custody and of access belongs on the preventive level, in so far as it must lead to the disappearance of one of the most frequent causes of child abductions.

Now, since the Convention does not specify the means to be employed by each State in bringing about respect for rights of custody which exist in another Contracting State, one must conclude that, with the exception of the indirect means of protecting custody rights which is implied by the obligation to return the child to the holder of the right of custody, respect for custody rights falls almost entirely out with the scope of the Convention. On the other hand, rights of access form the subject of a rule which, although undoubtedly incomplete, nevertheless is indicative of the interest shown in ensuring regular contact between parents and children, even when custody has been entrusted to one of the parents or to a third party.

18 If the preceding considerations are well-founded, it must be concluded that any attempt to establish a hierarchy of objects of the Convention could have only a symbolic significance. In fact, it would seem almost impossible to create a hierarchy as between two objects which spring from the same concern. For at the end of the day, promoting the return of the child or taking the measures necessary to avoid such removal amount to almost the same thing.

Now, as will be seen below, the one matter which the Convention has tried to regulate in any depth is that of the return of children wrongfully removed or retained. The reason for this seems clear: the most distressing situations arise only after the unlawful retention of a child and they are situations which, while requiring particularly urgent solutions, cannot be resolved unilaterally by any one of the legal systems concerned. Taken as a whole, all these circumstances justify, in our opinion, the Convention’s development of rules for regulating the return of the child, whilst at the same time they give in principle a certain priority to that object. Thus, although theoretically the two above-mentioned objects have to be placed on the same level, in practice the desire to guarantee the re-establishment of the *status quo* disturbed by the actions of the abductor has prevailed in the Convention.

¹¹ Such an option was rejected in the course of the first meeting of the Special Commission. *Cf. Conclusions drawn from the discussions of the Special Commission of March 1979* on legal kidnapping, prepared by the Permanent Bureau, Prel. Doc. No 5, June 1979, *supra*, pp. 163-164.

19 In a final attempt to clarify the objects of the Convention, it would be advisable to underline the fact that, as is shown particularly in the provisions of article 1, the Convention does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal; this applies as much to a removal which occurred prior to any decision on custody being taken — in which case the violated custody rights were exercised *ex lege* — as to a removal in breach of a pre-existing custody decision.

C *Importance attached to the interest of the child*

20 Above all, one has to justify the reasons for including an examination of this matter within the context of a consideration of the Convention's objects. These reasons will appear clearly if one considers, on the one hand, that the interests of the child are often invoked in this regard, and on the other hand, that it might be argued that the Convention's object in securing the return of the child ought always to be subordinated to a consideration of the child's interests.

21 In this regard, one fact has rightly been highlighted, *viz.* that 'the legal standard 'the best interests of the child' is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard. How can one put flesh on its bare bones without delving into the assumptions concerning the *ultimate* interests of a child which are derived from the moral framework of a particular culture? The word 'ultimate' gives rise to immediate problems when it is inserted into the equation since the general statement of the standard does not make it clear whether the 'interests' of the child to be served are those of the immediate aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence or old age'.¹²

22 On the other hand, it must not be forgotten that it is by invoking 'the best interests of the child' that internal jurisdictions have in the past often finally awarded the custody in question to the person who wrongfully removed or retained the child. It can happen that such a decision is the most just, but we cannot ignore the fact that recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched.

23 For these reasons, among others, the dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained. However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them. On the contrary, right from the start the signatory States declare themselves to be 'firmly convinced that the interests of children are of paramount importance in matters relating to their custody'; it is precisely because of this conviction that they drew up the Convention, 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention'.

¹² Dyer Report, *supra*, pp. 22-23.

24 These two paragraphs in the preamble reflect quite clearly the philosophy of the Convention in this regard. It can be defined as follows: the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. Now, the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child. In this regard it would be as well to refer to Recommendation 874(1979) of the Parliamentary Assembly of the Council of Europe, the first general principle of which states that ‘children must no longer be regarded as parents’ property, but must be recognised as individuals with their own rights and needs’.¹³

In fact, as Mr Dyer has emphasized, in the literature devoted to a study of this problem, ‘the presumption generally stated is that the true victim of the ‘childnapping’ is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives’.¹⁴

25 It is thus legitimate to assert that the two objects of the Convention — the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment — both correspond to a specific idea of what constitutes the ‘best interests of the child’. However, even when viewing from this perspective, it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area.

26 What is more, the rule concerning access rights also reflects the concern to provide children with family relationships which are as comprehensive as possible, so as to encourage the development of a stable personality. However, opinions differ on this, a fact which once again throws into relief the ambiguous nature of this principle of the interests of the child. In fact, there exists a school of thought opposed to the test which has been accepted by the Convention, which maintains that it is better for the child not to have contact with both parents where the couple are separated in law or in fact. As to this, the Conference was aware of the fact that such a solution could sometimes prove to be the most appropriate. Whilst safeguarding the element of judicial discretion in individual cases, the Conference nevertheless chose the other alternative, and the Convention upholds unequivocally the idea that access rights are the natural counterpart of custody rights, a counterpart which must in principle be acknowledged as belonging to the parent who does not have custody of the child.

D *Exceptions to the duty to secure the prompt return of children*

¹³ Parliamentary Assembly of the Council of Europe. 31st Ordinary Session, *Recommendation on a European Charter on the Rights of the Child*. Text adopted on 4 October 1979.

¹⁴ Dyer Report, *supra*, p. 21.

27 Since the return of the child is to some extent the basic principle of the Convention, the exceptions to the general duty to secure it form an important element in understanding the exact extent of this duty. It is not of course necessary to examine in detail the provisions which constitute these exceptions, but merely to sketch their role in outline, while at the same time stressing in particular the reasons for their inclusion in the Convention. From this vantage point can be seen those exceptions which derive their justification from three different principles.

28 On the one hand, article 13*a* accepts that the judicial or administrative authorities of the requested State are not bound to order the return of the child if the person requesting its return was not actually exercising, prior to the allegedly unlawful removal, the rights of custody which he now seeks to invoke, or if he had subsequently consented to the act which he now seeks to attack. Consequently, the situations envisaged are those in which either the conditions prevailing prior to the removal of the child do not contain one of the elements essential to those relationships which the Convention seeks to protect (that of the actual exercise of custody rights), or else the subsequent behaviour of the dispossessed parent shows his acceptance of the new situation thus brought about, which makes it more difficult for him to challenge.

29 On the other hand, paragraphs 1*b* and 2 of the said article 13 contain exceptions which clearly derive from a consideration of the interests of the child. Now, as we pointed out above, the Convention invests this notion with definite content. Thus, the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.

30 In addition, the Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and degree of maturity sufficient for its views to be taken into account. In this way, the Convention gives children the possibility of interpreting their own interests. Of course, this provision could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think they are being forced to choose between two parents. However, such a provision is absolutely necessary given the fact that the Convention applies, *ratione personae*, to all children under the age of sixteen; the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will. Moreover, as regards this particular point, all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities.

31 Thirdly, there is no obligation to return a child when, in terms of article 20, its return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms'. Here, we are concerned with a provision which is rather unusual in conventions involving private international law, and the exact scope of which is difficult to define. Although we shall refer to the commentary on article 20 for the purpose of defining such scope, it is particularly interesting to consider its origins here. This rule was the result of a compromise between those delegations which favoured, and those which were opposed to, the inclusion in the Convention of a 'public policy' clause.

The inclusion of such a clause was debated at length by the First Commission, under different formulations. Finally, after four votes against inclusion, the Commission accepted, by a majority of only one, that an application for the return of a child could be refused, by reference to a reservation which took into account the public policy exception by way of a restrictive formula concerning the laws governing the family and children in the requested State. The reservation provided for was formulated exactly as follows: 'Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed'.¹⁵ The adoption of this text caused a serious breach in the consensus which basically had prevailed up to this point in the Conference proceedings. That is why all the delegations, aware of the fact that a solution commanding wide acceptance had to be found, embarked upon this road which provided the surest guarantee of the success of the Convention.

32 The matter under debate was particularly important since to some extent it reflected two partly different concepts concerning the Convention's objects as regards the return of the child. Actually, up to now the text drawn up by the First Commission (like the Preliminary Draft drawn up by the Special Commission) had limited the possible exceptions to the rule concerning the return of the child to a consideration of factual situations and of the conduct of the parties or to a specific evaluation of the interests of the child. On the other hand, the reservation just accepted implicitly permitted the possibility of the return of a child being refused on the basis of purely legal arguments drawn from the internal law of the requested State, an internal law which could come into play in the context of the quoted provision either to 'evaluate' the right claimed by the dispossessed parent or to assess whether the action of the abductor was well-founded in law. Now, such consequences would alter considerably the structure of the Convention which is based on the idea that the forcible denial of jurisdiction ordinarily possessed by the authorities of the child's habitual residence should be avoided.

33 In this situation, the adoption by a comforting majority¹⁶ of the formula which appears in article 20 of the Convention represents a laudable attempt to compromise between opposing points of view, the role given to the internal law of the State of refuge having been considerably diminished. On the one hand, the reference to the fundamental principles concerning the protection of human rights and fundamental freedoms relates to an area of law in which there are numerous international agreements. On the other hand, the rule in article 20 goes further than the traditional formulation of 'public policy' clauses as regards the extent of incompatibility between the right claimed and the action envisaged. In fact, the authority concerned, in order to be able to refuse to order the return of the child by invoking the grounds which appear in this provision, must show not only that such a contradiction exists, but also that the protective principles of human rights prohibit the return requested.

34 To conclude our consideration of the problems with which this paragraph deals, it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead

¹⁵ See P.-v. No 9 and associated Working Documents.

¹⁶ The text was adopted with 14 votes in favor, 6 against and 4 abstentions, see P. -v. No 13.

letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them — those of the child's habitual residence — are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

II *NATURE OF THE CONVENTION*

A *A convention of co-operation among authorities*

35 By defining the ends pursued by the Contracting States, a convention's objects in the final analysis determine its nature. Thus, the Convention on the Civil Aspects of International Child Abduction is above all a convention which seeks to prevent the international removal of children by creating a system of close co-operation among the judicial and administrative authorities of the Contracting States. Such collaboration has a bearing on the two objects just examined, *viz.* on the one hand, obtaining the prompt return of the child to the environment from which it was removed, and on the other hand the effective respect for rights of custody and access which exist in one of the Contracting States.

36 This description of the Convention can also be drawn in a negative way. Thus, it can be said at the outset that the Convention is not concerned with the law applicable to the custody of children. In fact, the references to the law of the State of the child's habitual residence are of limited significance, since the law in question is taken into consideration only so as to establish the wrongful nature of the removal (see, for example, article 3). Secondly, the Convention is certainly not a treaty on the recognition and enforcement of decisions on custody. This option, which gave rise to lengthy debates during the first meeting of the Special Commission, was deliberately rejected. Due to the substantive consequences which flow from the recognition of a foreign judgment, such a treaty is ordinarily hedged around by guarantees and exceptions which can prolong the proceedings. Now, where the removal of a child is concerned, the time factor is of decisive importance. In fact, the psychological problems which a child may suffer as a result of its removal could reappear if a decision on its return were to be taken only after some delay.

37 Once it is accepted that we are dealing with a convention which is centred upon the idea of co-operation amongst authorities, it must also be made clear that it is designed to regulate only those situations that come within its scope and which involve two or more Contracting States. Indeed, the idea of a 'universalist' convention (*i.e.* a convention which applies in every international case) is difficult to sustain outwith the realm of conventions on applicable law. In this regard, we must remember that the systems which have been designed either to return children or to secure the actual exercise of access rights, depend largely on co-operation among the Central Authorities, a co-operation which itself rests upon the notion of reciprocal rights and duties. In the same way, when individuals, by invoking the provisions of the Convention, apply directly to the judicial or administrative authorities of a Contracting State, the applicability of the

Convention's benefits will itself depend on the concept of reciprocity which in principle excludes its being extended to nationals of third countries.

What is more, although the Convention attains its objectives in full only as among the Contracting States, the authorities in each of those States have the absolute right to be guided by the provisions of the Convention when dealing with other, similar situations.

B *The autonomous nature of the Convention*

38 The Convention, centred as it is upon the notion of co-operation among authorities with a view to attaining its stated objects, is autonomous as regards existing conventions concerning the protection of minors or custody rights. Thus, one of the first decisions taken by the Special Commission was to direct its proceedings towards the drawing up of an independent Convention, rather than the preparation of a protocol to the *Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable to the protection of minors*. Seen from this perspective, the Convention could not possibly be confined within the framework provided by the conventions on the recognition and enforcement of custody decisions, including that of the Council of Europe Convention.¹⁷

39 This autonomous character does not mean that the provisions purport to regulate all the problems arising out of international child abductions. On the contrary, to the extent that the Convention's aims, although ambitious, are given concrete expression, the basic problem of custody rights is not to be found within the scope of the Convention. The Convention must necessarily coexist with the rules of each Contracting State on applicable law and on the recognition and enforcement of foreign decrees, quite apart from the fact that such rules are derived from internal law or from treaty provisions.

On the other hand, even within its own sphere of application, the Convention does not purport to be applied in an exclusive way. It seeks, above all, to carry into effect the aims of the Convention and so explicitly recognizes the possibility of a party invoking, along with the provisions of the Convention, any other legal rule which may allow him to obtain the return of a child wrongfully removed or retained, or to organize access rights (article 34).

C *Relations with other conventions*

40 The Convention is designed as a means for bringing about speedy solutions so as to prevent the consolidation in law of initially unlawful factual situations, brought about by the removal or retention of a child. In as much as it does not seek to decide upon the merits of the rights of parties, its compatibility with other conventions must be considered. Nonetheless, such compatibility can be achieved only by ensuring that priority is given to those provisions which are likely to bring about a speedy and, to some extent, temporary solution. In fact it is only after the return of the child to its habitual residence that questions of custody rights will arise before

¹⁷ The *European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children*, adopted by the Committee of Ministers of the Council of Europe on 30 November 1979 and opened for signing by the Member States at Luxemburg on 20 May 1980.

the competent tribunals. On this point, article 34 states that ‘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.’ Moreover, since one is trying to avoid delays in the application of the Convention’s provisions caused by claims concerning the merits of custody rights, the principle in article 34 ought to be extended to any provision which has a bearing upon custody rights, whatever the reason. On the other hand, as has just been emphasized in the preceding paragraph, the parties may have recourse to any rule which promotes the realization of the Convention’s aims.

D *Opening of the Convention to States not Members of the Hague Conference*

41 On this point also, by virtue of the decision that it be of a ‘semi-open’ type, the Convention is shown to be one of co-operation. In principle, any State can accede to the Convention, but its 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’ (article 38). The Contracting States, by this means, sought to maintain the requisite balance between a desire for universality and the belief that a system based on co-operation could work only if there existed amongst the Contracting Parties a sufficient degree of mutual confidence.

What is more, the choice of a system based on the express acceptance of accession by each Member State, by which such acceptance becomes effective as amongst themselves,¹⁸ in preference to a more open system by which accession has effect except as regards Member States which raise objections thereto within a certain period of time,¹⁹ demonstrates the importance which the States attached to the selection of their co-signatories in those questions which form the subject-matter of the Convention.

III *INSTRUMENTS FOR APPLYING THE CONVENTION*

A *The Central Authorities*

42 A convention based on co-operation such as the one which concerns us here can in theory point in two different directions; it can impose direct co-operation among competent internal authorities, in the sphere of the Convention’s application, or it can act through the creation of Central Authorities in each Contracting State, so as to coordinate and ‘channel’ the desired co-operation. The Preliminary Draft drawn up by the Special Commission expressed quite clearly the choice made in favour of the second option, and the Convention itself was also built in large measure upon the intervention and powers of Central Authorities.

43 Nevertheless, the unequivocal acceptance of the possibility for individuals to apply directly to the judicial or administrative authorities which have power to apply the provisions of the Convention (article 29), increases the importance of the duty of co-operation laid upon them,

¹⁸ As in article 39 of the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, see P.-v. No 13.

¹⁹ The system adopted, among others, by the *Convention on International Access to Justice*, also adopted during the Fourteenth Session of the Conference.

so much so that the system adopted by the Convention could be characterized as a ‘mixed system’, due to the fact that, aside from the duties imposed upon the Central Authorities, it creates other obligations which are peculiar to judicial or administrative authorities.

44 What is more, it would be a mistake to claim to have constructed a convention to counter international child abduction without taking account of the important role played by the internal judicial or administrative authorities in all matters concerning the protection of minors. In this context, references to administrative authorities must be understood as a simple reflection of the fact that, in certain Member States, the task in question is entrusted to such authorities, while in the majority of legal systems jurisdiction belongs to the judicial authorities. *In fine*, it is for the appropriate authorities within each State to decide questions of custody and protection of minors; it is to them that the Convention has entrusted the responsibility of solving the problems which arise, whether they involve the return of a child wrongfully removed or retained or organizing the exercise of access rights. Thus, the Convention adopts the demand for legal certainty which inspires all internal laws in this regard. In fact, although decisions concerning the return of children in no way prejudge the merits of any custody issue (see article 19), they will in large measure influence children’s lives; such decisions and such responsibilities necessarily belong ultimately to the authorities which ordinarily have jurisdiction according to internal law.

45 However, the application of the Convention, both in its broad outline and in the great majority of cases, will depend on the working of the instruments which were brought into being for this purpose, *i.e.* the Central Authorities. So far as their regulation by the Convention is concerned, the first point to be made is that the Conference was aware of the profound differences which existed as regards the internal organization of the Contracting States. That is why the Convention does not define the structure and capacity to act of the Central Authorities, both of which are necessarily governed by the internal law of each Contracting State. Acceptance of this premise is shown in the Convention by its recognition of the fact that the tasks specifically assigned to Central Authorities can be performed either by themselves, or with the assistance of intermediaries (article 7). For example, it is clear that discovering a child’s whereabouts may require the intervention of the police; similarly, the adoption of provisional measures or the institution of legal proceedings concerning private relationships may fall outwith the scope of those powers which can be devolved upon administrative authorities in terms of some internal laws. Nonetheless, the Central Authority in every case remains the repository of those duties which the Convention imposes upon it, to the extent of its being the ‘engine’ for the desired co-operation which is designed to counter the wrongful removal of children. On the other hand, it is so as to take account of the peculiarities of different legal systems that the Convention allows a Central Authority to require that applications addressed to it be accompanied by a ‘written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act’ (article 28).

46 In other respects, the Convention follows a long-established tradition of the Hague Conference,²⁰ by providing that States with more than one system of law or which have autonomous territorial organizations, as well as Federal States, are free to appoint more than one

²⁰ Compare, for example, article 18(3) of the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. Also, articles 24 and 25 of the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

Central Authority. However, the problems encountered in the practical application of those Conventions which provide for several Central Authorities within the territory of a single State, as well as, in particular, the special characteristics of the subject-matter of this Convention, led the Conference to adopt the text previously established by the Special Commission and take a step towards creating a sort of 'hierarchy' of Central Authorities in those States. In fact, by confining our discussion to the latter point, we can see that if the person responsible for the removal or retention of a child avails himself of the excellent means of communication within a particular State, the applicant or Central Authority of the requesting State could be forced to re-apply several times in order to obtain the return of the child. Moreover, it is still possible that, even if there are valid reasons for believing that the child is in a Contracting State, the territorial unit of the child's residence will be ignored.

47 The Convention supplies a solution to these and other situations by providing that States which establish more than one Central Authority should at the same time designate 'the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State' (article 6). The matter is important, because the Convention imposes a time-limit upon the duty of judicial or administrative authorities in the requested State for the prompt return of the child;²¹ a mistaken choice as to the requested Central Authority could therefore have decisive consequences for the claims of the parties. Now, so as to prevent a factor which was not provided for in the Convention modifying the Convention's normal application, this type of 'super-Central Authority' envisaged in article 6 will have to adopt a positive approach. As a matter of fact, if it is to act as a bridge between on the one hand the Central Authority of its own State which has jurisdiction in each particular case, and on the other hand the Central Authorities of the other Contracting States, it will find itself obliged to choose between proceeding to locate a child in order to transmit the matter to the appropriate Central Authority, and transmitting a copy of the application to all the Central Authorities of the State concerned, which would inevitably cause a great increase in administrative duties. However it is undoubtedly the case that such a Central Authority will play a fundamental role in the application of the Convention in regard to relations affecting the aforementioned States.

B *The model form*

48 Following the decision taken by the Special Commission at its second meeting, the Fourteenth Session. of the Conference adopted simultaneously with its adoption of the Convention, a Recommendation containing a model form for applications for the return of children wrongfully removed or retained. Two comments are appropriate here. The first concerns the legal force of this Recommendation. In drawing it up, it seemed advisable to have recourse to the general law governing international organizations. Now, viewed from this perspective, a recommendation is in substance a non-obligatory invitation addressed by one international organization to one, several or all Member States. Consequently, States are not strictly required to make use of the model form contained in the Recommendation; indeed, the Commission took care to avoid presenting the form as an annex to the Convention.

The reasons for this are clear. Most importantly, given the lack of prior international experience in this field, it can well be imagined that, after a number of years, the practical application of the

²¹ *Cf infra*, the commentary on article 12 of the Convention.

Convention's provisions will result in certain modifications to the present form being thought advisable. Now, it seems better not to subject future revisions of the text to the formalities required by public international law for the revision of international treaties. Besides, it could be said, in connection with any future concerted action by the Conference in this regard, that adaptation of the form which was recommended to States should also be a matter for bilateral negotiations between Central Authorities, in implementation of their general obligation contained in article 7(2)(i).

On the other hand, a direct consequence of the decision not to make the use of the model form obligatory is the catalogue of details which every application to a Central Authority must contain (article 8).

49 The second comment bears upon the sphere of application and the terms of the recommended form. Although the Convention also governs important matters concerning access rights, the model form proposed is merely a model application for the return of the child. This demonstrates the concentration of interest within the Conference on the resolution of problems arising out of the removal of a child, whilst at the same time throwing into relief the novelty of the means chosen to resolve them. It is precisely because the means are new that it was thought advisable to include some indication of the way in which they should be used.

50 The actual terms of the form narrate precisely those points required by the Convention itself. We should however like to draw attention to two minor points. Firstly, the phrase 'date and place of marriage' of the parents of the child in question: in as much as it is not followed, in parentheses, by the words 'if any', it would seem to treat natural children in an exceptional and discriminatory fashion. Moreover, the absence of the same phrase alongside the reference to the date and place of birth of the child compares badly with the precision shown by article 8 of the Convention which adds, referring to the date of birth, the words 'where available'.

51 Secondly, there is an inconsistency between the French and English texts regarding the 'information concerning the person alleged to have removed or retained the child'. It would be advisable to follow the English text here, since it is more comprehensive, especially as regards its reference to the nationality of the alleged abductor, a fact which will sometimes prove decisive in efforts to locate the child.

IV *STRUCTURE AND TERMINOLOGY*

A *The structure of the Convention*

52 Articles 1, 2, 3 and 5 define the Convention's scope with regard to its subject-matter, by specifying its aims and the criteria by which the removal or retention of a child can be regarded as wrongful. Article 4 concerns the persons to whom the Convention applies, while article 35 determines its temporal application. Articles 6 and 7 are devoted to the creation of the Central Authorities and their duties. Articles 8, 27 and 28 are concerned with applications to Central Authorities and the documents which may accompany or supplement an application to them. Articles 9 to 12, and 14 to 19, deal with the various means established for bringing about the return of a child, as well as the legal significance of a decree to that effect. Articles 13 and 20

concern the exceptions to the general rule for the return of the child. Article 21 lays down the specific duties which the States have taken upon themselves with regard to access rights.

Articles 22 to 26 and 30 (like the aforementioned articles 27 and 28) deal with certain technical matters regarding proceedings and the costs which can result from applications submitted pursuant to the provisions of the Convention. Articles 29 and 36 reflect the ‘non-exclusive’ view which prevailed during the preparation of the Convention in stating, on the one hand, that applications may be submitted directly by individuals to the judicial or administrative authorities of the Contracting States, outwith the framework of the provisions of the Convention, and on the other hand that Contracting States have the acknowledged right to derogate by agreement from the restrictions which the present Convention allows to be imposed upon the return of the child. Articles 31 to 34 refer to States with more than one system of law and to the Convention’s relations with other conventions. Lastly, articles 37 to 45 contain the Final Clauses.

B *Terminology used in the Convention*

53 Following a long-established tradition of the Hague Conference, the Convention avoided defining its terms, with the exception of those in article 5 concerning custody and access rights, where it was absolutely necessary to establish the scope of the Convention’s subject-matter. These will be examined in their context. At this point we wish merely to consider one aspect of the terminology used which in our opinion merits a brief comment. It has to do with lack of correspondence between the title of the Convention and the terms used in the text. Whilst the former uses the phrase ‘international child abduction’, the provisions of the Convention avail themselves of circumlocutions or at any event of less evocative turns of phrase, such as ‘removal’ or ‘retention’. The reason for this is quite in keeping with the Convention’s limited scope. As was stressed above (see Nos 12 to 16), studies of the topic with which the Convention deals show clearly that, with regard both to the relationship which normally exists between ‘abductor’ and ‘child’ and to the intentions of the former, we are far removed from the offences associated with the terms ‘kidnapping’, ‘*enlevement*’ or ‘*secuestro*’. Since one is far removed from problems peculiar to the criminal law, the use in the text of the Convention of possibly ambiguous terms was avoided.

On the other hand, it was felt desirable to keep the term ‘abduction’ in the title of the Convention, owing to its habitual use by the ‘mass media’ and its resonance in the public mind. Nonetheless, so as to avoid any ambiguity, the same title, as in the Preliminary Draft, states clearly that the Convention only aims to regulate the ‘civil aspects’ of this particular phenomenon. If, in the course of this Report, expressions such as ‘abduction’ or ‘abductor’ are used from time to time, and one will find them also in the model form, that is because they sometimes permit of easier drafting; but at all events, they will have to be understood to contain nuances which their application to the specific problem with which the Convention deals may call for.

Second Part — Commentary on the specific articles of the Convention

CHAPTER 1 - SCOPE OF THE CONVENTION

54 The first chapter defines the scope of the Convention as regards its subject-matter and the persons concerned (its scope *ratione materiae* and *ratione personae*). However, so as to have an overall picture of the Convention's scope, one must consider also article 34 which deals with the Convention's relationship with other conventions, article 35 which concerns the Convention's temporal application, and articles 31 to 33 which relate to the application of the Convention in States with more than one legal system.

Article I — The aims of the Convention

a General observations

55 This article sets out in two paragraphs the objects of the Convention which were discussed in broad terms in the first part of this Report. It is therefore clear that the lack of correspondence between the title and the specific provisions of the Convention is more than merely a matter of terminology.²² In any event, it must be realized that the terms used in the title, while lacking legal exactitude, possess an evocative power and force which attract attention, and this is essential.

56 As for the nature of the matters regulated by the Convention, one general comment is required. Although the Convention does not contain any provision which expressly states the international nature of the situations envisaged, such a conclusion derives as much from its title as from its various articles. Now, in the present case, the international nature of the Convention arises out of a factual situation, that is to say the dispersal of members of a family among different countries. A situation which was purely internal to start with can therefore come within the scope of the Convention through, for example, one of the members of the family going abroad with the child, or through a desire to exercise access rights in a country other than that in which the person who claims those rights lives. On the other hand, the fact that the persons concerned hold different nationality does not necessarily mean that the international type of case to which the Convention applies automatically will arise, although it would clearly indicate the possibility of its becoming 'international' in the sense described.

b Sub-paragraph a

57 The aim of ensuring the prompt return of children wrongfully removed or retained has already been dealt with at length. Besides, the Fourteenth Session in no way altered the literal meaning of the wording devised by the Special Commission. Thus only two brief points by way of explanation will be put forward here. The first concerns the characterization of the behaviour which the realization of this objective seeks to prevent. To sum up, as we know, the conduct concerned is that which changes the family relationships which existed before or after any judicial decision, by using a child and thus turning it into an instrument and principal victim of the situation. In this context, the reference to children 'wrongfully retained' is meant to cover those cases where the child, with the consent of the person who normally has custody, is in a place other than its place of habitual residence and is not returned by the person with whom it was staying. This is the typical situation which comes about when the removal of the child results from the wrongful exercise of access rights.

²² See the Report of the Special Commission, No 52.

58 Secondly, the text states clearly that the children whose return it is sought to secure are those who have been removed to, or retained in, ‘any Contracting State’. This wording is doubly significant. On the one hand, the provision in article 4 limits the scope of the Convention *ratione personae* to those children who, while being habitually resident in one of the Contracting States, are removed to or retained in, the territory of another Contracting State.

59 But these same words also have a quite different meaning. In fact, through this formulation this particular object of the Convention, whether considered in its own right or in relation to article 2, becomes indirectly a general one, applicable to all children who, in the circumstances set forth, are in any Contracting State. However, there will always be a difference between the legal position of those children who, prior to their removal, were habitually resident in another Contracting State, and that of other children. The position of the former will have to be resolved by the direct application of the provisions of the Convention. On the other hand, the duty of States towards the other children is less clear (leaving aside provisions of internal law) in so far as it derives from the obligation stated in article 2, which could be described as a duty to take appropriate measures to prevent their territory being turned into a place of refuge for potential ‘abductors’.

c Sub-paragraph b

60 The aim of the Convention contained in this sub-paragraph was clarified in the course of drafting at the Fourteenth Session.²³ So far as its scope is concerned, it is now clear that the situations under consideration are the same as those to which the Convention applies, that is to say international situations which involve two or more Contracting States. It should not be thought that precision in this matter is unnecessary, especially when one considers that the text of the Preliminary Draft allowed of other interpretations, and in particular a reference to internal situations.

61 As for knowing the desired meaning of the aim stated therein, it is necessary to draw a distinction between custody rights and access rights. With regard to custody rights, it can be said that the Convention has not attempted to deal with them separately. It is thus within the general obligation stated in article 2, and the regulation governing the return of the child — which is based, as we shall see in the commentary on article 3, upon respect for custody rights actually exercised and attributed under the law of the child’s habitual residence — that one must look in order to find the consequences of the provision which concerns us here. On the other hand, access rights are treated more favourably, and the foundations upon which respect for their effective exercise seem fixed, at least in broad outline, within the context of article 21.

Article 2 — General obligation of Contracting States

62 Closely related to the objects stated in broad and flexible fashion in article 1*b* is the fact that this article sets forth a general duty incumbent upon Contracting States. It is thus a duty which, unlike obligations to achieve a result which are normally to be found in conventions, does not require that actual results be achieved but merely the adoption of an attitude designed to lead to such results. In the present case, the attitude and behaviour required of States is expressed in

²³ Cf. Working Document No 2 (Proposal of the United Kingdom delegation) and P.-v. No 2.

the requirement to ‘take all appropriate measures to secure within their territories the implementation of the objects of the Convention’. The Convention also seeks, while safeguarding the ‘self-executing’ character of its other articles, to encourage Contracting States to draw inspiration from these rules in resolving problems similar to those with which the Convention deals, but which do not fall within its scope *ratione personae* or *ratione temporis*. On the one hand, this should lead to careful examination of the Convention’s rules whenever a State contemplates changing its own internal laws on rights of custody or access; on the other hand, extending the Convention’s objects to cases which are not covered by its own provisions should influence courts and be shown in a decreasing use of the public policy exception when questions concerning international relations which are outwith the scope of the Convention fall to be decided.

63 Moreover, the last sentence of the article specified one of the particular means envisaged, while stressing also the importance placed by the Convention on the use of speedy procedures in matters of custody or access rights. However, this provision does not impose an obligation upon States to bring new procedures into their internal law, and the correspondence now existing between the French and English texts rightly seeks to avoid such an interpretation, which the original French text made possible. It is therefore limited to requesting Contracting States, in any question concerning the subject-matter of the Convention, to use the most expeditious procedures available in their own law.

Article 3 — The unlawful nature of a removal or retention

a General observations

64 Article 3 as a whole constitutes one of the key provisions of the Convention, since the setting in motion of the Convention’s machinery for the return of the child depends upon its application. In fact, the duty to return a child arises only if its removal or retention is considered wrongful in terms of the Convention. Now, in laying down the conditions which have to be met for any unilateral change in the status quo to be regarded as wrongful, this article indirectly brings into clear focus those relationships which the Convention seeks to protect. Those relationships are based upon the existence of two facts, firstly, the existence of rights of custody attributed by the State of the child’s habitual residence and, secondly, the actual exercise of such custody prior to the child’s removal. Let us examine more closely the import of these conditions.

b The juridical element

65 As for what could be termed the juridical element present in these situations, the Convention is intended to defend those relationships which are already protected, at any rate by virtue of an apparent right to custody in the State of the child’s habitual residence, *i.e.* by virtue of the law of the State where the child’s relationships developed prior to its removal. The foregoing remark requires further explanation in two respects. The first point to be considered concerns the law, a breach of which determines whether a removal or retention is wrongful, in the Convention sense. As we have just said, this is a matter of custody rights. Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the Fourteenth Session, the majority view was that such situations could not be put in the same category as the wrongful removals which it is sought

to prevent.²⁴ This example, and others like it where breach of access rights profoundly upsets the equilibrium established by a judicial or administrative decision, certainly demonstrate that decisions concerning the custody of children should always be open to review. This problem however defied all efforts of the Hague Conference to co-ordinate views thereon. A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.

66 The second question which should be examined concerns the law which is chosen to govern the initial validity of the claim. We shall not dwell at this point upon the notion of habitual residence, a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile. Moreover, the choice of the law of habitual residence as the factor which is to determine the lawfulness of the situation flouted by the abduction is logical. In actual fact, to the arguments in favour of its being accorded a pre-eminent role in the protection of minors, as in the Hague Convention of 1961, must be added the very nature of the Convention itself, *viz.* its limited scope. In this regard, two points must be made: on the one hand, the Convention does not seek to govern definitively questions concerning the custody of children, a fact which weakens considerably those arguments favouring the application of national law; on the other hand, the rules of the Convention rest largely upon the underlying idea that there exists a type of jurisdiction which by its nature belongs to the courts of a child's habitual residence in cases involving its custody.

From a different viewpoint, our attention should also be drawn to the fact that the Convention speaks of the 'law' of the State of habitual residence, thus breaking with a long-established tradition of Hague Conventions on applicable law since 1955, which refer to a particular internal law to govern the matters with which they deal. Of course, in such cases, the word 'law' has to be understood in its widest sense, as embracing both written and customary rules of law — whatever their relative importance might be — and the interpretations placed upon them by case-law. However, the adjective 'internal' implies the exclusion of all reference to the conflict of law rules of the particular legal system. Therefore, since the Convention has abandoned its traditional formulation by speaking of 'the law of the habitual residence', this difference cannot be regarded as just a matter of terminology. In fact, as the preliminary proceedings of the Commission demonstrate,²⁵ it was intended right from the start to expand considerably the range of provisions which have to be considered in this context. Actually, a proposal was made during the Fourteenth Session that this article should make it clear that the reference to the law of the habitual residence extends also to the rules of private international law. The fact that this proposal was rejected was due to the Conference's view that its inclusion was unnecessary and became implicit anyway once the text neither directly nor indirectly excluded the rules in question.²⁶

67 The foregoing considerations show that the law of the child's habitual residence is invoked in the widest possible sense. Likewise, the sources from which the custody rights which

²⁴ Cf. Working Document No 5 (Proposal of the Canadian delegation) and P.-v. No 3.

²⁵ Cf the Special Commission Report, No 62, *supra*, p. 90.

²⁶ Cf. Working Document No 2 (Proposal of the United Kingdom delegation), and P.-v. No 2.

it is sought to protect derive, are all those upon which a claim can be based within the context of the legal system concerned. In this regard, paragraph 2 of article 3 takes into consideration some — no doubt the most important — of those sources, while emphasizing that the list is not exhaustive. This paragraph provides that ‘the rights of custody mentioned in sub-paragraph *a* above may arise in particular’, thus underlining the fact that other sorts of rights may exist which are not contained within the text itself. Now, as we shall see in the following paragraphs, these sources cover a vast juridical area, and the fact that they are not exhaustively set out must be understood as favouring a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration.

68 The first source referred to in article 3 is law, where it is stated that custody ‘may arise . . . by operation of law’. That leads us to stress one of the characteristics of this Convention, namely its application to the protection of custody rights which were exercised prior to any decision thereon. This is important, since one cannot forget that, in terms of statistics, the number of cases in which a child is removed prior to a decision on its custody are quite frequent. Moreover, the possibility of the dispossessed parent being able to recover the child in such circumstances, except within the Convention’s framework, is practically non-existent, unless he in his turn resorts to force, a course of action which is always harmful to the child. In this respect, by including such cases within its scope, the Convention has taken a significant step towards resolving the real problems which in the past largely escaped the control of the traditional mechanisms of private international law.

As for knowing the legal system which, according to the Convention, is to attribute the custody rights, which it is desired to protect, it is necessary to go back to the considerations developed in the previous paragraph. Thus, custody *ex lege* can be based either on the internal law of the State of the child’s habitual residence, or on the law designated by the conflict rules of that State. The scope of the first option is quite clear; the second implies, for example, that the removal by its French father of a child born out of wedlock which had its habitual residence in Spain where it lived with its mother, both mother and child being of French nationality, should be considered wrongful in the Convention sense, by means of the application of French law designated as applicable by the Spanish conflict rule on questions of custody, quite independently of the fact that application of internal Spanish law would probably have led to a different result.

69 The second source of custody rights contained in article 3 is a judicial or administrative decision. Since the Convention does not expand upon this, it must be deemed, on the one hand, that the word ‘decision’ is used in its widest sense, and embraces any decision or part of a decision (judicial or administrative) on a child’s custody and, on the other hand, that these decisions may have been issued by the courts of the State of the child’s habitual residence as well as by the courts of a third country.²⁷ Now, in the latter case, that is to say when custody rights were exercised in the State of the child’s habitual residence on the basis of a foreign decree, the Convention does not require that the decree had been formally recognized. Consequently, in order to have the effect described, it is sufficient that the decision be regarded as such by the State of habitual residence, *i.e.* that it contain in principle certain minimum characteristics which are necessary for setting in motion the means by which it may be

²⁷ This interpretation is based upon the deliberations of the Special Commission which led to its adopting a similar text to the current one See Report of the Special Commission, No 64, *supra*. pp. 191-192.

confirmed or recognized.²⁸ This wide interpretation is moreover confirmed by the whole tenor of article 14.

70 Lastly, custody rights may arise according to article 3, 'by reason of an agreement having legal effect under the law of that State'. In principle, the agreements in question may be simple private transactions between the parties concerning the custody of their children. The condition that they have 'legal effect' according to the law of the State of habitual residence was inserted during the Fourteenth Session in place of a requirement that it have the 'force of law', as stated in the Preliminary Draft. The change was made in response to a desire that the conditions imposed upon the acceptance of agreements governing matters of custody which the Convention seeks to protect should be made as clear and as flexible as possible. As regards the definition of an agreement which has 'legal effect' in terms of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities. Now, to go back to the wide interpretation given by article 3 to the notion of 'the law of the State of the child's habitual residence', the law concerned can equally as well be the internal law of that State as the law which is indicated as applicable by its conflict rules. It is for the authorities of the State concerned to choose between the two alternatives, although the spirit of the Convention appears to point to the choice of the one which, in each particular case, would recognize that custody had actually been exercised. On the other hand, the Convention does not state, in substance or form, the conditions which these agreements must fulfil, since these will change according to the terms of the law concerned.

71 Leaving aside a consideration of those persons who can hold rights of custody, until the commentary on article 4 which concerns the scope of the Convention *ratione personae*, it should be stressed now that the intention is to protect all the ways in which custody of children can be exercised. Actually, in terms of article 3, custody rights may have been awarded to the person who demands that their exercise be respected, and to that person in his own right or jointly. It cannot be otherwise in an era when types of joint custody, regarded as best suited to the general principle of sexual non-discrimination, are gradually being introduced into internal law. Joint custody is, moreover, not always custody *ex lege*, in as much as courts are increasingly showing themselves to be in favour, where circumstances permit, of dividing the responsibilities inherent in custody rights between both parents. Now, from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties.

²⁸ See Working Document No 58, '*Document de clarification presente par la delegation italienne*,' for the desirability of including such a case in the Convention.

c The factual element

72 The second element characterizing those relationships protected by the Convention is that the custody rights which it is claimed have been breached by the child's removal were actually exercised by the holder. In fact, as soon as an approach to the subject-matter of the Convention was adopted which deviated from the pure and simple international recognition of custody rights attributed to parents, the Convention put its emphasis on protecting the right of children to have the stability which is so vital to them respected. In other words, the Convention protects the right of children not to have the emotional, social etc. aspects of their lives altered, unless legal arguments exist which would guarantee their stability in a new situation. This approach is reflected in the scope of the Convention, which is limited to custody rights actually exercised. What is more, such a notion is justified within the framework of international relations by a complementary argument which concerns the fact that contradictory decisions arise quite frequently in this particular context, decisions which are basically of little use in protecting the stability of a child's life.

73 Actually, this idea was not opposed to any extent. However, several proposals²⁹ were put forward for the deletion from article 3 of any reference to the actual exercise of custody rights. The reason for this was that its retention could place on the applicant the burden of proving a point which would sometimes be difficult to establish. The situation became even more complicated when account was taken of the fact that article 13, which concerns the possible exceptions to the obligation to order the return of the child, requires the 'abductor' this time to prove that the dispossessed party had not actually exercised the custody rights he now claims. Now, it is indeed by considering both provisions together that the true nature of the condition set forth in article 3 can be seen clearly. This condition, by defining the scope of the Convention, requires that the applicant provide only some preliminary evidence that he actually took physical care of the child, a fact which normally will be relatively easy to demonstrate. Besides, the informal nature of this requirement is highlighted in article 8 which simply includes, in subparagraph c, 'the grounds on which the applicant's claim for return of the child is based', amongst the facts which it requires to be contained in applications to the Central Authorities.

On the other hand, article 13 of the Convention (12 in the Preliminary Draft) shows us the real extent of the burden of proof placed upon the 'abductor': it is for him to show, if he wishes to prevent the return of the child, that the guardian had not actually exercised his rights of custody. Thus, we may conclude that the Convention, taken as a whole, is built upon the tacit presumption that the person who has care of the child actually exercises custody over it. This idea has to be overcome by discharging the burden of proof which has shifted, as is normal with any presumption (*i.e.* discharged by the 'abductor' if he wishes to prevent the return of the child).

74 However, there is expressly included amongst the matters which the Convention is intended to protect the situation which arises when actual custody cannot be exercised precisely because of the removal of the child; that is the situation envisaged in the last alternative set out in article 3*b*. Theoretically, the underlying idea is perfectly in keeping with the spirit of the Convention, and it is therefore from a practical point of view that it may be wondered whether

²⁹ Working Documents Nos 1 (Proposal of the United States delegation) and 10 (Proposal of the Finnish delegation), and also P.-v. No 3.

such a provision needed to be added.³⁰ From this viewpoint, the hypothetical situations which this provision is designed to protect are of two types, one of which falls clearly within the scope of the Convention, while the other, failing this rule, would probably require too strained an interpretation of its provisions. On the one hand, there are cases where an initial decision on custody is rendered worthless by the removal of the child. In so far as such a description follows the disruption of normal family life after a reasonable lapse of time, the holder of the rights could be regarded as having exercised them from the outset, so that the situation described fulfils all the conditions laid down within the scope of the Convention. However, if a decision on custody by the courts of the child's habitual residence is considered, which modifies a prior decision and cannot be enforced because of the action of the abductor, it could be that the new holder of the right to custody has not exercised it within the extended time-limit. The difficulties which would be encountered in seeking to apply the Convention to such situations and perhaps to others not herein mentioned, are obvious. To conclude, although this provision must not be expected to come into play very often, it has to be said finally that its inclusion in the Convention might prove to be useful.

Article 4 — Convention's scope ratione personae

75 This article concerns only the Convention's scope *ratione personae* as regards the children who are to be protected. However, for the sake of completeness, we shall also deal with the other aspects of the problem in their proper context, that is to say those potential holders of custody and access rights and those who could be regarded as 'abductors', within the terms of the Convention.

a The children protected

76 The Convention applies to children of less than sixteen years of age, who were 'habitually resident in a Contracting State immediately before any breach of custody or access rights'. As regards the requirement that they be habitually resident, reference must again be made to those considerations previously expressed about the nature of the Convention, which lead to the conclusion that a convention based on co-operation among authorities can only become fully operational after the relationships envisaged come into existence as among Contracting States.

77 The age limit for application of the Convention raises two important questions. Firstly, the matter of age in the strict sense gave rise to virtually no dispute. The Convention kept the age at sixteen, and therefore held to a concept of 'the child' which is more restrictive than that accepted by other Hague Conventions.³¹ The reason for this derives from the objects of the Convention themselves; indeed, a person of more than sixteen years of age generally has a mind

³⁰ Cf. Working Document No 2 (Proposal of the United Kingdom delegation) and the debate on this point in P.-v. Nos 3 and 13.

³¹ For example: *Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children* (article 1); *Convention of 15 April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children* (article I); *Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors* (article 12); *Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decisions Relating to Adoptions* (article 1).

of his own which cannot easily be ignored either by one or both of his parents, or by a judicial or administrative authority.

As for deciding upon the point at which this age should exclude the Convention's application, the most restrictive of the various options available was retained by the Convention. Consequently, no action or decision based upon the Convention's provisions can be taken with regard to a child after its sixteenth birthday.

78 The second problem deals with the situation of children under sixteen years of age who have the right to choose their own place of residence. Considering that this right to choose one's residence generally forms part of the right to custody, a proposal was put forward to the effect that the Convention should not apply in such cases.³² However, this proposal was rejected on various grounds, *inter alia* the following: (1) the difficulty of choosing the legal system which should determine whether such a possibility exists, since there are at least three different laws which could be applicable, namely, national law, the law of habitual residence prior to the child's removal, and the law of the State of refuge; (2) the excessive restriction which this proposal would place upon the scope of the Convention, particularly with regard to access rights; (3) the fact that the right to decide a child's place of residence is only one possible element of the right to custody which does not itself deprive it of all content. On the other hand, the decision taken in this regard cannot be isolated from the provision in article 13, second paragraph, which allows the competent authorities to have regard to the opinion of the child as to its return, once it has reached an appropriate age and degree of maturity. Indeed, this rule leaves it open to judicial or administrative authorities, whenever they are faced with the possibility of returning a minor legally entitled to decide on his place of residence, to take the view that the opinion of the child should always be the decisive factor. The point could therefore be reached where an optional provision of the Convention becomes automatically applicable, but such a result seems preferable to an overall reduction in the Convention's scope.

b The holders of custody and access rights

79 The problems raised by both of these rights in this regard are quite different. Firstly, as regards access rights, it is obvious, by the very nature of things, that they will always be held by individuals, whose identity will depend on the law which applies to the organizing of these rights. These persons will as a rule be close relatives of the child, and normally will be either its father or mother.

80 On the other hand, legal persons can also, in terms of the Convention, hold rights of custody. Article 3 envisages the possibility of custody rights being attributed to 'an institution or any other body', and is expressed in deliberately vague and wide terms. In fact, during the Fourteenth Session, the inclusion within the scope of the Convention of situations in which the child is entrusted to an institution was not challenged. Now, since there are bodies other than institutions which have children in their care, the term used was extended so as to apply equally to those bodies with legal personality and to those which, as an arm of the State, lack separate personality.

³² Cf. Working Document No 4 (Proposition de la délégation beige) and P.-v. No 4.

c The potential 'abductors'

81 The Convention contains no express provision on this matter. Nevertheless, two comments may be drawn from the text as a whole, which shed light upon this question in relation to the Convention's scope *ratione personae*. The first concerns the physical persons who may be responsible for the removal or retention of a child. On this, the Convention upholds the point of view adopted by the Special Commission by not attributing such acts exclusively to one of the parents.³³ Since the idea of 'family' was more or less wide, depending on the different cultural conceptions which surround it, it was felt better to hold a wide view which would, for example, allow removals by a grandfather or adoptive father to be characterized as child abduction, in accordance with the Convention's use of that term.

82 The second comment relates to the possibility of an 'institution or any other body' acting as an 'abductor'. In this regard, it is difficult to imagine how any body whatever could remove, either by force or by deception, a child from a foreign country to its own land. On the other hand, if a child were entrusted, by virtue of a judicial or administrative decision (*i.e.* compulsory placement of the child) to such a body in the country of its habitual residence, the parent who sought to obtain the actual enjoyment of custody rights would stand little chance of being able to invoke the provisions of the Convention. In fact, by virtue of the fact that such bodies would as a rule exercise jurisdiction, except as regards the possible recognition of parental authority,³⁴ such a claim would not come within the scope of the Convention, since custody, in the sense understood by the Convention, would belong to the body in question.

Article 5 — Certain terms used in the Convention

83 The Convention, following a long-established tradition of the Hague Conference, does not define the legal concepts used by it. However, in this article, it does make clear the sense in which the notions of custody and access rights are used, since an incorrect interpretation of their meaning would risk compromising the Convention's objects.

84 As regards custody rights, the Convention merely emphasizes the fact that it includes in the term 'rights relating to the care of the person of the child', leaving aside the possible ways of protecting the child's property. It is therefore a more limited concept than that of 'protection of minors',³⁵ despite attempts made during the Fourteenth Session to introduce the idea of 'protection' so as to include in particular those cases where children are entrusted to institutions or bodies. But since all efforts to define custody rights in regard to those particular situations failed, one has to rest content with the general description given above. The Convention seeks to be more precise by emphasizing, as an example of the 'care' referred to, the right to determine

³³ A more restrictive approach was to be found initially in the Dyer Report, referred to above, entitled *Report on international child abduction by one parent*.

³⁴ See the Judgment of the International Court of Justice, dated 28 November 1958, on the case concerning the application of the Convention of 1902 for regulating the guardianship of minors, *ICJ Reports* 1958, p. 55 *et seq.*

³⁵ See, for example, the *Convention of 5 October 1961 concerning the powers of authorities and the applicable law in respect of the protection of minors*.

the child's place of residence. However, if the child, although still a minor at law, has the right itself to determine its own place of residence, the substance of the custody rights will have to be determined in the context of other rights concerning the person of the child.

On the other hand, although nothing is said in this article about the possibility of custody rights being exercised singly or jointly, such a possibility is clearly envisaged. In fact, a classic rule of treaty law requires that a treaty's terms be interpreted in their context and by taking into account the objective and end sought by the treaty,³⁶ and the whole tenor of article 3 leaves no room for doubt that the Convention seeks to protect joint custody as well. As for knowing when joint custody exists, that is a question which must be decided in each particular case, and in the light of the law of the child's habitual residence.

85 As regards access rights, sub-paragraph *b* of this article merely points out that they include 'the right to take a child for a limited period of time to a place other than the child's habitual residence'. Clearly, therefore, it is not intended that the Convention exclude all other ways of exercising access rights. Quite simply, it seeks to emphasize that access rights extend also to what is called 'residential access', that aspect of access rights about which the person who has custody of the child is particularly apprehensive. Moreover, since this explanatory provision in no way qualifies this 'other place' to which the child may be taken, one must conclude that access rights, in terms of the Convention, also include the right of access across national frontiers.

86 A proposal was made to include in this article a definition of the judicial or administrative authorities mentioned throughout the Convention's rules.³⁷ The difficulties encountered as much in reaching a systematic viewpoint on this as in devising a definition wide enough to encompass all possible contingencies made for its exclusion. Now, as was mentioned earlier,³⁸ it is clear that these are the authorities who have the power, according to the internal law of each Contracting State, to determine questions concerning a child's custody or protection. Besides, it is precisely because of differences amongst these laws that reference is always made to 'judicial or administrative' authorities, so as to embrace all authorities which have jurisdiction in the matter, without regard to their legal characterization in each State.

CHAPTER II - CENTRAL AUTHORITIES

Article 6 — Creation of Central Authorities

87 The role played by the Central Authorities, crucial factors as they are in the application of the Convention, has already been dealt with at length.³⁹ As for those States which may appoint more than one Central Authority, the idea which prevailed was that the determining factor should be the existence of several territorial organizations for the protection of minors. Thus there was

³⁶ See article 31(1) of the Vienna Convention of 23 May 1969 on the law of treaties.

³⁷ See Working Document No 7 (Proposal of the United States delegation) and P.-v. Nos 4 and 14.

³⁸ See *supra*, No 45.

³⁹ See *supra*, Nos 43 to 48.

added to those cases of Federal States and States with more than one system of law that of States ‘having autonomous territorial organizations’, a term which is to be interpreted broadly.

Article 7 — Obligations of Central Authorities

88 This article summarizes the role played by Central Authorities in bringing into play the system established by the Convention. The article is structured in two paragraphs, the first of which, drafted in general terms, sets out an overall duty of co-operation, while the second lists, from sub-paragraphs *a* to *i*, some of the principal functions which the Central Authorities have to discharge. Both result from a compromise between, on the one hand, those delegations which wanted strong Central Authorities with wide-ranging powers of action and initiative, and on the other hand those which saw these Authorities as straightforward administrative mechanisms for promoting action by the parties. Now, since these diverse attitudes reflected most of the deep differences which existed amongst the systems represented at the Conference, the ultimate solution had to be flexible, and such as would allow each Central Authority to act according to the law within which it has to operate. Therefore, although the Convention clearly sets out the principal obligations laid upon the Central Authorities, it lets each Contracting State decide upon the appropriate means for discharging them. And it is in this sense that the sentence occurring at the beginning of the second paragraph must be understood, which states that the Central Authorities are to discharge their listed functions ‘either directly, or through any intermediary’. It is for each Central Authority to choose one or the other options, while working within the context of its own internal law and within the spirit of the general duty of co-operation imposed upon it by the first paragraph.

89 As we have just said, the rule in the *first paragraph* sets out the general duty of Central Authorities to co-operate, so as to ensure the Convention’s objects are achieved. Such co-operation has to develop on two levels: the Central Authorities must firstly co-operate with each other; however, in addition, they must promote co-operation among the authorities competent for the matters dealt with within their respective States. Whether this co-operation is promoted effectively will depend to a large extent on the freedom of action which each internal law confers upon the Central Authorities.

90 The functions listed in the *second paragraph* seek to trace, in broad outline, the different stages of intervention by Central Authorities in the typical case of child removal. Nonetheless, it is clear that this list is not exhaustive. For example, since the intervention of Central Authorities necessarily depends on their having been initially seized of the matter, either directly by the applicant or by the Central Authority of a Contracting State, then in the latter case the Central Authority initially seized will have to send the application to the Central Authority of the State in which the child is thought to be. Now, this obligation is not spelled out in article 7, but later, in the context of article 9. On the other hand, it is also clear that the Central Authorities are not obliged to fulfil, in every specific case, all the duties listed in this article. In fact, the circumstances of each particular case will dictate the steps which are to be taken by the Central Authorities; for example, it cannot be maintained that every Central Authority must discover the whereabouts of a child when the applicant knows full well where it is.

91 In addition to finding the whereabouts of the child, where necessary (sub-paragraph *a*), the Central Authority must take or cause to be taken any provisional measures which could help

prevent ‘further harm to the child or prejudice to interested parties’ (sub-paragraph *b*). The drafting of this sub-paragraph clearly brings out once again a fact which was emphasized above, namely, that the ability of Central Authorities to act will vary from one State to another. Basically, the provisional measures envisaged are designed in particular to avoid another removal of the child.

92 Sub-paragraph *c* sets out the duty of Central Authorities to try to find an extrajudicial solution. In actual fact, in the light of experience as spoken to by some delegates, a considerable number of cases can be settled without any need to have recourse to the courts. But, once again, it is the Central Authorities which, in those stages preceding the possible judicial or administrative proceedings, will direct the development of the problem; it is therefore for them to decide when the attempts to secure the ‘voluntary return’ of the child or to bring about an ‘amicable resolution’, have failed.

93 Sub-paragraph *d* relates to the exchange of information about the social background of the child. This duty is made subject to the criteria adopted by the Central Authorities involved in a particular case. Indeed, the insertion of the phrase ‘where desirable’ demonstrates that there is no wish to impose an inflexible obligation here: the possibility of there being no information to provide, as well as the fear that reference to this provision might be used by the parties as a delaying tactic, are some of the arguments which prompted this approach. On the other hand, a proposal which would have made the transmission of certain information conditional upon its remaining confidential, was rejected.⁴⁰

94 The obligation laid upon Central Authorities to provide information on the content of the law in their own States for the application of the Convention appears in sub-paragraph *e*. This duty applies in particular to two situations. Firstly, where the removal occurs prior to any decision as to the custody of the child, the Central Authority of the State of the child’s habitual residence is to produce, for the purposes of the Convention’s application, a certificate on the relevant law of that State. Secondly, the Central Authority must inform the individuals about how the Convention works and about the Central Authorities, as well as about the procedures available. On the other hand, the possibility of going further, by obliging the Central Authorities to give legal advice in individual cases, is not envisaged by this rule.

95 When it is necessary, in order to obtain the child’s return, for the judicial or administrative authorities of the State in which it is located to intervene, the Central Authority must itself initiate proceedings (if that can be done under its internal law) or facilitate the institution of proceedings. This duty also extends to proceedings which prove to be necessary for organizing or securing the effective exercise of rights of access (sub-paragraph *f*).

96 Where the Central Authority is not able to apply directly to the competent authorities in its own State, it must provide or facilitate the provision of legal aid and advice for the applicant, in terms of article 25 (sub-paragraph *g*). It is appropriate to point out here very briefly that the phrase ‘where the circumstances so require’ in this sub-paragraph refers to the applicant’s lack of economic resources, as determined by the criteria laid down by the law of the State in which

⁴⁰ See Working Document No 9 (Proposal of the United Kingdom delegation) and P.-v. No 5.

such assistance is sought, and that it does not therefore refer to abstract considerations as to the convenience or otherwise of granting legal aid.

97 Following the method adopted by this paragraph, sub-paragraph *h* includes among the Central Authorities' obligations the bringing into play in each case of such administrative arrangements as may be necessary and appropriate to secure the safe return of the child.

98 Finally, sub-paragraph *i* sets forth an obligation on the part of Central Authorities which does not directly concern individuals but only the Convention itself. It is the duty 'to keep each other informed with respect to the operation of the Convention, and, as far as possible, to eliminate any obstacles to its application'. This obligation is to operate on two complementary levels, firstly at the level of bilateral relations between States which are Party to the Convention, and secondly on a multilateral level, through participating when required in commissions called for this purpose by the Permanent Bureau of the Hague Conference.

CHAPTER III - RETURN OF THE CHILD

Article 8 — Applications to Central Authorities

99 In terms of the *first paragraph*, an application for the return of a child can be addressed to any Central Authority which, from that point, will be bound by all the obligations laid down by the Convention. This demonstrates that the applicant is free to apply to the Central Authority which in his opinion is the most appropriate. However, for reasons of efficiency, the Central Authority of the child's habitual residence is expressly mentioned in the text, but this must not be understood as signifying that applications directed to other Central Authorities are to be regarded as exceptional.

100 Since use of the model form is merely recommended, it was necessary to include in the text of the Convention the elements which any application submitted to a Central Authority must contain in order to be admissible, as well as the optional documents which may accompany or supplement such an application. The elements which every application to a Central Authority must contain, in this context, are those listed in the *second paragraph* of article 8. In particular, they are facts which allow the child and interested parties to be identified, such as those which may be able to help in locating the child (sub-paragraphs *a*, *b*, and *d*). As regards information on the child's date of birth, the Convention makes it clear that this should be supplied only 'where available'. This provision is intended to favour action by an applicant who is ignorant of such a fact but who will, however, always have to supply precise information on the age of the child, since the provisions of article 4 may result in his application being rejected, in terms of article 27.

Moreover, the application must contain 'the grounds on which the applicant's claim for return of the child is based' (sub-paragraph *c*). This requirement is logical, in that it allows the application of article 27 concerning the right of Central Authorities to reject applications which are clearly not well-founded. The grounds must in principle refer to the two elements, legal and factual, contained in article 3. Now, since the legal element in particular may depend on the provisions of the law of the child's habitual residence, or upon a decision or agreement, it might have been expected that documentary support would be required at this initial stage. However, the

Convention chose to follow a different route and placed this evidence amongst those documents which may, optionally, accompany or supplement the application. The reason for this is that obtaining the documents in question is sometimes difficult and, what is more, could take up precious time better spent in speedily discovering the whereabouts of the child. Moreover, whenever a Central Authority succeeds in bringing about the voluntary return of the child or an amicable resolution of the affair, such requirements may seem merely accessory.

101 Understood thus, the first two sub-paragraphs of the *third paragraph*, dealing with the optional provision of documents which may accompany or supplement applications, are seen to refer to documents which are fundamental to a claim for the return of the child. It must be emphasized firstly that the requirement that copies of any decision or agreement be authenticated in no way contradicts the provision in article 23 that ‘no legalization or similar formality may be required in the context of this Convention’. It is simply a matter of verifying what were originally copies or private documents so as to guarantee that they correspond to the originals and thus to secure their free circulation.

Secondly, proof of the substantive law of the State of the child’s habitual residence may be established by either certificates or affidavits, that is to say documents which include solemn statements for which those who make them assume responsibility. As regards those persons who may adduce such statements, the Convention chose to define them widely, a fact which must make the task of the applicant easier (sub-paragraph *f*). Thus, they may emanate from any qualified person — for example, an attorney, solicitor, or barrister or research institution — as well as from the Central Authorities and the other competent authorities of the State of the child’s habitual residence.

On the other hand, it should be stressed that at a later stage, when the judicial or administrative authorities of the State of refuge have been called upon to intervene, they may, in terms of article 15, request the production of certain documents which were considered to be optional at the time of application to the Central Authorities.

Lastly, the Convention acknowledges that the application may be accompanied or supplemented by ‘any other relevant document’ (sub-paragraph *g*). In theory, since it is the dispossessed guardian of the child who brings the application, it is for him to provide these supplementary documents. This does not preclude the Central Authority to which the application was originally made, where the application is sent to another Central Authority, from accompanying the application by, *inter alia*, information concerning the social background of the child (if it has such information at its disposal and considers it to be useful), by virtue of the task laid upon it by article 7, paragraph 2d.

Article 9 — Transmission of the application to the Central Authority of the State where the child is located

102 A direct consequence of the applicant’s right to apply to the Central Authority of his choice is the duty imposed on the latter to transmit the application to the Central Authority of the State in which it has reason to believe the child is located; this duty arises also when the Central Authority which is informed of a case by another Central Authority reaches the conclusion that the child is in fact located in a different country. This is a task which supplements the framework

of duties outlined in article 7, since it relates directly to the duty of co-operation amongst Central Authorities established by the first paragraph of that article.

Now, although the meaning of article 9 may be clear, -it has not been very artfully drafted. The 'requesting Central Authority' to which this article refers exists only where the application submitted in accordance with article 8 has been transmitted to *another* Central Authority in terms of article 9 itself. Consequently, the duty to inform a 'requesting Central Authority' exists only when the application has been transmitted to a third Central Authority, the child not being located in the State of the second Central Authority to which the application was sent. But on the other hand, the duty to transmit an application in terms of this article devolves upon *any* Central Authority, independently of the fact that it was seized of the matter either directly or through the intervention of another Central Authority, since this provision must be understood as applying to both of the cases it is meant to cover.

Article 10 — Voluntary return of the child

103 The duty of Central Authorities, stated in article 7(2)(c), to 'take all appropriate measures to secure the voluntary return of the child', is given preferential treatment in this article, which highlights the interest of the Convention in seeing parties have recourse to this way of proceeding. The phrase 'before the institution of any legal or administrative proceedings' which preceded this provision in the Preliminary Draft, and restricted the duty included within it to a particular point in time, was deleted from the text of the Convention. The reason for this deletion is the difficulty experienced by some legal systems in accepting that a public authority, such as a Central Authority, could act before an application had been brought before the competent authorities; however, the whole tenor of the provision shows that the Central Authorities of other States are not precluded from acting in that way. On the other hand, it is in no way an inflexible obligation, for two reasons: firstly, efforts to secure the voluntary return of the child which were begun prior to the referral of the matter to the judicial or administrative authorities may be pursued thereafter, and secondly, in so far as the initiative for the return of the child has not been transferred to those authorities, it is for the Central Authority to decide whether the attempts to achieve this objective have failed.

Moreover, the measures envisaged in this article are not intended to prejudice the efforts of Central Authorities to prevent further removals of the child, pursuant to article 7(2)(b).

Article 11 — The use of expeditious procedures by judicial or administrative authorities

104 The importance throughout the Convention of the time factor appears again in this article. Whereas article 2 of the Convention imposes upon Contracting States the duty to use expeditious procedures, the *first paragraph* of this article restates the obligation, this time with regard to the authorities of the State to which the child has been taken and which are to decide upon its return. There is a double aspect to this duty: firstly, the use of the most speedy procedures known to their legal system; secondly, that applications are, so far as possible, to be granted priority treatment.

105 The *second paragraph*, so as to prompt internal authorities to accord maximum priority to dealing with the problems arising out of the international removal of children, lays down a

non-obligatory time-limit of six weeks, after which the applicant or Central Authority of the requested State may request a statement of reasons for the delay. Moreover, after the Central Authority of the requested State receives the reply, it is once more under a duty to inform, a duty owed either to the Central Authority of the requesting State or to the applicant who has applied to it directly. In short, the provision's importance cannot be measured in terms of the requirements of the obligations imposed by it, but by the very fact that it draws the attention of the competent authorities to the decisive nature of the time factor in such situations and that it determines the maximum period of time within which a decision on this matter should be taken.

Articles 12 and 18 — Duty to return the child

106 These two articles can be examined together since they complement each other to a certain extent, despite their different character.

Article 12 forms an essential part of the Convention, specifying as it does those situations in which the judicial or administrative authorities of the State where the child is located are obliged to order its return. That is why it is appropriate to emphasize once again the fact that the compulsory return of the child depends, in terms of the Convention, on a decision having been taken by the competent authorities of the requested State. Consequently, the obligation to return a child with which this article deals is laid upon these authorities. To this end, the article highlights two cases; firstly, the duty of authorities where proceedings have begun within one year of the wrongful removal or retention of a child and, secondly, the conditions which attach to this duty where an application is submitted after the aforementioned time-limit.

107 In the first paragraph, the article brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith. The problem is an important one since, in so far as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it — something which is outside the scope of the Convention. Now, the difficulties encountered in any attempt to state this test of 'integration of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard.

108 Several questions had to be faced as a result of this approach: firstly, the date from which the time-limit was to begin to run; secondly, extension of the time-limit; thirdly, the date of expiry of the time-limit. As regards the first point, *i.e.* how to determine the date on which the time-limit should begin to run, the article refers to the wrongful removal or retention. The fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child's stay in a place other than that of its habitual residence. Secondly, the establishment of a single time-limit of one year (putting on one side the difficulties encountered in establishing the child's whereabouts) is a substantial improvement on the system envisaged in article 11 of the Preliminary Draft drawn up by the Special Commission. In fact, the application of the Convention was thus clarified, since the inherent difficulty in having to prove the existence of those problems which can surround the locating of the child was eliminated. Thirdly, as regards the *terminus ad quem*, the article has retained the date on which

proceedings were commenced, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interests of parties protected by the Convention.

To sum up, whenever the circumstances just examined are found to be present in a specific case, the judicial or administrative authorities must order the return of the child forthwith, unless they aver the existence of one of the exceptions provided for in the Convention itself.

109 The second paragraph answered to the need, felt strongly throughout the preliminary proceedings,⁴¹ to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted⁴² plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an obligation disappears whenever it can be shown that 'the child is now settled in its new environment'. The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard. In any case, the proof or verification of a child's establishment in a new environment opens up the possibility of longer proceedings than those envisaged in the first paragraph. Finally, and as much for these reasons as for the fact that the return will, in the very nature of things, always occur much later than one year after the abduction, the Convention does not speak in this context of return 'forthwith' but merely of return.

110 One problem common to both of these situations was determining the *place* to which the child had to be returned. The Convention did not accept a proposal to the effect that the return of the child should always be to the State of its habitual residence before its removal. Admittedly, one of the underlying reasons for requiring the return of the child was the desire to prevent the 'natural' jurisdiction of the courts of the State of the child's residence being evaded with impunity, by force. However, including such a provision in the Convention would have made its application so inflexible as to be useless. In fact, we must not forget that it is the right of children not to be removed from a particular environment which sometimes is a basically family one, which the fight against international child abductions seeks to protect. Now, when the applicant no longer lives in what was the State of the child's habitual residence prior to its removal, the return of the child to that State might cause practical problems which would be difficult to resolve. The Convention's silence on this matter must therefore be understood as allowing the authorities of the State of refuge to return the child directly to the applicant, regardless of the latter's present place of residence.

111 The third paragraph of article 12 introduces a perfectly logical provision, inspired by considerations of procedural economy, by virtue of which the authorities which are acquainted with a case can stay the proceedings or dismiss the application, where they have reason to believe that the child has been taken to another State. The reasons by which they may come to

⁴¹ See Report of the Special Commission, No 92.

⁴² See Working Document No 25 (Proposal of the delegation of the Federal Republic of Germany) and P.-v. Nos 7 and 10.

such a conclusion are not stated in the article, and will therefore depend on the internal law of the State in question.

112 Finally, *article 18* indicates that nothing in this chapter limits the power of a judicial or administrative authority to order the return of the child at any time. This provision, which was drafted on the basis of article -15 of the Preliminary Draft, and which imposes no duty, underlines the non-exhaustive and complementary nature of the Convention. In fact, it authorizes the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end. This may happen particularly in the situations envisaged in the second paragraph of article 12, *i.e.* where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment.

Articles 13 and 20 — Possible exceptions to the return of the child

113 In the first part of this Report we commented at length upon the reasons for, the origins and scope of, the exceptions contained in the articles concerned.⁴³ We shall restrict ourselves at this point to making some observations on their literal meaning. In general, it is appropriate to emphasize that the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion — and does not impose upon them a duty — to refuse to return a child in certain circumstances.

114 With regard to *article 13*, the introductory part of the first paragraph highlights the fact that the burden of proving the facts stated in sub-paragraphs *a* and *b* is imposed on the person who opposes the return of the child, be he a physical person, an institution or an organization, that person not necessarily being the abductor. The solution adopted is indeed limited to stating the general legal maxim that he who avers a fact (or a right) must prove it, but in making this choice, the Convention intended to put the dispossessed person in as good a position as the abductor who in theory has chosen what is for him the most convenient forum.

115 The exceptions contained in *a* arise out of the fact that the conduct of the person claiming to be the guardian of the child raises doubts as to whether a wrongful removal or retention, in terms of the Convention, has taken place. On the one hand, there are situations in which the person who had the care of the child did not actually exercise custody rights at the time of the removal or retention. The Convention includes no definition of 'actual exercise' of custody, but this provision expressly refers to the care of the child. Thus, if the text of this provision is compared with that of article 5 which contains a definition of custody rights, it can be seen that custody is exercised effectively when the custodian is concerned with the care of the child's person, even if, for perfectly valid reasons (illness, education, etc.) in a particular case, the child and its guardian do not live together. It follows from this that the question of whether custody is actually exercised or not must be determined by the individual judge, according to the circumstances of each particular case.

⁴³ See *supra*, Nos 28 to 35.

Moreover, by relating this paragraph to the definition of wrongful removal or retention in article 3, one must conclude that proof that custody was not actually exercised does not form an exception to the duty to return the child if the dispossessed guardian was unable actually to exercise his rights precisely because of the action of the abductor. In fact, the categorization of protected situations, contained in article 3, governs the whole Convention, and cannot be contradicted by a contrary interpretation of any of the other articles.

On the other hand, the guardian's conduct can also alter the characterization of the abductor's action, in cases where he has agreed to, or thereafter acquiesced in, the removal which he now seeks to challenge. This fact allowed the deletion of any reference to the exercise of custody rights 'in good faith', and at the same time prevented the Convention from being used as a vehicle for possible 'bargaining' between the parties.

116 The exceptions contained in *b* deal with situations where international child abduction has indeed occurred, but where the return of the child would be contrary to its interests, as that phrase is understood in this sub-paragraph. Each of the terms used in this provision is the result of a fragile compromise reached during the deliberations of the Special Commission and has been kept unaltered. Thus it cannot be inferred, *a contrario*, from the rejection during the Fourteenth Session of proposals favouring the inclusion of an express provision stating that this exception could not be invoked if the return of the child might harm its economic or educational prospects,⁴⁴ that the exceptions are to receive a wide interpretation.

117 Nothing requires to be added to the preceding commentary on the second paragraph of this article (notably in No 31, *supra*).

The third paragraph contains a very different provision which is in fact procedural in nature and seeks on the one hand to compensate for the burden of proof placed on the person who opposes the return of the child, and on the other hand to increase the usefulness of information supplied by the authorities of the State of the child's habitual residence. Such information, emanating from either the Central Authority or any other competent authority, may be particularly valuable in allowing the requested authorities to determine the existence of those circumstances which underlie the exceptions contained in the first two paragraphs of this article.

118 It is significant that the possibility, acknowledged in *article 20*, that the child may not be returned when its return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms' has been placed in the last article of the chapter: it was thus intended to emphasize the always clearly exceptional nature of this provision's application. As for the substance of this provision, two comments only are required. Firstly, even if its literal meaning is strongly reminiscent of the terminology used in international texts concerning the protection of human rights, this particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently, so as to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of

⁴⁴ See Working Documents Nos 12 (Proposal of the United States delegation) and 42 (*Proposition de la délégation hellénique*), and also P.-v. No 8.

the requested State concerning the subject-matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles. Secondly, such principles must not be invoked any more frequently, nor must their invocation be more readily admissible than they would be in their application to purely internal matters. Otherwise, the provision would be discriminatory in itself, and opposed to one of the most widely recognized fundamental principles in internal laws. A study of the case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the Convention has in view.

Article 14 — Relaxation of the requirements of proof of foreign law

119 Since the wrongful nature of a child's removal is made to depend, in terms of the Convention, on its having occurred as the result of a breach of the actual exercise of custody rights conferred by the law of the child's habitual residence, it is clear that the authorities of the requested State will have to take this law into consideration when deciding whether the child should be returned. In this sense, the provision in article 13 of the preliminary draft Convention,⁴⁵ that the authorities 'shall have regard to' the law of the child's habitual residence, could be regarded as superfluous. However, such a provision would on the one hand underline the fact that there is no question of applying that law, but merely of using it as a means of evaluating the conduct of the parties, while on the other hand, in so far as it applied to decisions which could underlie the custody rights that had been breached, it would make the Convention appear to be a sort of *lex specialis*, according to which those decisions would receive effect indirectly in the requested State, an effect which would not be made conditional on the obtaining of an *exequatur* or any other method of recognition of foreign judgments.

Since the first aspect of article 14 necessarily derives from other provisions of the Convention, the actual purport of article 14 is concerned only with the second. The article therefore appears as an optional provision for proving the law of the child's residence and according to which the authority concerned 'may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable'. There is no need to stress the practical importance this rule may have in leading to the speedy decisions which are fundamental to the working of the Convention.

Article 15 — The possibility of requesting a decision or other determination from the authorities of the child's habitual residence

120 This article answers to the difficulties which the competent authorities of the requested State might experience in reaching a decision on an application for the return of a child through being uncertain of how the law of the child's habitual residence will apply in a particular case. Where this is so, the authorities concerned can request 'that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination'. Only two comments will be made here. The first concerns the voluntary nature of the request, in

⁴⁵ See Report of the Special Commission, Nos 102-103.

the sense that the return of the child cannot be made conditional upon such decision or other determination being provided. This conclusion arises in fact as much from the actual terms of the article (which speaks of ‘requesting’ and not ‘requiring’) as from the fact acknowledged in the same provision, that it may be impossible to obtain the requested documents in the State of the child’s residence. Now, with regard to this last point, the duty which the article places upon Central Authorities to help the applicant obtain the decision or determination must make his task easier, since the Central Authority can provide a certificate concerning its relevant law in terms of article 8(3)(f). Secondly, the contents of the decision or certificate must have a bearing upon the wrongful nature, in the Convention sense, of the removal or retention. This means, in our opinion, that one or the other will have to contain a decision on the two elements in article 3, and thus establish that the removal was in breach of custody rights which, *prima facie*, were being exercised legitimately and in actual fact, in terms of the law of the child’s habitual residence.

Article 16 — Prohibition against deciding upon the merits of custody rights

121 This article, so as to promote the realization of the Convention’s objects regarding the return of the child, seeks to prevent a decision on the merits of the right to custody being taken in the State of refuge. To this end, the competent authorities in this State are forbidden to adjudicate on the matter when they have been informed that the child in question has been, in terms of the Convention, wrongfully removed or retained. This prohibition will disappear when it is shown that, according to the Convention, it is not appropriate to return the child, or where a reasonable period of time has elapsed without an application under the Convention having been lodged. The two sets of circumstances which can put an end to the duty contained in the article are very different, both in the reasons behind them and in their consequences. In fact, it is perfectly logical to provide that this obligation will cease as soon as it is established that the conditions for a child’s return have not been met, either because the parties have come to an amicable arrangement or because it is appropriate to consider on the exceptions provided for in articles 13 and 20. Moreover, in such cases, the decision on the merits of the custody rights will finally dispose of the case.

On the other hand, since the ‘notice’ which may justify the prohibition against deciding upon the merits of the case must derive either from an application for the return of the child which is submitted directly by the applicant, or from an official communication from the Central Authority of the same State, it is difficult to see how cases in which the notice is not followed by an application would not be contained within the first hypothesis. Moreover, if such situations do exist, the ambiguity in the phrase ‘reasonable time’ could lead to decisions being taken before the period of one year, contained in article 12, first paragraph, has expired; in such a case, this decision would coexist alongside the duty to return the child, in accordance with the Convention, thus giving rise to a problem which is dealt with in article 17.

Article 17 — The existence of a decision on custody in the requested State

122 The origins of this article clearly demonstrate the end pursued. The First Commission initially adopted a provision which gave absolute priority to the application of the Convention, by making the duty to return the child prevail over any other decision on custody, which had been issued or was likely to be issued in the requested State. At the same time, it accepted the possibility of a reservation allowing the return of the child to be refused, when its return was

shown to be incompatible with a decision existing in the State of refuge, prior to the ‘abduction’.⁴⁶ The current text is therefore the result of a compromise which was reached in order to eliminate a reservation in the Convention, without at the same time reducing the extent of its acceptability to the States.⁴⁷ In this way, the original provision was recast by emphasizing that the sole fact that a decision existed would not of itself prevent the return of the child, and by allowing judges to take into consideration the reasons for this decision in coming to a decision themselves on the application for the child’s return.

123 The solution contained in this article accords perfectly with the object of the Convention, which is to discourage potential abductors, who will not be able to defend their action by means either of a ‘dead’ decision taken prior to the removal but never put into effect, or of a decision obtained subsequently, which will, in the majority of cases, be vitiated by fraud. Consequently, the competent authority of the requested State will have to regard the application for the child’s return as proof of the fact that a new factor has been introduced which obliges it to reconsider a decision which has not been put into effect, or which was taken on the basis of exorbitant grounds of jurisdiction, or else failed to have regard to the right of all the parties concerned to state their case. Moreover, since the decision on the return of the child is not concerned with the merits of custody rights, the reasons for the decision which may be taken into consideration are limited to those which concern ‘the application of the Convention’. A situation brought about by a decision issued by the authorities of the State of a child’s habitual residence prior to its ‘abduction’ and which granted custody to the ‘abductor’, would normally be resolved by applying article 3 of the Convention, since the existence of a claimed right to custody must be understood in accordance with the law of that State.

Article 19 — Scope of the decisions on the return of the child

124 This provision expresses an idea which underlies the whole of the Convention; as a matter of fact, in this Report we have already been concerned on several occasions as much with the reasons for it as with commenting upon it. This article is restricted to stating the scope of decisions taken regarding the return of the child which the Convention seeks to guarantee, a return which, so as to be ‘forthwith’ or ‘speedy’, must not prejudge the merits of custody rights; this provision seeks to prevent a later decision on these rights being influenced by a change of circumstances brought about by the unilateral action of one of the parties.

CHAPTER IV - RIGHTS OF ACCESS

Article 21

125 Above all, it must be recognized that the Convention does not seek to regulate access rights in an exhaustive manner; this would undoubtedly go beyond the scope of the Convention’s

⁴⁶ Working Documents Nos 53, paragraph 2 (Proposal of the United Kingdom delegation), 32, article XG (Proposal of the Netherlands delegation), and 19 (Proposal of the Japanese delegation), as well as P.-v. No 12.

⁴⁷ See Working Document No 77 (Proposal of the Chairman, supported by the Rapporteur and the delegations of Australia, Canada, Finland, France, the Federal Republic of Germany, Ireland, Spain, Switzerland and the United Kingdom) and P.-v. No 17.

objectives. Indeed, even if the attention which has been paid to access rights results from the belief that they are the normal corollary of custody rights, it sufficed at the Convention level merely to secure co-operation among Central Authorities as regards either their organization or the protection of their actual exercise. In other respects, the best indication of the high level of agreement reached regarding access rights is the particularly short amount of time devoted to them by the First Commission.

126 As we have just pointed out, the article as a whole rests upon co-operation among Central Authorities. A proposal which sought to insert a provision in a new paragraph that both the authorities and the law of the State of the child's habitual residence should have exclusive jurisdiction in questions of access rights, was rejected by a large majority.⁴⁸ The organizing and securing of the actual exercise of access rights was thus always seen by the Convention as an essential function of the Central Authorities. Understood thus, the first paragraph contains two important points: in the first place, the freedom of individuals to apply to the Central Authority of their choice, and secondly the fact that the purpose of the application to the Central Authority can be either the organization of access rights, *i.e.* their establishment, or the protection of the exercise of previously determined access rights. Now, recourse to legal proceedings will arise very frequently, especially when the application seeks to organize rights which are merely claimed or when their exercise runs up against opposition from the holder of the rights of custody. With this in view, the article's third paragraph envisages the possibility of Central Authorities initiating or assisting in such proceedings, either directly, or through intermediaries.

127 The nature of the problems tackled in the second paragraph is very different. Here it is a question of securing the peaceful enjoyment of access rights without endangering custody rights. This provision therefore contains important elements for the attainment of this end. Once again, co-operation among Central Authorities is placed, of necessity, in the very centre of the picture, and it is a co-operation designed as much to promote the exercise of access rights as to guarantee the fulfilment of any conditions to which their exercise may be subject.

Of all the specific ways of securing the exercise of access rights, article 21 contains only one, where it points out that the Central Authority must try 'to remove, as far as possible, all obstacles to the exercise of such rights', obstacles which may be legal ones or may originate in possible criminal liability. The rest is left up to the co-operation among Central Authorities, which is regarded as the best means of ensuring respect for the conditions imposed upon the exercise of access rights. In fact, such respect is the only means of guaranteeing to the custodian that their exercise will not harm his own rights.

128 The Convention gives no examples of how Central Authorities are to organize this co-operation so as to secure the 'innocent' exercise of access rights, since such examples could have been interpreted restrictively. Mention could however be made purely indicatively as in the Report of the preliminary draft Convention,⁴⁹ of the fact that it would be advisable that the child's name not appear on the passport of the holder of the right of access, whilst in 'transfrontier' access cases it would be sensible for the holder of the access rights to give an

⁴⁸ See Working Document No 31 (Proposal of the Danish delegation) and P.-v. No 13.

⁴⁹ See Report of the Special Commission. No 110.

undertaking to the Central Authority of the child's habitual residence to return the child on a particular date and to indicate also the places where he intends to stay with the child. A copy of such an undertaking would then be sent to the Central Authority of the habitual residence of the holder of the access rights, as well as to the Central Authority of the State in which he has stated his intention of staying with the child. This would enable the authorities to know the whereabouts of the child at any time and to set in motion proceedings for bringing about its return, as soon as the stated time-limit has expired. Of course, none of the measures could by itself ensure that access rights are exercised properly, but in any event we believe that this Report can go no further: the specific measures which the Central Authorities concerned are able to take will depend on the circumstances of each case and on the capacity to act enjoyed by each Central Authority.

CHAPTER V - GENERAL PROVISIONS

129 This chapter contains a series of provisions which differ according to the topics with which they deal, and which had to be dealt with outside the framework of the foregoing chapters. On the one hand, there are certain procedural provisions common both to the proceedings for the return of the child and to the organization of access rights, and on the other hand there are provisions for regulating the problems arising out of the Convention's application in States with more than one system of law, as well as those which concern its relationship with other conventions and its scope *ratione temporis*.

Article 22 — 'Cautio judicatum solvi'

130 Following a marked tendency to favour the deletion from the Convention of procedural measures which discriminated against foreigners, this article declares that no security, bond or deposit, however described, shall be required within the context of the Convention. Two short comments are in order here. The first concerns the scope of the stated prohibition *ratione personae*; on this point, an extremely liberal solution was arrived at, such as was required by a convention built upon the basic idea of protecting children.⁵⁰ Secondly, the security, bond or deposit from which foreigners are exempt are those which, in any legal system and howsoever described, are meant to guarantee respect for decisions on the payment of costs and expenses arising out of legal proceedings. The article, in its concern for coherence, states that the rule will apply only to those 'judicial or administrative proceedings falling within the scope of the Convention', and avoids a wider formulation which could have been interpreted as applicable, for example, to proceedings raised directly for a decision on the merits of custody rights. On the other hand, it can clearly be inferred from the preceding observations that it does not prevent other types of security, bond or deposit being required, particularly those which are imposed so as to guarantee the proper exercise of access rights.

Article 23 — Exemption from legalization

131 This article repeats word for word the text of the equivalent article in the preliminary draft Convention, which merely set forth in a separate provision an idea which is to be found in

⁵⁰ See the more restrictive construction which was incorporated in article 14 of the *Convention on International Access to Justice*, also adopted during the Fourteenth Session of the Conference.

all Hague Conventions, involving the transmission of documents among Contracting States. The fact that it has been drafted in wide terms means that not only ‘diplomatic legalization’, but also any other similar sort of requirement, is forbidden. However, any requirement of the internal law of the authorities in question that copies or private documents be authenticated remains outside the scope of this provision.

Article 24 — Translation of documents

132 As regards the languages which are to be used as among Central Authorities, the Convention upheld the approach in the Preliminary Draft, by which documents are to be sent in their original language, accompanied by a translation into one of the official languages of the requested State or, where that is not feasible, a translation into French or English.⁵¹ In this matter, the Convention also allows a reservation to be made in terms of article 42, under which a Contracting State can object to the use of one or other of the substitute languages, but this reservation cannot of course exclude the use of both. Finally, it must be emphasized firstly that the scheme which has been chosen offers only a *minimal* facility and may be improved upon by other conventions which exclude any requirement of translation as among States which are Party to them, and secondly that it governs only communications among Central Authorities. Consequently, applications and other documents sent to internal judicial or administrative authorities will have to conform to the rules regarding translation laid down by the law of each State.

Article 25 — Legal aid and advice

133 The relevant provision here enlarges the scope of legal aid in two respects. Firstly, it includes among the possible beneficiaries persons habitually resident in a Contracting State as well as that State’s own nationals. Secondly, the legal aid available is extended to cover legal advice as well, which is not invariably included in the various systems of legal aid operated by States.⁵²

Article 26 — Costs arising out of the Convention’s application

134 The principle enunciated in the first paragraph, under which each Central Authority bears its own costs in applying the Convention, met no opposition. Quite simply, it means that a Central Authority cannot claim costs from another Central Authority. It must however be admitted that the costs envisaged will depend on the actual services provided by each Central Authority, according to the freedom of action conferred upon it by the internal law of the State concerned.

135 On the other hand, the second paragraph refers to one of the most controversial matters dealt with by the Fourteenth Session, a matter which in the end had to be resolved by accepting the reservation in the third paragraph of the same article. In fact, the argument between those

⁵¹ A somewhat different approach is found in article 7 of the *Convention on International Access to Justice*, referred to *supra*.

⁵² See, in similar vein, articles I and 2 of the *Convention on International Access to Justice*, referred to *supra*.

delegations which wanted the applicant to be exempt from all costs arising out of the application of the Convention (including exemption from all costs and expenses not covered by the legal aid and advice system such as those which arise out of legal proceedings or, where applicable, the participation of counsel or legal advisers), and those which favoured the opposite solution adopted by the preliminary draft Convention,⁵³ was resolved only by including a reservation favouring the latter's point of view. The reason for this was that, since different criteria for the granting of legal aid were rooted in the very structure of the legal systems concerned, any attempt to make one approach prevail absolutely over the others would have led to the automatic exclusion of certain States from the Convention, a result which no one wanted.⁵⁴ However, there was total agreement as regards the rule contained in the last sentence of the second paragraph, authorizing the Central Authorities to 'require the payment of the expenses incurred or to be incurred in implementing the return of the child'.

136 The fourth paragraph contains a quite different type of provision, by which the competent internal authorities may direct the 'abductor' or the person who prevented the exercise of access rights, 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'. But since this rule is only an optional provision, which recognizes the discretion which may be exercised by the courts in each case, its scope would seem to be particularly symbolic, a possible deterrent to behaviour which is contrary to the objects of the Convention.

Article 27 — Possible rejection of an application

137 Common sense would indicate that Central Authorities cannot be obliged to accept applications which belong outside the scope of the Convention or are manifestly without foundation. In such cases, the only duty of Central Authorities is to 'inform forthwith the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons'. This means that an application may be rejected by the Central Authority to which the applicant applied directly as well as by a Central Authority which was initially brought into the case by another Central Authority.

Article 28 — Authorization required by the Central Authority

138 The provision in this article is merely another example of the Convention's attitude to the organization and powers of Central Authorities. Since the aim is to avoid requiring States to change their own law in order to be able to accept the Convention, the Convention takes into consideration the fact that, in terms of the law of various Member States of the Conference the Central Authority would have the power to require some authorization from the applicant. As a matter of fact, the 'model form', as an example of the documents which might be attached to an application (see note to No IX), brings in a reference to 'the authorization empowering the Central Authority to act on behalf of the applicant', an authorization which, every time it is

⁵³ Article 22(2)(a) of the Preliminary Draft prepared by the Special Commission.

⁵⁴ See Working Documents Nos 51 and 61 (*Propositions de la délégation beige*) and Nos 57 and 67 (Proposals of the Canadian, Netherlands and United States delegations) and also P.-v. Nos 11 and 14.

required by a Central Authority, will have to accompany those matters listed in article 8 and the applications submitted under article 21.

Article 29 - Direct application to competent internal authorities

139 The Convention does not seek to establish a system for the return of children which is exclusively for the benefit of the Contracting States. It is put forward rather as an additional means for helping persons whose custody or access rights have been breached. Consequently, those persons can either have recourse to the Central Authorities — in other words, use the means provided in the Convention — or else pursue a direct action before the competent authorities in matters of custody and access in the State where the child is located. In the latter case, whenever the persons concerned opt to apply directly to the relevant authorities, a second choice is open to them in that they can submit their application ‘whether or not under the provisions of this Convention’. In the latter case the authorities are not of course obliged to apply the provisions of the Convention, unless the State has incorporated them into its internal law, in terms of article 2 of the Convention.

Article 30 — Admissibility of documents

140 This provision was intended to resolve the problem which existed in some Member States regarding the admissibility of documents. It merely seeks to facilitate admission before the judicial or administrative authorities of Contracting States of applications submitted either directly or through the intervention of a Central Authority, as well as documents which may be attached or supplied by the Central Authorities. In fact, this article must not be understood to contain a rule on the evidential value which is to be placed on these documents, since that problem falls quite outwith the scope of the Convention.⁵⁵

Articles 31 to 33 — Application of the Convention in relation to States with more than one system of law

141 These three articles govern the Convention’s application to States with non-unitary legal systems. As in recent conventions of the Hague Conference, a distinction has been drawn between States which have several systems of law applicable in different territorial units, and those with several systems of law applicable to different categories of persons. To be more precise, the solution adopted received its inspiration from that reached by the conventions drawn up during the Thirteenth Session of the Conference.⁵⁶

As regards the first group of States, article 31 explains how references to the child’s habitual residence and to the law of the State of its habitual residence are to be understood.

As regards the second type, article 32 leaves the determination of the applicable law to the rules in force in each State.

⁵⁵ See article 26 of the preliminary draft Convention, Working Document No 49 (Proposal of the United States delegation) and P.-v. No 11.

⁵⁶ See in particular Mr von Overbeck’s Report on the Convention on the Law Applicable to Matrimonial Property Regimes, in *Acts and Documents of the Thirteenth Session*, Book II, p. 374 *et seq.*

Finally, it must be emphasized that the substantive provisions of these two articles are not restricted to the States directly concerned. In actual fact, the relevant rules are to be taken into consideration by all Contracting States in their relations with each other, for example whenever a child is removed from one of those States to another State with a unified or non-unified legal system.

142 On the other hand, article 33 limits the occasions where States with more than one system of law are obliged to apply the Convention, by excluding those in which a State with a unified system of law would not be bound to do so. Put shortly, this article merely states that the Convention applies only at the international level and at the same time characterizes as internal all those relationships which arise within a State, whether or not that State has more than one system of law.

Article 34 — Relationship to other conventions

143 This article was commented upon in the first part of the Report (Nos 39 and 40).

Article 35 — Scope of the Convention ratione temporis

144 The question as to whether the Convention should apply to abductions involving two States and which occurred prior to its entry into force or only to those occurring thereafter, was met with different proposed solutions during the Fourteenth Session. The first proposal was undoubtedly the most liberal, since it envisaged the Convention's applying to all 'abductions', irrespective of when it came into effect.⁵⁷ However, this decision was followed by acceptance of the idea that any Contracting State could declare that the Convention would apply only to 'abductions' which occurred after its entry into force in that State.⁵⁸ The situation therefore remained largely unresolved, with each State, where it deemed this necessary, being able to limit the Convention's application. It was clear that the operation of such declarations within a convention which is clearly bilateral in its application would create some technical problems, to alleviate which the First Commission finally pronounced itself in favour of the opposite solution to that first adopted, *i.e.* the more restrictive. It is seen therefore in article 35, by which the Convention is to apply as among Contracting States 'only to wrongful removals or retentions occurring after its entry into force in those States'.⁵⁹ On the other hand, the inference must be drawn from the Convention's provisions as a whole (and in particular article 12, second paragraph) that no time-limit is imposed on the submission of applications, provided the child has not reached sixteen years of age, in terms of article 4. In fact, the commencement of an action after the expiry of the one year period stated in the first paragraph of article 12, merely lessens the obligation to cause the child to be returned, whilst it is recognized that the obligation will not arise if the child is shown to have become settled in its new environment.

⁵⁷ See Working Document No 53 (Proposal of the United Kingdom delegation) and P. -v. No 13.

⁵⁸ See Working Document No 68 (Proposal of the Canadian delegation) and P.-v. No 15.

⁵⁹ See Working Document No 81 (Proposal of the Chairman with the consent of the delegations of Austria, the Federal Republic of Germany, Switzerland and the United Kingdom) and P.-v. No 18. An oral proposal of the Reporter that the Convention be extended to cover situations which occurred during the year prior to its entry into force was not accepted.

145 The provision certainly has the merit of being clear. However, it cannot be denied that its application is fated to frustrate the legitimate expectations of the individuals concerned. But since in the last resort it is a limitation on the duty to return the child, it in no way prevents two or more States agreeing amongst themselves to derogate from it in terms of article 36, by agreeing to apply the Convention retroactively.

Moreover, the provision concerns only those provisions in the Convention regarding the return of the child. In actual fact, the provision of the Convention governing access rights can, in the nature of things, only be invoked where their exercise is refused or continues to be refused after the Convention has come into force.

Article 36 — Possibility of limiting by agreement the restrictions on the return of the child

146 This article, conform to the general principles underlying the Convention, which are based on the experience derived from other Hague Conventions,⁶⁰ allows two or more Contracting States to agree to derogate as amongst themselves from any of the Convention's provisions which may involve restrictions on the return of the child, in particular those contained in articles 13 and 20. This demonstrates, on the one hand, the compromise character of some of the Convention's provisions and the possibility that criteria more favourable to the principal object of the Convention may be adopted to govern relationships among States which share very similar legal concepts, while on the other hand, as we have emphasized on several occasions throughout this Report, the Convention is not to be regarded as in any way exclusive in its scope. Now, if such supplementary conventions see the light of day, one negative consequence, feared by some delegations, will have to be avoided, namely that beyond the geographical limits of such agreements, the States concerned will be tempted to interpret the limitations contained in the Convention in a wide sense, thus weakening its scope.⁶¹

CHAPTER VI- FINAL CLAUSES

147 The final clauses in articles 37 to 45 of the Convention have been drafted in accordance with similar provisions adopted by the most recent sessions of the Hague Conference. No detailed commentary is therefore necessary and we shall make only a few brief comments on them.

Firstly, the adaptation of the final clauses to the decision which was taken on the conditional opening of the Convention to non-Member States. This point has been dealt with earlier,⁶² and it is sufficient merely to emphasize here that the 'semi-closed' character of the Convention derives from the means by which States Parties may declare their acceptance and not from any restriction placed on the States which may accede to it (article 38).

⁶⁰ See, for example, the *Convention of 1 March 1954 on civil procedure*.

⁶¹ See Working Documents Nos 70 (*Proposition des delegations beige, francaise et luxembourgeoise*) and 80 (Proposal of the United States delegation) as well as P.-v. Nos 16 and 18.

⁶² See *supra*, No 42.

148 With regard to the ‘degree’ of acceptance of the Convention by States which contain two or more territorial units in which different systems of law are applicable to matters dealt with in this Convention, article 40 provides that they may declare — at the time of signature, ratification, acceptance, approval or accession — that the Convention shall extend to all its territorial units or only to one or more of them. Such a declaration can be modified at any time by another more extensive declaration. Actually, any modification of a declaration which tends to limit the applicability of the Convention ought to be regarded as a partial denunciation in terms of article 44, third paragraph.

Under article 39, the same result will occur with regard to States which are responsible for the international relations of other territories. Although such situations are meant to disappear as a logical consequence of the progressive application of the principle which proclaims the right of peoples to self-determination, the Conference felt it advisable to keep a clause which might yet prove to be useful.

149 Finally, a word should be said on article 41, since it contains a wholly novel provision in Hague Conventions. It also appears in the other Convention adopted at the Fourteenth Session, *i.e.* the *Convention on International Access to Justice*, at the express request of the Australian delegation.

This article seeks to make it clear that ratification of the Convention by a State will carry no implication as to the internal distribution of executive, judicial and legislative powers in that State.

This may seem self-evident, and this is the point which the head of the Canadian delegation made during the debates of the Fourth Commission where it was decided to insert such a provision in both Conventions (see P. -v. No 4 of the Plenary Session). The Canadian delegation, openly expressing the opinion of a large number of delegations, regarded the insertion of this article in the two Conventions as unnecessary. Nevertheless, article 41 was adopted, largely to satisfy the Australian delegation, for which the absence of such a provision would apparently have created insuperable constitutional difficulties.

150 On the question of reservations, the Convention allows only those provided for in articles 24 and 26. No other reservation is permitted. Moreover, article 42 sets forth the customary provision whereby a State can ‘at any time withdraw a reservation it has made’.

151 Finally, the importance placed on the duty which was assumed by the Ministry of Foreign Affairs of the Kingdom of the Netherlands (article 45) to notify Member States and Contracting States should be emphasized, particularly in view of the role played by declarations of acceptance of future accessions in a convention such as this.

Madrid, April 1981

Elisa Perez-Vera

EXHIBIT G—Robles Antonio v. Barrios Bello Orders

2004 WL 1895125 (N.D.Ga.)

United States District Court,
N.D. Georgia, Atlanta Division.
Isaac ROBLES ANTONIO, Plaintiff/Petitioner,
v.
Josefina BARRIOS BELLO, Defendant/Respondent.
No. Civ.A.1:04-CV-1555-T.

June 2, 2004.

James F. Bogan III, for Plaintiff/Petitioner.

AMENDED ORDER GRANTING *EX PARTE* TRO AND EMERGENCY EQUITABLE RELIEF
THRASH, J.

*1 Plaintiff/Petitioner Isaac Robles Antonio (“Petitioner”), having filed his “*EX PARTE* MOTION UNDER THE HAGUE CONVENTION FOR ENTRY OF A TRO, APPLICATION FOR WARRANT SEEKING PHYSICAL CUSTODY OF CHILD, AND SCHEDULING OF AN EXPEDITED HEARING” (“Motion”), and the Court having conducted a hearing on the Motion on Tuesday, June 1, 2004, and after considering the arguments of Petitioner’s counsel and the entire record, and pursuant to [Federal Rule of Civil Procedure 65](#), the Court hereby GRANTS the Motion, ruling as follows:

(1) This Court finds that *ex parte* emergency relief is necessary to prevent irreparable injury. Specifically, the evidence of record shows that on November 29, 2003, Defendant/Respondent Josefina Barrios Bello (“Respondent”), who is currently married to Petitioner, wrongfully removed their seven-year-old daughter, Itzel Ameyalli Robles Barrios, without Petitioner’s acquiescence or consent, from their familial home in Mexico and smuggled the child into the United States. Given that Respondent has already abducted the child and herself faces the risk of apprehension here, there exists a clear risk that Respondent will further secret the child and herself, in violation of the Hague Convention, and not appear before this Court to resolve the claim presented by Petitioner. Accordingly, and pursuant to [Federal Rule of Civil Procedure 65\(b\)](#), the Court finds it necessary to grant this Order without notice.

(2) Respondent is hereby prohibited from removing Petitioner’s daughter, Itzel Ameyalli Robles Barrios, from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and no person acting in concert or participating with Respondent (including, without limitation, Respondent’s brother, Santiago Barrios Bello, and her boyfriend, Cesar Guillermo Erasto Partida) shall take any action to remove the child from the jurisdiction of this Court pending a determination on the merits of this Petition.

(3) A preliminary injunction hearing on the merits of the Verified Complaint is hereby scheduled to be held on Friday, June 4, 2004, at 9 a.m. in Courtroom 2108 of this United States District Court, 75 Spring Street, Atlanta, Georgia 30303.

(4) Respondent is hereby directed to show cause at the hearing scheduled in paragraph (3) above why the child should not be returned to Mexico, accompanied by Petitioner, where an appropriate custody determination can be made under Mexican law, and why the other relief requested in the Verified Complaint should not be granted.

(5) The Court hereby orders that the trial of this action on the merits be advanced and consolidated with the preliminary injunction hearing scheduled in paragraph (3) above.

(6) The Court hereby orders the United States Marshals Service to take physical custody of the child, 7-year old Itzel Ameyalli Robles Barrios, and bring the child to a United States Magistrate Judge. The United States Marshals Service shall notify Petitioner’s counsel of the date and time that Itzel Ameyalli Robles Barrios will be brought

before a Magistrate Judge, and Petitioner is hereby ordered to appear before the Magistrate Judge at that date and time. The Magistrate Judge shall thereupon arrange for the child to be placed in Petitioner's temporary physical custody and otherwise set conditions consistent with this. Order to guarantee that both Petitioner and the child will attend the preliminary injunction hearing scheduled in this case.

*2 (7) Pending the hearing, Petitioner's daughter will be placed and remain in his temporary custody. Petitioner is hereby ordered to bring the child and himself to the preliminary injunction hearing scheduled in this case.

(8) The United States Marshals Service is further directed to serve Respondent with this Order, as well as the pleadings filed by Petitioner in this case.

(9) To execute this Order, the United States Marshals Service may enlist the assistance of other law enforcement authorities, including the local police.

(10) The "Order Granting *Ex Parte* TRO and Emergency Equitable Relief" entered by this Court at 11 a.m. on June 1, 2004 is hereby superseded by this Amended Order.

SO ORDERED.

Not Reported in F.Supp.2d, 2004 WL 1895125 (N.D.Ga.)

END OF DOCUMENT

H
2004 WL 1895124 (N.D.Ga.)

United States District Court,
N.D. Georgia, Atlanta Division.
Issac ROBLES ANTONIO, Plaintiff/Petitioner,

v.

Josefina BARRIOS BELLO, Defendant/Respondent.

No. CIV.A.1:04-CV-1555-TWT.

June 4, 2004.

James Francis Bogan, III, Richard Allen Horder, Kilpatrick Stockton, Atlanta, GA, for Plaintiff.
Thomas Edward Vanderbloemen, King & Spalding, Atlanta, GA, for Defendant.

ORDER

SCOFIELD, Magistrate J.

*1 The above matter came before the undersigned pursuant to District Judge Thrash's order entered June 2, 2004, granting an ex parte temporary restraining order and emergency equitable relief. In Judge Thrash's order, the matter was referred to the undersigned to arrange for the minor child, Itzell Ameyalli Robles Barrios, to be placed in the temporary custody of the Petitioner herein. This Court was directed to impose any necessary conditions to ensure that both Petitioner and the child would attend the preliminary injunction hearing scheduled in this case for June 4, 2004, at 9:00 a.m. before Judge Thrash.

At the hearing before this Court, the Petitioner appeared with counsel, and the undersigned appointed attorney Vionette Reyes as guardian ad litem for the minor child Itzell. As conditions for the release of the child to Petitioner, the Court required the Petitioner to surrender his passport and ordered that the minor child be made available for private interview with attorney Reyes tomorrow, at the office of Petitioner's counsel or at such other location as may be mutually agreed upon. Petitioner was again ordered to appear with the minor child Itzell on Friday, June 4, 2004, before Judge Thrash, under pain of prosecution for contempt of this Court's order and the previous order of the district judge should he not appear as ordered. Upon the agreement of Petitioner to comply with these conditions, this Court ordered the minor Itzell released to the temporary custody of Petitioner pending the Friday hearing.

It is SO ORDERED.

Not Reported in F.Supp.2d, 2004 WL 1895124 (N.D.Ga.)

END OF DOCUMENT

H
2004 WL 1895126 (N.D.Ga.)

United States District Court,
N.D. Georgia, Atlanta Division.
Isaac ROBLES ANTONIO, Plaintiff/Petitioner,
v.
Josefina BARRIOS BELLO, Defendant/Respondent.
No. Civ.A.1:04-CV-1555-T.

June 7, 2004.

James Francis Bogan, III, Richard Allen Horder, Kilpatrick Stockton, Atlanta, GA, for Plaintiff.

Thomas Edward Vanderbloemen, King & Spalding, Atlanta, GA, for Defendant.

ORDER GRANTING RELIEF UNDER THE HAGUE CONVENTION AND THE INTERNATIONAL CHILD
ABDUCTION REMEDIES ACT
THRASH, J.

*1 On May 28, 2004, Plaintiff/Petitioner Isaac Robles Antonio ("Petitioner") filed a "Verified Complaint/Petition under the Hague Convention for Return of Child to Plaintiff/Petitioner in Mexico, Including Provisional Orders, an Ex Parte Temporary Restraining Order, Application for Warrant Seeking Physical Custody and an Expedited Hearing" ("Complaint"), seeking the return of his seven-year-old daughter, Itzel Ameyalli Robles Barrios ("Itzel"), who Petitioner asserts was wrongfully removed from their familial home in Mexico by his wife, Defendant/Respondent Josefina Barrios Bello ("Respondent"). On June 4, 2004, a preliminary injunction hearing was held before the Court which was, pursuant to [Federal Rule of Civil Procedure 65\(a\)\(2\)](#), consolidated with a trial on the merits. After considering the evidence submitted at the hearing, the arguments of counsel, and the entire record, the Court hereby ORDERS as follows:

FINDINGS OF FACT

1. Itzel is the natural child of Petitioner and Respondent. Respondent is Petitioner's wife. From the time of Itzel's birth until November 29, 2003, she lived with Petitioner and Respondent at their home in Mexico.
2. On November 29, 2003, Respondent wrongfully removed Itzel from her home and habitual residence in Mexico and brought her to the United States.
3. Up until the time Respondent wrongfully removed the child from Mexico, Petitioner and Respondent had joint legal and physical custody of the child under Mexican law. This removal breached Petitioner's custody rights under Mexican law, which rights the Petitioner exercised at the time of the child's removal.
4. Respondent brought both herself and Itzel to this country illegally.
5. Petitioner has filed for divorce in Mexico, seeking custody of Itzel. The Court finds that the court in Mexico should determine whether Petitioner or Respondent should have custody of Itzel and does not by this order make a custody determination.
6. The Court appointed a guardian ad litem for Itzel, Vionnette Reyes, who made a report and recommendation to the Court at the hearing. The guardian ad litem interviewed the child, Petitioner and Respondent. According to the guardian ad litem, there is no evidence that the Petitioner ever abused Itzel. The guardian ad litem further recommended that the child should be returned to Mexico for an appropriate custody determination by the Mexican court, especially given that the child is in this country illegally. The guardian ad litem further stated that, in her opinion and based on her investigation, Itzel was in no physical or psychological danger while in the custody of her father (Petitioner).

7. While Respondent testified at the hearing that Petitioner had physically abused her during the marriage, she made no claim and submitted no evidence that Petitioner had ever harmed Itzel.
8. Respondent did not prove that any of the exceptions provided in the Hague Convention applies in this case.

CONCLUSIONS OF LAW

*2 1. “A petitioner establishes a prima facie case of wrongful removal by demonstrating by a preponderance of the evidence that: 1) the habitual residence of the child immediately before the date of the alleged wrongful removal was in the foreign country; 2) the removal breached the petitioner’s custody rights under the foreign country’s law; and 3) the petitioner exercised custody of the child at the time of her alleged removal.” [Gil v. Rodriguez, 184 F.Supp.2d 1221, 1224 \(M.D.Fla.2002\)](#) (citations omitted).

2. “A respondent may avoid returning the child to petitioner if respondent can demonstrate by clear and convincing evidence that: 1) return would ‘expose the child to physical or psychological harm or otherwise place the child in an intolerable situation’ or; 2) if the child objects to return and is of sufficient age and maturity to do so; or 3) if return would not be permitted by fundamental American principles concerning the protection of human rights and freedoms. Furthermore, to avoid return, a respondent may demonstrate by a preponderance of the evidence that: 1) more than one year has elapsed since the child’s removal and the child is settled in her new environment or; 2) the petitioner does not really have custody rights; or 3) petitioner has consented or acquiesced to the removal.” *Id.* (citations omitted).

3. Petitioner has met his burden by establishing that: 1) Itzel habitually resided in Mexico prior to her removal on November 29, 2003; 2) by removing Itzel, Respondent breached Petitioner’s custodial rights under Mexican law; and 3) Petitioner possessed custodial rights at the time of Itzel’s removal.

4. Respondent has not proved that any of the exceptions to the Hague Convention apply.

5. Accordingly, the Court hereby orders that Itzel must be returned to Mexico by her father pending a custody determination by the courts of Mexico.

This Order and the Court’s verbal order of June 4, 2004, are stayed pursuant to the order of the United States Court of Appeals for the Eleventh Circuit until further order of that Court.

SO ORDERED.

Not Reported in F.Supp.2d, 2004 WL 1895126 (N.D.Ga.)

END OF DOCUMENT

H
2004 WL 1895127 (N.D.Ga.)

United States District Court,
N.D. Georgia, Atlanta Division.
Isaac ROBLES ANTONIO, Plaintiff,
v.
Josefina BARRIOS BELLO, Defendant.
No. Civ.A.1:04-CV-1555-T.

June 7, 2004.

James Francis Bogan, III, Kilpatrick Stockton, Richard Allen Horder, Kilpatrick Stockton, Atlanta, GA, for Plaintiff.

Thomas Edward Vanderbloemen, King & Spalding, Atlanta, GA, for Defendant.

ORDER

THRASH, J.

***1** This is an action under the Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act, [42 U.S.C. §§ 11601-11610](#). The Petitioner seeks to have his seven-year-old daughter returned to Mexico. It is before the Court on the Respondent's Motion to Stay the Order granting the relief requested in the Petition.

The Petitioner and the Respondent are the natural parents of Itzel Ameyalli Robles Barrios. Until November 29, 2003, the child lived with her parents in their home in Mexico. On that date, while Petitioner was at work, the Respondent fled with the child. She left a note telling Petitioner not to look for them. Through relatives and others, the Petitioner learned that the Respondent had smuggled herself and the child into the United States and was living at an address on Buford Highway in Atlanta, Georgia. The Petitioner filed an action for divorce in Mexico.

This action was filed on May 28, 2004. On June 1, 2004, I held an ex parte hearing and entered an order directing the United States Marshals to take custody of the child and bring her before a Magistrate Judge. The Order also directed the United States Marshals to serve the Respondent with the Petition and notify her of a hearing on the Petition to be held on June 4, 2004, at 9:00 a.m. The Respondent was served on June 2, 2004. The child was brought before Magistrate Judge Scofield who appointed Vionnette Reyes, a Spanish-speaking attorney, as her guardian ad litem. The Magistrate Judge released the child into the custody of the Petitioner with conditions to assure their appearance at the hearing on June 4, 2004.

On June 2, 2004, I started the jury trial of *United States v. Joseph Ryan*. On the second day of trial, at 4:30 p.m., I interrupted the trial to have a conference call in this case. During the conference call, an attorney for the Respondent requested postponement of the June 4 hearing because he said he needed more time to prepare. I stated that because of my trial schedule, it would probably be a month before I could reschedule the hearing. Counsel for the Petitioner objected to postponement of the hearing under these circumstances. I then told counsel for the Respondent that the hearing would have to proceed as scheduled.

On June 4, 2004, at 9:00 a.m., I held a hearing on the merits of the Petition. The Petitioner was represented by lawyers from the law firm of Kilpatrick Stockton. The Respondent was present and represented by lawyers from the law firm of King & Spalding. The Petitioner and the Respondent testified at the hearing. She testified that he had hit her, locked her in a room and raped her. He denied that. There was no testimony that the Petitioner had ever abused or mistreated the child. I heard argument from counsel for both parties. The guardian ad litem recommended that the child be returned to Mexico with her father with the ultimate custody decision to be made by the courts in Mexico. I followed that recommendation and granted the relief requested in the Petition.

***2** The Respondent moved for an order staying the Order granting the Petition. I denied the Respondent's motion to stay for the following reasons. First, the likelihood of success on appeal is low. It is undisputed that the Respondent

smuggled herself and the child from Mexico into this country and that they were living here illegally. It is undisputed that she did that in violation of the Petitioner's custody rights under Mexican law. The Respondent was subject to arrest, detention and deportation at any time. There was no evidence in the hearing or in the report of the guardian ad litem that returning the child to the Petitioner and returning her to Mexico would result in any harm to the child. The testimony of spousal abuse was legally insufficient to establish an exception to the mandate of the Hague Convention. Under these circumstances, not granting the relief requested would have been an abuse of discretion. This is not a close case.

The Respondent may raise procedural issues on appeal. Certainly, under other circumstances, I would have given the Respondent more notice of the hearing and counsel more time to prepare. Unfortunately, this matter came up in the middle of a lengthy criminal jury trial of a detained defendant. Because of that trial and other matters, it may have been weeks before I could have rescheduled the hearing for a time when all of the parties and the guardian ad litem were available. If the hearing had to be delayed, I could not give the child back to the Respondent because of the substantial risk that she would again take the child and flee, or be arrested on immigration charges. If the Petitioner (a factory worker) was forced by economic necessity to return to Mexico, the child would have to be placed in the custody of the Georgia Department of Family and Children Services which I hope to avoid. Under these difficult circumstances, I think that I had the discretion to deny the request for a continuance in the best interest of the child.

I refused the request for a stay for the same reasons. If I had granted a stay, there is a high probability that the child would have ended up in the custody of the Georgia Department of Family and Children Services. In addition, denying the request for a stay only means that the Respondent has to go back to Mexico to adjudicate her custody rights to the child in the courts of that country. Balancing the hardships to the parties and considering the best interest of the child, it seemed to me that the request for a stay should be denied.

SO ORDERED.

Not Reported in F.Supp.2d, 2004 WL 1895127 (N.D.Ga.)

END OF DOCUMENT

H
2004 WL 1895123 (11th Cir.(Ga.))

United States Court of Appeals, Eleventh Circuit.
Isaac ROBLES ANTONIO, Plaintiff-Appellee,
v.
Josefina BARRIOS BELLO, Defendant-Appellant.
No. 04-12794-GG.

June 10, 2004.

On Appeal from the United States District Court for the Northern District of Georgia.

[William A. Clineburg, Jr.](#), [Thomas Edward Vanderbloemen](#), King & Spalding, Atlanta, GA, for Appellant.

[James F. Bogan, III](#), Kilpatrick Stockton, Atlanta, GA, for Appellee.

Before [HULL](#), [MARCUS](#) and [PRYOR](#), Circuit Judges.

BY THE COURT:

PER CURIAM.

*1 The Appellant, Josefina Barrios Bello, has filed with this Court an Emergency Motion for Stay Pending Appeal from a Judgment of the United States District Court for the Northern District of Georgia--entered on June 4, 2004 after an evidentiary hearing on that same day--granting the Verified Complaint/Petition Under the Hague Convention for Return of a Child (Itzel Ameyalli Robles Barrios) to Mexico, filed by Appellee, Isaac Robles Antonio. Also in her Emergency Motion, Appellant states that on June 4, 2004, the district court denied her Motion to Stay the Order granting the relief requested in the Verified Complaint/Petition. Appellant has also filed a Consolidated Motion for leave to file a supplemental brief to her Emergency Motion for Stay and leave to file a reply brief to Appellee's Response to the Emergency Motion for Stay.

On June 4, 2004, this Court entered an Order that temporarily granted Appellant's Motion for Stay and temporarily enjoined the removal of the child from the jurisdiction of the United States District Court of the Northern District of Georgia. Also in that Order, we directed the Court Reporter to transcribe, and Appellant's counsel to furnish this Court with a transcript of the June 4, 2004 hearing in the district court. We further ordered Appellant's counsel to furnish copies of any exhibits which were filed and received in evidence by the District Court at the aforementioned hearing and the Clerk of the United States District Court to file with this Court any materials filed under seal or received *in camera* by the District Court.

After thorough review of the foregoing materials, as well as careful consideration of the parties' written submissions, we now VACATE our June 4, 2004 Order and DENY Appellant's Motion for Stay Pending Appeal. We GRANT IN PART Appellant's Consolidated Motion. We grant Appellant leave to file the supplemental brief she filed with the Consolidated Motion and deny Appellant leave to file a reply to Appellee's Response.

The grant of an emergency motion to stay a district court's order is an exceptional remedy, which will be granted only upon a showing that: (1) the movant is likely to prevail on the merits on appeal; (2) absent a stay, the movant will suffer irreparable damage; (3) the non-movant will suffer no substantial harm from the issuance of the stay; and (4) the public interest will be served by issuing the stay. [Garcia-Mir v. Meese, 781 F.2d 1450, 1453 \(11th Cir.1986\)](#). Ordinarily, the first factor is the most important and, in order to find a likelihood of success on the merits, we must find that the district court's decision was clearly erroneous. See *id.* Absent being able to establish the first factor, a movant for emergency stay relief must establish that the three remaining factors for stay relief, the "equities," tend strongly in her favor. See *id.* at 1454; see also [Gonzalez v. Reno, 2000 WL 381901, *1 \(11th Cir. Apr.19, 2000\)](#).

*2 In his petition brought under the International Child Abduction Remedies Act (“ICARA”), [42 U.S.C. § 11601 et seq.](#), [\[FN1\]](#) Appellee, a citizen of Mexico, alleged that Appellant, also a citizen of Mexico, had wrongfully removed their seven-year-old daughter, without his acquiescence or consent, from their family home in Mexico. Pursuant to ICARA, Appellee requested that the child be returned to Mexico for a determination of her custody there, where the parties are currently undergoing divorce proceedings.

[FN1.](#) In 1980, Congress enacted ICARA to implement the Hague Convention on the Civil Aspects of [International Child Abduction, 19 I.L.M. 1501 \(1980\)](#), a treaty to which the United States and Mexico are signatories. See [42 U.S.C. § 11601\(b\)\(1\)](#).

The district court conducted an evidentiary hearing on the petition at which both parties testified. The court also appointed a *guardian ad litem* who interviewed the child, Appellant, and Appellee, and made a report and recommendation to the court. Based on the parties’ testimony, the recommendation of the *guardian ad litem*, [\[FN2\]](#) and documentary evidence, the district court found the following: (1) since her birth, the child, Itzel, has lived with both parents at their familial home in Mexico; (2) on November 29, 2003, Appellant wrongfully removed Itzel from her home and habitual residence in Mexico and brought both the child and herself to the United States illegally; (3) prior to Itzel’s removal, Appellant and Appellee had joint legal and physical custody of Itzel under Mexican law; and (4) Itzel’s removal breached Appellee’s custody rights under Mexican law, which rights Appellee had exercised at the time of the child’s removal.

[FN2.](#) The *guardian ad litem* specifically recommended that the child be returned to Mexico for the determination of custody, especially since the child is in this country illegally. In the *guardian ad litem*’s opinion, based on her interviews with both parties and Itzel, there was no physical or psychological danger to Itzel if she was returned to Mexico in the custody of her father.

Based on these factual findings, the district court concluded a court in Mexico was the appropriate venue to determine whether Appellant or Appellee should have custody of Itzel. [\[FN3\]](#) Thus, the district court granted Appellee’s Petition and ordered that Itzel be returned to Mexico by her father pending a custody determination by the courts of Mexico.

[FN3.](#) The court noted that Appellant had testified at the hearing that she had been physically abused by Appellee during their marriage, but had made no claim and presented no evidence that Appellee had ever harmed Itzel. From our *de novo* review of the record, we also have found no such evidence or claim.

In reviewing a district court’s order on an ICARA petition, we review a district court’s findings of fact for clear error and its conclusions of law *de novo*. See [Lops v. Lops, 362 F.3d 702, 710 \(11th Cir.2004\)](#).⁵³⁴

The district court also denied Appellant’s motion for a stay of the Order granting ICARA relief. In its order denying a stay, the court observed that “[t]here was no testimony that the Petitioner had ever abused or mistreated the child.... It is undisputed that the respondent smuggled herself and the child from Mexico into this country and they are living here illegally. It is undisputed that she did that in violation of petitioner’s custody rights under Mexican law.” The district court further explained that it had denied Appellant’s prior request to continue the hearing and her motion for stay of the Order granting Appellee’s ICARA petition based on the following considerations, *inter alia*: (1) if the hearing was postponed and Appellant given temporary custody, the court was concerned that Appellant might again flee with Itzel and leave the court’s jurisdiction; (2) if Appellee had to return to Mexico prior to the re-scheduled hearing, since Appellant was subject to deportation based on her illegal status, there was the real prospect that Itzel would have to be placed in the care of Georgia Department of Family and Children Services; and (3) denial of the stay meant only that Appellant must return to Mexico to adjudicate her parental rights there. We can find no abuse of discretion in the district court’s denial of a continuance based on the reasons enumerated by the district court in its Order denying appellant’s Motion for a Stay. See [United States v. Bowe, 221 F.3d 1183, 1189 \(11th Cir.2000\)](#) (reviewing district court’s decision on motion to continue trial for abuse of discretion; observing that district court enjoys “broad discretion” in deciding such motions).

⁵³⁴Note that the Court’s reference to *Lops v. Lops* was apparently incorrect and should have been to *Furnes v. Reeves*, which appears at 362 F.3d 702.

*3 In denying Appellant’s motion for a stay pending appeal, the district court concluded that Appellant’s “likelihood of success on appeal was low.” We agree. As we recently outlined in [Furnes v. Reeves, 362 F.3d 702, 712 \(11th Cir.2004\)](#), to state an ICARA violation based on the wrongful removal or retention of a child, a petitioner must show by a preponderance of the evidence that: (1) the child has been removed or retained in violation of the petitioner’s rights of custody, and (2) “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.” [Id.](#) (citation omitted). In the district court, it was undisputed that these two factors were met. Moreover, Appellant could not show that one of the recognized affirmative defenses to an ICARA violation applied. This conclusion was also based, in large part, on undisputed facts. See [id.](#) (outlining these defenses). On this record, we can find no error in the district court’s conclusion that Appellant’s likelihood of success on the merits of her appeal from the grant of Appellee’s ICARA petition is “low.”

Moreover, the Appellant has also failed to establish that the other three factors for stay relief (the “equities”) tend strongly in her favor. See [Garcia-Mir, 781 F.2d at 1454](#). Again, these factors consider whether denial of the stay will result in irreparable damage to the movant, whether grant of the stay will cause substantial harm to the non-movant, and whether the public interest will be served by issuing the stay. See [id. at 1453](#). As for irreparable harm to the Appellant, the district court found that denial of the stay meant only that the Appellant, who is here illegally and is subject to deportation in any event, has to go back to Mexico to adjudicate her custody rights to the child in the courts of that country. [\[FN4\]](#) Moreover, on the harm to Appellee, the district court found that if a stay was entered, Appellee (a factory worker in Mexico) may be forced by economic necessity to return to work and Itzel could then be placed in state protective custody. Finally, the district court noted the public interest would not be served by placing Itzel in state protective custody. The return order also furthers the public interest in complying with this country’s treaty obligations, as implemented by ICARA, and in doing so expeditiously. [\[FN5\]](#)

[FN4.](#) The irreparable harm from not granting a stay is *not*, as Appellant suggests, that she will lose her child. The return order does not effect any change in custody since Appellant is free to accompany Itzel back to Mexico and assert her custody rights there. See [Furnes, 362 F.3d at 717](#).

[FN5.](#) One of the stated purposes of the Hague Convention is “ ‘to establish procedures to ensure [that children wrongfully removed are] prompt[ly] return[ed] to the State of their habitual residence.’ ” [Furnes, 362 F.3d at 716](#) (citation omitted).

We cannot say that the district court clearly erred in its factual findings. Moreover, based on our *de novo* review of the entire record, we also conclude that Appellant is not entitled to the exceptional remedy of an emergency stay.

Should the child be removed from the jurisdiction of this Court while the appeal is pending, Appellee’s counsel shall advise this Court and file any appropriate motions. See [Bekier v. Bekier, 248 F.3d 1051 \(11th Cir.2001\)](#).

Not Reported in F.3d, 2004 WL 1895123 (11th Cir.(Ga.))

END OF DOCUMENT

Exhibit H: Samples of Common Hague Case Pleadings and Filings*

* The sample pleadings and filings are offered as samples only. Please verify the current status of any cases cited, as there may have been changes in the law since they were filed.

Verified Petition

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta

JUL 29 2011

JAMES M. HATTEN, Clerk
U.S. District Court
Southern District

IN RE THE APPLICATION OF)
)
)
Plaintiff/Petitioner,)
)
v.)
)
)
Defendant/Respondent.)
_____)

Civil Action File No. **111**

WSD

**VERIFIED COMPLAINT AND PETITION
FOR RETURN OF THE CHILDREN**

Plaintiff and Petitioner [REDACTED] respectfully shows this Court as follows:

I. INTRODUCTION

1. This action is brought by [REDACTED] ("Mr. J" or "Petitioner"), a citizen of Spain, to secure the return of his six-year-old daughter, A [REDACTED] J [REDACTED] H [REDACTED], and his five-year-old son, F [REDACTED] J [REDACTED] H [REDACTED] (together, "Children"; individually, "Child"), who were, without Petitioner's consent or acquiescence, wrongfully removed from Spain and brought to the Northern District of Georgia by

the Children's mother, Defendant/Respondent [REDACTED] ("Ms. H[REDACTED]" or "Respondent").

2. This Petition is filed pursuant to the Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention")¹ and the International Child Abduction Remedies Act ("ICARA").² A copy of the Hague Convention is attached hereto as Exhibit A. The Hague Convention came into effect in the United States of America on July 1, 1988, and has been ratified between, among other Contracting States, the United States of America and Spain.

3. The objects of the Hague Convention are:

Article 1(a): To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

Article 1(b): To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

(Id.)

4. The Hague Convention authorizes a federal district court to determine the merits of a claim for the wrongful removal or retention of a child; it does not,

¹ Oct. 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986).

² 42 U.S.C. §§ 11601-11610 (2011).

however, permit the district court to consider the merits of any underlying custody dispute.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over this case pursuant to 42 U.S.C. § 11603(a) (jurisdiction under the Hague Convention) and 28 U.S.C. § 1331 (federal question jurisdiction). Venue is proper pursuant to 42 U.S.C. § 11603 and 28 U.S.C. § 1391(b) because, upon information and belief, the Children and Respondent are residing at the home of the Respondent's boyfriend, [REDACTED] Perez also known as [REDACTED], in the Atlanta Division of the Northern District of Georgia at [REDACTED], Roswell, Georgia 30076. A copy of a letter from the United States Postal Service concerning the residence at [REDACTED], Roswell, Georgia is attached hereto as Exhibit B.

III. STATEMENT OF FACTS

6. As noted above, Petitioner and Respondent are the parents of the Children. Petitioner and Respondent have never been married but lived together in Benacazon, Seville, Spain prior to Respondent's wrongful removal of the Children on November 30, 2010. A certified copy of the census of residents of the town council of Benacazon and translation thereof are attached hereto as Exhibit C.

7. On [REDACTED] 2004, Ms. H [REDACTED] gave birth to A [REDACTED] J [REDACTED] H [REDACTED] in Seville, Spain. A copy of A [REDACTED] J [REDACTED] H [REDACTED]'s birth certificate and a translation thereof are attached hereto as Exhibit D.

8. On [REDACTED] 2006, Ms. H [REDACTED] gave birth to F [REDACTED] J [REDACTED] H [REDACTED] in Seville, Spain. A copy of F [REDACTED] J [REDACTED] H [REDACTED]'s birth certificate and a translation thereof are attached hereto as Exhibit E.

9. Until the date of the separation between Mr. J [REDACTED] and Ms. H [REDACTED], as detailed below, Mr. J [REDACTED], Ms. H [REDACTED] and the Children lived together at their familial residence at Rio Guadamar Street, No. 9, Benacazon, Seville, Spain. See Exhibit C. In total, Mr. J [REDACTED] and Ms. H [REDACTED] lived together in Spain for seven years.

10. The Children attended school at C.E.I.P. Talhara School of Benacazon (Seville) in Spain until their wrongful removal. A copy of a certified letter from the school and a translation thereof are attached hereto as Exhibit F.

11. In April 2010, Mr. J [REDACTED] and Ms. H [REDACTED] separated. After the separation, Mr. J [REDACTED] continued to exercise his parental rights and maintained his relationship with the Children.

12. On September 15, 2010, Mr. J■■■ sought provisional measures from a Spanish court in San Lucar La Mayor due to the separation. A copy of an affidavit from Luis Zarraluqui Navarro and translation thereof are attached hereto as Exhibit G.

13. The Court of First Instance No. 4 of San Lucar La Mayor issued an opinion on November 24, 2010 that provides that Mr. J■■■'s request for a "provisional measures" is "admissible." A copy of the November 24, 2010 opinion and a translation thereof are attached hereto as Exhibit H.

14. The opinion further demands that both Mr. J■■■ and Ms. H■■■■■■ appear before the court on December 15, 2010. See Exhibit H, p. 2.

15. On December 3, 2010, twelve days before the date of the hearing ordered by the Spanish court, Ms. H■■■■■■ called Mr. J■■■ on his mobile phone and informed him that she moved to the United States with the Children.

16. That same day, Mr. J■■■ received a fax from Ms. H■■■■■■ informing him that she and the Children were in the United States. In the fax, Ms. H■■■■■■ acknowledges the parental relationship between Mr. J■■■ and the Children. A copy of the fax from Respondent to Mr. J■■■ and a translation thereof are attached hereto as Exhibit I.

17. Ms. H■■■■■■ abducted A■■■■■■ J■■■ H■■■■■■ and F■■■■■■ J■■■ H■■■■■■ from Spain without Mr. J■■■'s permission.

18. On December 9, 2010, the Court of the First Instance and Preliminary Investigation No. 4 of San Lucar La Mayor issued an opinion prohibiting the Children from leaving Spain. A copy of the December 9, 2010 opinion of the court and its translation thereof is attached hereto as Exhibit J.

19. On the same day, an Indictment against Ms. H [REDACTED] was filed before the Court of the First Instance and Preliminary Investigation No. 4 of San Lucar La Mayor. The Indictment and translation thereof are attached hereto as Exhibit K.

20. On December 28, 2010, the Spanish Court issued an opinion which provides how there is the "possible existence of a penal infringement" and that Mr. J [REDACTED] should attend a hearing on February 4, 2011 to declare his damages. The December 28, 2010 opinion and translation thereof are attached hereto as Exhibit L.

21. Upon information and belief, the Children are currently being kept in the company of Respondent, their mother and her boyfriend, at [REDACTED], Roswell, Georgia 30076. See Exhibit B.

22. In February of 2011, Mr. J [REDACTED] received from the Fulton County Probate Court for the State of Georgia a notice of a petition for the appointment of a temporary guardian, the mother's boyfriend, [REDACTED] Perez, for the Children. A copy of the notice is attached hereto as Exhibit M.

23. Mr. J■■ submitted a sworn statement objecting to the appointment of Mr. Perez as the Children's guardian. A copy of the sworn statement and a translation thereof is attached hereto as Exhibit N.

24. On March 3, 2011, the Probate Court for Fulton County, based on Mr. J■■'s objection, dismissed the Petition for Appointment of a Temporary Guardian for the Children. A copy of the Orders are attached hereto as Exhibit O.

25. On May 12, 2011, Petitioner's Request for Return for the Children was submitted to the United States Department of State through the Spanish Central Authority. A copy of the Petitioner's Request for Return and a translation thereof are attached hereto as Exhibit P.

**IV. WRONGFUL REMOVAL AND RETENTION OF CHILDREN BY
RESPONDENT: CLAIM FOR RELIEF UNDER
THE HAGUE CONVENTION**

26. As set forth above, on or about November 30, 2010, Respondent wrongfully removed the Children within the meaning of Article 3 of the Convention and continues to wrongfully retain the Children in the state of Georgia, United States, in violation of Article 3 and despite Petitioner's efforts to have the Children returned to Spain.

27. Petitioner has never acquiesced or consented to the removal of the Children from Spain to the United States or to their living outside of Spain.

28. Respondent's removal and retention of the Children is wrongful within the meaning of Article 3 of the Convention because:

- (a) It is in violation of Petitioner's rights of custody as established by the Spanish law. A copy of Articles 108, 154, 156, 158, 159 and 160 of the Spanish Civil Code and Article 225 of the Spanish Penal Code are attached hereto respectfully as Exhibits Q & R. Specifically, Respondent's removal and retention of the Children is in violation of Petitioner's right as a physical custodian to determine the Children's place of residence. See Hague Convention, Art. 5(a) (defining "rights of custody" under Article 3 to include "in particular, the right to determine the child's place of residence");
- (b) At the time of the Children's removal from Spain, Petitioner was actually exercising his rights of custody within the meaning of Articles 3 and 5 of the Convention and, but for Respondent's removal and retention of the Children, Petitioner would have continued to exercise those rights; and

- (c) The Children were habitually resident with Petitioner in Spain within the meaning of Article 3 of the Convention immediately before their removal and retention by Respondent.

29. Respondent is presently wrongfully retaining the Children in the State of Georgia, County of Fulton.

30. Upon information and belief, Respondent is keeping the Children at Respondent's boyfriend's residence, [REDACTED], Roswell, Georgia 30076.

31. The Children are now six and five years old. The Hague Convention applies to children under sixteen (16) years of age and thus applies to both Children.

32. This Petition is filed less than one year from Respondent's wrongful removal of the Children. Petitioner has never consented or acquiesced to Respondent's wrongful removal or retention of the Children.

V. PROVISIONAL REMEDIES
(42 U.S.C. § 11604 & HAGUE CONVENTION, ARTICLE 16)

33. Petitioner requests that this Court issue an immediate order restraining Respondent from removing the Children from the jurisdiction of this Court, and a warrant seeking immediate physical custody of the Children, directing any United States Marshal or other law enforcement officer to bring the Children before this Court. Petitioner also asks that this Court schedule an expedited hearing on the merits of this Petition.

VI. ATTORNEY FEES AND COSTS
(42 U.S.C. § 11607)

34. To date, Petitioner has incurred attorneys' fees and costs as a result of the wrongful retention of the Children by Respondent.

35. Petitioner respectfully requests that this Court award him all costs and fees, including transportation costs, incurred to date as required by 42 U.S.C. § 11607.

VII. NOTICE OF HEARING
(42 U.S.C. § 11603(c))

36. Pursuant to 42 U.S.C. § 11603(c), Respondent shall be given notice of these proceedings in accordance with the laws governing notice in interstate child custody proceedings.

VIII. RELIEF REQUESTED

WHEREFORE, Petitioner [REDACTED] prays for the following relief:

(a) An immediate temporary restraining order prohibiting the removal of the Children from the jurisdiction of this Court pending a hearing on the merits of this Verified Complaint, and further providing that no person acting in concert or participating with Respondent shall take any action to remove the Children from the jurisdiction of this Court pending a determination on the merits of the Verified Complaint;

(b) The scheduling of an expedited preliminary injunction hearing on the merits of the Verified Complaint; an order that Respondent show cause at this hearing why the Children should not be returned to Spain, and why such other relief requested in the Verified Complaint should not be granted; and, pursuant to Federal Rule of Civil Procedure 65, an order that the trial of the action on the merits be advanced and consolidated with the hearing on the Verified Complaint;

(c) A final judgment in Petitioner's favor establishing that the Children shall be returned to Spain, where an appropriate custody determination can be made by a Spanish court under Spanish law;

(d) An Order requiring that Respondent pay Petitioner's expenses and costs, including transportation costs, under 42 U.S.C. § 11607, such expenses and costs to be resolved via post-judgment motion, consistent with the procedure outlined under Local Rule 54.2(A) of this Court; and

(e) For any such further relief as may be just and appropriate under the circumstances of this case.

Respectfully submitted, this 29th day of July, 2011.

KILPATRICK TOWNSEND &
STOCKTON LLP
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
Telephone (404) 815-6500
Facsimile (404) 815-6555
[@ktslaw.com](mailto: @ktslaw.com)
[@ktslaw.com](mailto: @ktslaw.com)
[@ktslaw.com](mailto: @ktslaw.com)

[Redacted]
[Redacted]
Georgia Bar No. 098775
[Redacted]
Georgia Bar No. 141306
[Redacted]
Georgia Bar No. 143128

Attorneys for Plaintiff/Petitioner

VERIFICATION

I am one of the attorneys for Plaintiff/Petitioner, [REDACTED]. I make this verification on behalf of Petitioner because Petitioner is absent from this country. The above document is true based on the above-identified attorneys' investigation to date and communications between Kilpatrick Townsend & Stockton LLP and Mr. J [REDACTED], except as to the matters that are stated in it on information and belief and as to those matters I believe it to be true. I declare under penalty of perjury under the laws of the State of Georgia that the foregoing is true and correct.

This 29th day of July, 2011.

[REDACTED]
[REDACTED] _____

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Times New Roman font in 14 point type in compliance with Local Rule 5.1(B).

[REDACTED]

TRO Motion and Brief in Support

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta

JUL 29 2011

JAMES M. BATTEN, Clerk
By *[Signature]*
Deputy Clerk

IN RE THE APPLICATION OF)
F [REDACTED])
)
Plaintiff/Petitioner,)
)
v.)
)
Y [REDACTED],)
)
Defendant/Respondent.)
_____)

Civil Action File No. 11-11-CV-2489

WSD

**PLAINTIFF'S MOTION UNDER THE HAGUE
CONVENTION FOR ENTRY OF A TEMPORARY RESTRAINING
ORDER AND SCHEDULING OF AN EXPEDITED HEARING**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Petitioner, F [REDACTED] ("Mr. J [REDACTED]" or "Petitioner"), hereby moves the Court for an order temporarily restraining and prohibiting Respondent, Y [REDACTED] [REDACTED] ("Ms. H [REDACTED]" or "Respondent") from removing their minor children, A [REDACTED] J [REDACTED] H [REDACTED] and F [REDACTED] J [REDACTED] H [REDACTED] (the "Children") from the jurisdiction of this Court, and also moves for other relief to protect Petitioner's rights under the Convention on Civil Aspects of International Child Abduction (the "Hague Convention") and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610. Injunctive relief on a basis is necessary to prevent irreparable harm to Petitioner and to preserve the status quo. Under 42

Case 1:11-cv-02489-WSD Document 2 Filed 07/29/11 Page 2 of 4

U.S.C. §11604(a), a district court is empowered to take appropriate measures “to protect the well-being of the child involved or to prevent the child’s further removal or concealment before the final disposition of the petition.” For the reasons set forth in Plaintiff’s Brief in Support of this Motion, such relief is needed in this case.

Petitioner respectfully requests that the Court shorten or otherwise waive the time requirements that apply to motions, grant an immediate hearing on this motion, enter a temporary injunction, and further grant another hearing requiring Respondent to show cause why the relief set forth in the Verified Complaint should not be granted by this Court. Specifically, Petitioner seeks the following relief:

(a) An immediate temporary restraining order prohibiting the removal of the Children from the jurisdiction of this Court pending a hearing on the merits of this Verified Complaint, and further providing that no person acting in concert or participating with Respondent shall take any action to remove the Children from the jurisdiction of this Court pending a determination on the merits of the Verified Complaint;

(b) The scheduling of an expedited preliminary injunction hearing on the merits of the Verified Complaint; an order that Respondent show cause at this hearing why the Children should not be returned to Spain by Petitioner, and why such other relief requested in the Verified Complaint should not be granted; and,

pursuant to Federal Rule of Civil Procedure 65, an order that the trial of the action on the merits be advanced and consolidated with the hearing on the Verified Complaint; and

(c) Any such further relief as may be just and appropriate under the circumstances of this case.

Respectfully submitted, this 29th day of July, 2011.

KILPATRICK TOWNSEND &
STOCKTON LLP
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
Telephone (404) 815-6500
Facsimile (404) 815-6555
[REDACTED]@ktslaw.com
[REDACTED]@ktslaw.com
[REDACTED]@ktslaw.com

[REDACTED]
[REDACTED]
Georgia Bar No. 098775
[REDACTED]
Georgia Bar No. 141306
[REDACTED]
Georgia Bar No. 143128

Attorneys for Plaintiff/Petitioner
[REDACTED]

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Times New Roman font in 14 point type in compliance with Local Rule 5.1(B).



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta

JUL 29 2011

JAMES N. HARTEN, Clerk
Deputy Clerk

IN RE THE APPLICATION OF)
F [REDACTED])
)
Plaintiff/Petitioner,)
)
v.)
Y [REDACTED])
)
Defendant/Respondent.)
_____)

Civil Action File No. **CV-2489**

WSD

**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION
UNDER THE HAGUE CONVENTION FOR A TEMPORARY
RESTRAINING ORDER AND SCHEDULING AN EXPEDITED HEARING**

Plaintiff/Petitioner F [REDACTED] ("Mr. J [REDACTED]" or "Petitioner") urgently needs emergency equitable relief to prevent Defendant/Respondent Y [REDACTED] [REDACTED] ("Ms. H [REDACTED]" or "Respondent") from further interference with Petitioner's rights of custody over their minor children, A [REDACTED] J [REDACTED] H [REDACTED] and F [REDACTED] J [REDACTED] H [REDACTED] (the "Children"), who were, without Petitioner's acquiescence or consent, wrongfully removed from Spain by Respondent. As set forth in Petitioner's Verified Complaint and Petition for Return of Children (the "Verified Complaint"), Respondent has wrongfully removed the Children from their place of habitual residence in Seville, Spain, in violation of the Convention on the Civil Aspects of International Child Abduction

Case 1:11-cv-02489-WSD Document 2-1 Filed 07/29/11 Page 2 of 13

(the “Hague Convention”). Oct. 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98 (a copy of the Hague Convention is attached as Exhibit A to the Verified Complaint). Petitioner is entitled to relief in the form of an order for the Children’s return to Spain under Articles 8 (providing a right of action to a person exercising rights of custody) and 12 (providing for the return of the child as a remedy) of the Hague Convention, as well as under the International Child Abduction Remedies Act (“ICARA”), 42 U.S.C. §§11601-11610. Emergency relief is authorized under 42 U.S.C. §11604(a), which provides that a court may take appropriate measures “to protect the well-being of the child involved *or to prevent the child’s further removal or concealment before the final disposition of the petition.*” (Emphasis added.) As discussed below, emergency relief is appropriate here.

I. FACTUAL BACKGROUND

Petitioner and Respondent are the parents of the Children. Petitioner and Respondent have never been married but lived together for seven years until they separated in 2010. Verified Complaint, ¶¶ 6, 9 & 11. After the separation, Petitioner continued to exercise his parental rights of custody. *Id.* at ¶ 11.

On [REDACTED] 2004, Ms. H [REDACTED] gave birth to A [REDACTED] J [REDACTED] H [REDACTED] in Seville, Spain. *Id.* at ¶ 7. A [REDACTED] J [REDACTED] H [REDACTED] is currently six years old. On [REDACTED] 2006, Ms. H [REDACTED] gave birth to F [REDACTED] J [REDACTED] H [REDACTED]

Case 1:11-cv-02489-WSD Document 2-1 Filed 07/29/11 Page 3 of 13

in Seville, Spain. Id. at ¶ 8. F [REDACTED] J [REDACTED] H [REDACTED] is currently five years old. The Hague Convention applies to children under sixteen years of age, and thus, applies to the Children.

On December 3, 2010, twelve days before the date of a hearing ordered by the Spanish court, Ms. H [REDACTED] called Mr. J [REDACTED] on his mobile phone and informed him that she moved to the United States with the Children. Id. at ¶¶ 14 & 15. That same day, Mr. J [REDACTED] received a fax from Ms. H [REDACTED] informing him that she and the Children were in the United States. Id. at ¶ 16. Ms. H [REDACTED] abducted A [REDACTED] J [REDACTED] H [REDACTED] and F [REDACTED] J [REDACTED] H [REDACTED] from Spain without Mr. J [REDACTED]'s permission. Id. at ¶ 17.

Upon information and belief, the Children are currently being kept in the company of Respondent and her boyfriend at [REDACTED] Georgia. Id. at ¶ 5.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Petitioner is Entitled to Emergency Relief.

Federal courts are empowered to grant temporary restraining orders and preliminary injunctions. See FED. R. CIV. P. 65. Like Federal Rule 65, the Local Rules of this Court authorize the grant of emergency relief. See L.R. 7.2B, NDGA (“Upon written motion and for good cause shown, the court may waive the time

Case 1:11-cv-02489-WSD Document 2-1 Filed 07/29/11 Page 4 of 13

requirements of this rule and grant an immediate hearing on any matter requiring such expedited procedure”).

Consistent with Federal Rule 65 and the exigent circumstances that typically exist in Hague Convention cases, Article 2 of the Hague Convention provides: “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.” October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98. The “objects” of the Hague Convention are expressed in Article 1: the prompt return of an abducted child and the protection of the rights of custody. Exhibit A to Verified Complaint, Article 1. Federal Rule 65 allows this Court to expeditiously promote the Hague Convention’s objectives by emergency equitable relief.

Applicable state law provisions also support Petitioner’s request for expeditious procedures for the return of his Children.¹ For instance, under O.C.G.A. § 19-9-91(b), a court may issue a warrant to take physical custody of a child if there is an imminent likelihood that a child will be removed from the jurisdiction of the court. Likewise, under the Georgia Juvenile Code, O.C.G.A. § 15-11-1, et seq., a child may be taken into immediate custody if the possibility

¹ Under 42 U.S.C. § 11604(b), “No court exercising jurisdiction . . . may . . . order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.”

exists that the child will “be removed from the jurisdiction of the court or will not be brought before the court, notwithstanding the service of the summons, ...” O.C.G.A. § 15-11-49.1.

The decision to grant or deny an injunction is “within the sound discretion of the district court.” Int’l Cosmetics Exch., Inc. v. Gapardis Health & Beauty, Inc., 303 F.3d 1242, 1246 (11th Cir. 2002). “A preliminary injunction may be issued to protect the moving party from irreparable injury and to preserve the power of the trial court to render a meaningful decision on the merits.” Compact Van Equip. Co., Inc. v. Leggett & Platt, Inc., 566 F.2d 952, 954 (5th Cir. 1978). The Court’s task on an application for a preliminary injunction is to find: “(1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if it is issued, would not be adverse to the public interest.” Id. As explained below, all of the elements for the emergency equitable relief requested herein, including injunctive relief, are satisfied in this case.

B. There is a Substantial Likelihood that Petitioner Will Ultimately Prevail on the Merits.

According to the Hague Convention, the removal or retention of a child is wrongful where the removal is in breach of established custody rights defined by

the law of the country in which the child was habitually resident immediately before the removal or retention, and where, at the time of removal, these custodial rights were exercised (either jointly or alone) or would have been so exercised but for the removal. Art. 3, October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98. By virtue of Spanish law, the country of the Children's habitual residence, Petitioner has custodial rights to the Children. Verified Petition, ¶ 28. Additionally, Petitioner exercised his custodial rights until the wrongful removal. Id. Consequently, Petitioner is likely to prevail on the merits of his petition for the return of the Children.

1. The Children were habitual residents of Seville, Spain before their abduction.

The legal definition of "habitual residence" is well-established. In Pesin v. Rodriguez, for example, the district court held: "Courts in both the United States and foreign jurisdictions have defined habitual residence as the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective." 77 F. Supp. 2d 1277, 1284 (S.D. Fla. 1999) (citing Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir.1995), and Friedrich v. Friedrich, 983 F.2d 1396, 1401-03 (6th Cir.1993)), aff'd, 244 F.3d 1250 (11th Cir. 2001). The Children were both born in Seville, Spain and, until their wrongful removal, spent the entirety of

Case 1:11-cv-02489-WSD Document 2-1 Filed 07/29/11 Page 7 of 13

their lives there with Petitioner and Respondent. Consequently, Spain is the Children's habitual residence.

2. Petitioner was exercising his rights of custody at the time of the Children's wrongful removal.

By virtue of Spanish law, the law of the Children's habitual residence, Petitioner exercised his custodial rights over the Children at the time of the wrongful removal. Verified Complaint, ¶ 9. As the Verified Complaint establishes, the Children have lived with and/or been supported by Petitioner since their births. Prior to their wrongful removal, Petitioner sought the provisional measures from a Spanish court to ensure he could continue to exercise his custodial rights. *Id.* at ¶ 12. Clearly, Petitioner was exercising his rights of custody at the time of the Children's wrongful removal.

Petitioner has not waived his rights of custody. Before and after the November 2010 abduction of the Children, Petitioner diligently sought to exercise his custodial rights as well as to locate his children. *Id.* at ¶ 25.

3. Granting Petitioner's Hague Petition Will Not Terminate Any Right of Custody of Respondent.

As shown above, Petitioner is very likely to succeed on the merits of his Hague Convention claim. It should be noted, moreover, that all Petitioner seeks is the Children's return to Spain, their habitual residence, and not any change

detrimental to Respondent's own rights of custody, should she still retain any such rights.

The Hague Convention authorizes a federal district court to determine the merits of a claim for wrongful removal or retention of a child. The Hague Convention does not, however, allow the district court to consider the merits of any underlying custody dispute. In re: Morris, 55 F. Supp. 2d 1156, 1160 (D. Colo. 1999) (recognizing that “[p]ursuant to Article 19 of the Convention, [this Court has] no power to pass on the merits of custody”). See also Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991); Loos v. Manuel, 651 A.2d 1077 (N.J. Super. Ct. Ch. Div. 1994). Stated another way, a district court only has jurisdiction to decide the merits of the wrongful removal claim, as the Hague Convention is intended to restore the pre-abduction status quo and deter parents from crossing borders in search of more sympathetic courts. Lops v. Lops, 140 F.3d 927, 936 (11th Cir. 1998) (citations omitted); Barrios Gil v. Del Valle Matheus Rodriguez, 184 F. Supp. 2d 1221, 1224 (M.D. Fla. 2002) (Emphasis added).

C. Petitioner will suffer irreparable injury unless equitable relief is granted.

Given that Respondent has already wrongfully removed the Children to the United States and impeded Petitioner's attempt to locate them, there is obviously a risk that Respondent will further hide the Children and herself when she learns that Petitioner is seeking the return of his Children to Spain through the United States

court system. If Respondent flees with Petitioner's Children again, it may be difficult, if not impossible, to locate them again. Petitioner could suffer irreparable injury if the requested relief is not granted, and, under these circumstances, emergency equitable relief is authorized under the Hague Convention.

ICARA directly speaks to such a remedy. 42 U.S.C. §11604(a) provides that a court may take appropriate measures "to protect the well-being of the child involved *or to prevent the child's further removal or concealment before the final disposition of the petition.*" (Emphasis added).

Should this Court decide to prevent the possibility of the Children's removal from its jurisdiction, Petitioner is willing to travel to Atlanta to care for the Children pending the resolution of this matter.

D. The threatened injury to Petitioner outweighs any damage an injunction may cause Respondent.

The potential of Petitioner once again losing the Children outweighs any perceived injury to Respondent. Petitioner merely seeks the restoration of the status quo: the return of the Children to their habitual residence.

In Furnes, the Eleventh Circuit emphasized the importance of re-establishing the status quo before the alleged wrongful removal: "A return order effectively maintains the status quo with regard to custody of the child. . . A return order will not effect a change in custody. . . because she [Respondent] is free to accompany her child back . . . and retain custody. . . The specific purpose of the Hague

Convention was to deter and amend the exact type of abduction in this case, not to bless it.” Furnes v. Reeves, 362 F.3d 702,717 (11th Cir. 2004) (holding the father had custody rights of the child, and therefore remanded the petition to the trial court in order for it to be granted).

Here, Petitioner is not seeking a custody order from this Court. Rather, he seeks the status quo prior to the wrongful abduction: the ability to exercise his rights of custody in Spain; the Children’s habitual residence. Any custody issues will be determined by a court in Seville, Spain.

E. An injunction, if issued, would not be adverse to the public interest.

The relief Petitioner seeks is authorized under the Hague Convention, an international treaty ratified as between Spain, the United States, and other contracting states. The relief is further consistent with federal and state law implementing the Convention. Indeed, this lawsuit was referred to Petitioner’s counsel by the United States Department of State. The Department of State facilitates the provision of legal aid and advice for Hague Convention applicants. There can be no public interest objection raised to the relief sought by Petitioner. The only relevant considerations are whether Petitioner satisfies the requirements of the Hague Convention and the requirements under the Federal Rules of Civil Procedure for the issuance of emergency equitable relief. Those requirements are satisfied here.

III. CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Petitioner asks this Court to grant the following relief:

(a) An immediate temporary restraining order prohibiting the removal of the Children from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and further providing that no person acting in concert or participating with Respondent shall take any action to remove the Children from the jurisdiction of this Court pending a determination on the merits of this Petition; and

(b) Scheduling an expedited preliminary injunction hearing on the merits of the Verified Complaint and ordering that Respondent show cause at this hearing why the child should not be returned to Spain, and why such other relief requested in the Verified Complaint should not be granted; and, pursuant to Federal Rule of Civil Procedure 65, ordering that the trial of the action on the merits be advanced and consolidated with the preliminary injunction hearing;

Respectfully submitted, this 29th day of July, 2011.

KILPATRICK TOWNSEND &
STOCKTON LLP
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
Telephone (404) 815-6500
Facsimile (404) 815-6555
[REDACTED]@ktslaw.com
[REDACTED]@ktslaw.com
[REDACTED]@ktslaw.com

[REDACTED]

Georgia Bar No. 098775

[REDACTED]

Georgia Bar No. 141306

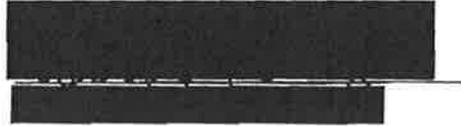
[REDACTED]

Georgia Bar No. 143128

Attorneys for Plaintiff/Petitioner
F [REDACTED]

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Times New Roman font in 14 point type in compliance with Local Rule 5.1(B).



Ex Parte TRO Motion and Brief in Support

ORIGINAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta

NOV 30 2007

JAMES N. HAITEN, CLERK
By: *J. White* Deputy Clerk

IN RE THE APPLICATION OF)
K [REDACTED])
)
Plaintiff/Petitioner)
)
v.)
O [REDACTED])
)
Defendant/Respondent.)

1 07-CV-2974
Civil Action File No.: _____

CAD

**PLAINTIFF'S MOTION UNDER THE HAGUE
CONVENTION FOR ENTRY OF A TEMPORARY RESTRAINING
ORDER AND SCHEDULING OF AN EXPEDITED HEARING
AND FEDERAL RULE 65(b) CERTIFICATE OF COUNSEL**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Petitioner, K [REDACTED] ("Ms. A [REDACTED]" or "Petitioner"), hereby moves the Court for an order temporarily restraining and prohibiting Respondent, O [REDACTED] [REDACTED] ("Mr. C [REDACTED]" or "Respondent"), from violating the Convention on Civil Aspects of International Child Abduction (the "Hague Convention")¹ and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610. Injunctive relief on this basis is necessary to prevent irreparable harm to Petitioner and to preserve the status quo. Under 42 U.S.C. §11604(a), a district

¹ A copy of the Hague Convention is attached to Petitioner's Verified Complaint as Exhibit P.

court is empowered to take appropriate measures “to protect the well-being of the child involved or to prevent the child’s further removal or concealment before the final disposition of the petition.” Such relief is needed in this case.²

On December 1, 2006, Respondent, who is Petitioner’s former husband, wrongfully removed and retained their son, B [REDACTED] or the “Child”) from his place of habitual residence in Canada to Gwinnett County, Georgia without Petitioner’s acquiescence or consent. Given that Respondent removed and retained the Child, there is a substantial risk that Respondent will further hide the Child and himself in violation of Canadian law and the Hague Convention.

Petitioner respectfully requests that the Court shorten or otherwise waive the time requirements that apply to motions, grant an immediate hearing on this motion, enter a temporary injunction, and further grant another hearing requiring Respondent to show cause why the relief set forth in the Verified Complaint should not be granted by this Court. Specifically, Petitioner seeks the following relief:

(a) An immediate temporary restraining order prohibiting the removal of the Child from the jurisdiction of this Court pending a hearing on the merits of this Verified Complaint, and further providing that no person acting in concert or participating with Respondent shall take any action to remove the Child from the

² This motion is supported by Petitioner’s Verified Complaint and supporting brief, filed contemporaneously.

jurisdiction of this Court pending a determination on the merits of the Verified Complaint.

(b) The scheduling of an expedited, ex parte preliminary injunction hearing on the merits of the Verified Complaint; an order that Respondent show cause at this hearing why the Child should not be returned to Canada by Petitioner, and why such other relief requested in the Verified Complaint should not be granted; and, pursuant to Federal Rule of Civil Procedure 65, an order that the trial of the action on the merits be advanced soon after the preliminary injunction hearing; and

(c) Any such further relief as may be just and appropriate under the circumstances of this case.

This 30th day of November 2007.

[REDACTED]

[REDACTED] Esq.
Georgia Bar No. 446655

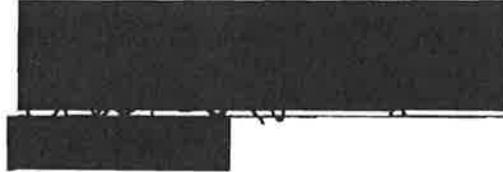
[REDACTED] Esq.
Georgia Bar No. 141306

Attorneys for Petitioner

KILPATRICK STOCKTON LLP
1100 Peachtree Street
Suite 2800
Atlanta, Georgia 30309
(404) 815-6500

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Times New Roman font in 14 point type in compliance with Local Rule 5.1(B).



FILED IN CLERK'S OFFICE
USDC Atlanta

ORIGINAL
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NOV 30 2007

JAMES N. HATTEN, CLERK
By: *JNH* Deputy Clerk

IN RE THE APPLICATION OF)
K [REDACTED])
)
Plaintiff/Petitioner)
)
v.)
O [REDACTED])
)
Defendant/Respondent.)

1 07 - CV - 2974
Civil Action File No.: _____



**PLAINTIFF'S BRIEF IN SUPPORT OF A MOTION UNDER
THE HAGUE CONVENTION FOR A TEMPORARY RESTRAINING
ORDER AND SCHEDULING OF AN EXPEDITED HEARING**

Plaintiff/Petitioner, K [REDACTED] ("Ms. A [REDACTED]" or "Petitioner"), urgently needs emergency equitable relief to prevent Defendant/Respondent, [REDACTED] ("Mr. C [REDACTED]" or "Respondent"), from further interference with Petitioner's rights of custody over their minor child, B [REDACTED] or the "Child"), who was, without Petitioner's acquiescence or consent, wrongfully removed from Canada by Respondent and thereafter wrongfully retained in Gwinnett County, Georgia. As set forth in Petitioner's Verified Complaint for Return of Child to Petitioner (the "Verified Complaint"), Respondent has wrongfully removed and retained the Child from his place of habitual residence in Canada, in violation of the Convention on the Civil

Aspects of International Child Abduction (the “Hague Convention”). Oct. 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98 (a copy of the Hague Convention is attached as Exhibit P to the Verified Complaint). Plaintiff is entitled to relief in the form of an order for the Child’s return to Canada under Articles 8 (providing a right of action to a person exercising rights of custody) and 12 (providing for the return of the child as a remedy) of the Hague Convention, as well as under the International Child Abduction Remedies Act (“ICARA”), 42 U.S.C. §§11601-11610. Emergency relief is authorized under 42 U.S.C. §11604(a), which provides that a court may take appropriate measures “to protect the well-being of the child involved *or to prevent the child’s further removal or concealment before the final disposition of the petition.*” (Emphasis added.)

I. FACTUAL BACKGROUND

As noted above, Petitioner and Respondent are the parents of the Child. (Verified Complaint, ¶ 5.) On December 22, 2001, Petitioner and Respondent were married in California. On September 19, 2002, Ms. A [REDACTED] gave birth to the Child. (Id. at ¶ 6.)

In the Spring of 2005, Petitioner and Respondent separated. Petitioner then returned to Ottawa, Ontario, Canada with the Child. From Spring of 2005 to November of 2006, the Child spent time in both Canada and Georgia, where the Respondent lives. (Id. at ¶ 7.) On or about June 27, 2005, Petitioner and

Respondent executed an agreement whereby Respondent consented and acquiesced for the Child to permanently reside in Ottawa, Ontario, Canada with Petitioner beginning in September of 2005. (Id. at ¶ 8.)

On October 12, 2006, Respondent filed a Complaint for Divorce and Motion and Brief for Emergency Ex Parte Relief in the Superior Court of Gwinnett County. More than a month later, on or about November 23, 2006, after the Child had lived in Canada for a year with the Petitioner, the Respondent filed an *ex parte* petition under the Hague Convention in the Court of the Queen's Bench of Alberta Judicial District of Calgary in Canada. After an *ex parte* hearing, which the Petitioner had no knowledge of, the Queen's Bench of Alberta, Judicial District of Calgary of Canada, ordered the return of the Child to Georgia. Pursuant to the order, the Royal Canadian Mounted Police took the Child from the Petitioner on December 1, 2006 and turned him over to Respondent who took him to Georgia. (Id. at ¶¶ 9-10.)

However, on April 12, 2007, the Court of Appeal of Alberta reversed the Canadian trial court's November 23, 2006 decision and ordered the return of the Child to Canada. (Id. at ¶ 14.) Mr. C [REDACTED] knew of the appeal because on February 27, 2007, Mr. C [REDACTED] requested an adjournment of the appellate case until April 10, 2007 in order for Mr. C [REDACTED] to retain counsel. (Id. at ¶ 13.) The appellate court held that Respondent consented to the Child residing with his

mother in Canada; that Canada was the place of the child's habitual residence; and therefore, the Child should be returned to Canada. (Id. at ¶¶ 16-17.) On April 16, 2007, the appellate court filed its Certificate of Judgment. On that same day, Petitioner's Canadian counsel faxed to the Respondent the appellate court's April 12, 2007 decision and April 16, 2007 Certificate of Judgment. (Id. at ¶ 18.)

On June 4, 2007, Petitioner submitted an application under the Hague Convention for the return of the Child to the Central Authority for the Province of Alberta, Canada. (Id. at ¶ 19.) Two days later, on June 6, 2007, the Central Authority for the Province of Alberta, Canada forwarded Petitioner's application to the National Center for Missing and Exploited Children. (Id. at ¶ 20.)

However, almost three months after the Canadian appellate court's order, on July 13, 2007, Respondent filed a Motion for Reconsideration and Brief in Support in the Gwinnett County action. In his Motion, Respondent requested the Gwinnett County Court to reconsider the Final Judgment and Decree because it failed to address the custody of the Child. The Motion failed to reference or cite the Canadian appellate court's April 16, 2007 order requiring return of the Child to Canada. (Id. at ¶ 21.) On July 16, 2007, the Superior Court of Gwinnett County filed the Amended Final Judgment and ordered Respondent sole, physical and legal custodian of the Child. (Id. at ¶ 22.)

II. ARGUMENT AND CITATION OF AUTHORITY

A. Petitioner is Entitled to *Ex Parte* Emergency Relief.

Federal courts are empowered to grant temporary restraining orders and preliminary injunctions. See FED. R. CIV. P. 65. Consistent with Federal Rule 65, the Local Rules of this Court authorize the grant of emergency relief. See LR 7.2B, NDGA (“Upon written motion and for good cause shown, the court may waive the time requirements of this rule and grant an immediate hearing on any matter requiring such expedited procedure”).

Rule 65(b) further provides that “[a] temporary restraining order may be granted without written or oral notice to the adverse party or that party’s attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party’s attorney can be heard in opposition, and (2) the applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.” FED. R. CIV. P. 65.

Consistent with Federal Rule 65 and the exigent circumstances that typically exist in Hague Convention cases, Article 2 of the Hague Convention provides: “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.” October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98. The “objects” of the Hague Convention are expressed in Article 1: the prompt return of an abducted child and the protection of the rights of custody. Federal Rule 65 allows this Court to expeditiously promote the Hague Convention’s objectives by emergency equitable relief.

Applicable state law provisions also support Petitioner’s request for expeditious procedures for the return of her son.¹ O.C.G.A. §§ 19-9-81 – 19-9-104 are the Georgia Code provisions providing for the enforcement of orders entered under the Hague Convention. Under O.C.G.A. § 19-9-91(b), a court may issue a warrant to take physical custody of a child if there is an imminent likelihood that a child will be removed from the jurisdiction of the court. Likewise, under the Georgia Juvenile Code, O.C.G.A. § 15-11-1, et seq., a child may be taken into immediate custody if the possibility exists that the child will “be removed from the jurisdiction of the court or will not be brought before the court, notwithstanding the service of the summons, ...” O.C.G.A. § 15-11-49.1.

The decision to grant or deny an injunction is “within the sound discretion of the district court.” Int’l Cosmetics Exch., Inc. v. Gapardis Health & Beauty, Inc.,

¹ Under 42 U.S.C. § 11604(b), “No court exercising jurisdiction . . . may . . . order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.”

303 F.3d 1242, 1246 (11th Cir. 2002). “A preliminary injunction may be issued to protect the moving party from irreparable injury and to preserve the power of the trial court to render a meaningful decision on the merits.” Compact Van Equip. Co., Inc. v. Leggett & Platt, Inc., 566 F.2d 952, 954 (5th Cir. 1978). The Court’s task on an application for a preliminary injunction is to find: “(1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if it is issued, would not be adverse to the public interest.” Id. As explained below, all of the elements for emergency equitable relief, including *ex parte* injunctive relief, are satisfied in this case.

B. There is a Substantial Likelihood that Petitioner Will Ultimately Prevail on the Merits.

According to the Hague Convention, the removal or retention of a child is wrongful where the removal is in breach of established custody rights defined by the law of the country in which the child was habitually resident immediately before the removal or retention, and where, at the time of removal, these custodial rights were exercised (either jointly or alone) or would have been so exercised but for the removal. Art. 3, October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514

U.N.T.S. at 98. By virtue of the Canadian appellate court's decision, it is clear the Petitioner has a substantial likelihood of success in prevailing on the merits.

1. The Child was a habitual resident of Canada before the wrongful removal and retaining of the Child.

The legal definition of "habitual residence" is well-established. In Pesin v. Rodriguez, for example, the district court held, "Courts in both the United States and foreign jurisdictions have defined habitual residence as the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective." 77 F. Supp. 2d 1277, 1284 (S.D. Fla. 1999) (citing Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir.1995), and Friedrich v. Friedrich, 983 F.2d 1396, 1401-03 (6th Cir.1993)), aff'd, 244 F.3d 1250 (11th Cir. 2001).

The Canadian appellate court concluded that the Child was a "habitual resident" of Canada as required under the Hague Convention:

It is highly questionable based on the record before the Chambers Judge, and certainly as supplemented before, that the father met the test for an Order to return child . . . *Thompson* holds that the Convention applies to a situation where the court of the country where the child was habitually resident (in this case Canada) was removed before the Court could determine the child's custody. *Thompson* holds that the child must be returned forthwith to the place of habitual residence absent some narrow exceptions. In other words, had the Chambers Judge been aware that the child appeared to have been habitually resident here, as that term is defined under the [Hague] Convention, he would likely had declined to make this Order.

(Verified Complaint, ¶ 16.) The Child lived with the Petitioner for over a year in Canada before he was wrongfully removed and retained by the Respondent. Pursuant to the Canadian appellate court's decision, the Child is a habitual resident of Canada.

2. Petitioner was exercising her rights of custody at the time of the Child's wrongful removal.

Petitioner was exercising her custodial rights at the time of the Child's wrongful removal. Art. 3, October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98. See Talsky v. Talsky, [1975] 62 D.L.R. (3d) 267 (Can.). As the Complaint establishes, Petitioner has never waived her parental rights. To the contrary, Petitioner has continually sought to enforce her parental rights by contacting the Central Authority for the Province of Alberta as well as the National Center for Missing and Exploited Children ("NCMEC"). Consequently, Petitioner is very likely to succeed on the merits of her Hague Convention claim because she was exercising her custodial rights at the time of the wrongful removal.

It must be noted, moreover, that all Petitioner seeks is the Child's return to Canada, the Child's habitual residence, and not any change detrimental to Respondent's own rights of custody, should he choose to exercise them. The Hague Convention authorizes a federal district court to determine the merits of a claim for wrongful removal or retention of a child. The Hague Convention does not, however, allow the district court to consider the merits of any underlying

custody dispute. In re: Morris, 55 F. Supp. 2d 1156, 1160 (D. Colo. 1999) (recognizing that “[p]ursuant to Article 19 of the Convention, [this Court has] no power to pass on the merits of custody”). See also Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991); Loos v. Manuel, 651 A.2d 1077 (N.J. Super. Ct. Ch. Div. 1994). Stated another way, a district court only has jurisdiction to decide the merits of the wrongful removal claim, as the Hague Convention is intended to restore the pre-abduction status quo and deter parents from crossing borders in search of more sympathetic courts. Lops v. Lops, 140 F.3d 927, 936 (11th Cir. 1998) (citations omitted); Barrios Gil v. Del Valle Matheus Rodriguez, 184 F. Supp. 2d 1221, 1224 (M.D. Fla. 2002) (Emphasis added).

C. Petitioner will suffer irreparable injury unless equitable relief is granted.

Respondent has already disregarded the Canadian appellate court’s authority. Respondent failed to appear before the appellate court. Given that Respondent has already wrongfully removed the child to the United States and has impeded Petitioner’s attempts at contacting her own son, there obviously exists a risk that Respondent will further hide the child and himself. This easily satisfies the “irreparable injury” prong for injunctive relief under Federal Rule of Civil Procedure 65.

ICARA directly speaks to such a remedy. 42 U.S.C. §11604(a) provides that a court may take appropriate measures “to protect the well-being of the child

involved or to prevent the child's further removal or concealment before the final disposition of the petition." (Emphasis added). The requirements of state law, however, must be satisfied as well. 42 U.S.C. § 11604(b) ("No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied."). The applicable state law requirements are satisfied here.

The applicable state law includes O.C.G.A. §§ 19-9-81 – 19-9-104, the Georgia provisions providing for the enforcement of orders entered under the Hague Convention. Under O.C.G.A. § 19-9-91(b), a court may issue a warrant to take physical custody of a child if there is an imminent likelihood that a child will be removed from the jurisdiction of the court.

Also applicable are the provisions under O.C.G.A. § 15-11-1, et seq. ("Juvenile Code"). Under the Juvenile Code, if the possibility exists that a child will be removed from the jurisdiction of the Court or will not be brought before the Court (notwithstanding service of process), a court may endorse on the summons an order that a law enforcement officer shall serve the summons and take the child into immediate custody and immediately bring the child before the Court. O.C.G.A. § 15-11-49.1 (2001). A child may also be taken into custody if the child is "deprived." A "deprived child" is a child who is without proper parental care

and control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental or emotional health. O.C.G.A. §15-11-2(8)(A).

A deprived child may be returned to remain with a guardian, subject to appropriate conditions and limitations prescribed by the Court, including supervision as directed by the Court for the protection of the child. O.C.G.A. § 15-11-55(a)(1). Should this Court decide to prevent the possibility of B [REDACTED]'s removal from its jurisdiction, Petitioner will be in Atlanta to care for her son pending the resolution of the instant matter.

The threat of irreparable injury clearly exists. While it is possible that Respondent will comply with the summons and voluntarily attend a hearing, the Court should take into account that Respondent has already wrongfully removed and retained the Child in contravention of the Hague Convention and the Canadian appellate court's decision. The Court should also note the significant possibility that Respondent will ignore the summons and go into hiding, further concealing the Child. Under these facts, emergency equitable relief is authorized under the Hague Convention. 42 U.S.C. §11604(a) (where appropriate, a district court should take measures "to prevent the child's further removal or concealment before the final disposition of the petition").

D. The threatened injury to Petitioner outweighs any damage an injunction may cause Respondent.

The potential of Petitioner losing any rights to the child outweighs any perceived injury to Respondent. Petitioner merely seeks the return of the status quo.

In Furnes, the Eleventh Circuit emphasized the importance of re-establishing the status quo before the alleged wrongful removal: “A return order effectively maintains the status quo with regard to custody of the child . . . A return order will not effect a change in custody . . . because she [Respondent] is free to accompany her child back . . . and retain custody . . . The specific purpose of the Hague Convention was to deter and amend the exact type of abduction in this case, not to bless it.” Furnes v. Reeves, 362 F.3d 702, 717 (11th Cir. 2004) (holding the father had custody rights of the child, and therefore remanded the petition to the trial court in order for it to be granted).

Here, Petitioner is not seeking a custody order from this Court. Rather, she seeks the status quo prior to the wrongful removal and retainment: the ability to exercise her rights of custody in Canada, the state of the Child’s habitual residence. Any custody issues will be determined by a Canadian court.

E. An injunction, if issued, would not be adverse to the public interest.

The relief Petitioner seeks is authorized under the Hague Convention, an international treaty ratified as among Canada, the United States, and other contracting states. The relief is, further, consistent with federal and state law implementing the Convention. Indeed, this lawsuit was referred to Petitioner's counsel under the auspices of NCMEC. NCMEC, by agreement with the United States Department of State, facilitates the provision of legal aid and advice for Hague Convention applicants. There can be no public interest objection raised to the relief sought by Petitioner. The only relevant considerations are whether Petitioner satisfies the requirements of the Hague Convention and the requirements under the Federal Rules of Civil Procedure for the issuance of emergency equitable relief. Those requirements are satisfied here.

III. CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Petitioner asks this Court to grant the following relief:

(a) An immediate temporary restraining order prohibiting the removal of the Child from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and, further, providing that no person acting in concert or participating with Respondent shall take any action to remove the child from the jurisdiction of this Court pending a determination on the merits of this Petition;

(b) Scheduling an expedited, *ex parte* preliminary injunction hearing on the merits of the Verified Complaint and ordering that Respondent show cause at this hearing why the Child should not be returned to Canada, and why such other relief requested in the Verified Complaint should not be granted; and, pursuant to Federal Rule of Civil Procedure 65, ordering that the trial of the action on the merits be advanced soon after the preliminary injunction hearing.

This 30th day of November 2007.

[REDACTED]

Esq.

Georgia Bar No. 446655

[REDACTED] Esq.

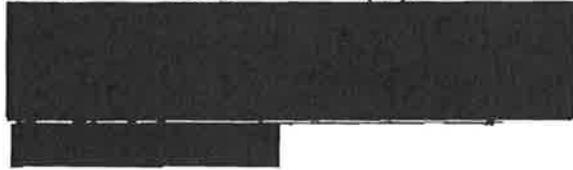
Georgia Bar No. 141306

Attorneys for Petitioner

KILPATRICK STOCKTON LLP
1100 Peachtree Street
Suite 2800
Atlanta, Georgia 30309
(404) 815-6500

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Times New Roman font in 14 point type in compliance with Local Rule 5.1(B).



Ex Parte TRO Motion and Application for Custody Warrant, and Brief in Support

FILED IN CLERK'S OFFICE
U.S. D.C. Atlanta

JUN - 1 2004

TR

LUTHER D. THOMAS, Clerk
By: *W. [Signature]*
Deputy Clerk

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

I [REDACTED],)
)
)
Plaintiff/Petitioner,)
)
v.)
J [REDACTED],)
)
)
Defendant/Respondent.)

CIVIL ACTION FILE
NO. 1:04-CV-1555

TWT

**PLAINTIFF/PETITIONER'S *EX PARTE* MOTION UNDER THE
HAGUE CONVENTION FOR ENTRY OF A TRO, APPLICATION
FOR WARRANT SEEKING PHYSICAL CUSTODY OF CHILD, AND
SCHEDULING OF AN EXPEDITED HEARING; AND FEDERAL
RULE 65(b) CERTIFICATE OF COUNSEL**

Pursuant to Fed. R. Civ. P. 65, Petitioner I [REDACTED]
[REDACTED] hereby moves the Court for an *ex parte* order temporarily
restraining and prohibiting Respondent J [REDACTED] ("Ms. B [REDACTED]
[REDACTED]" or "Respondent") from violating the Hague Convention and the
International Child Abduction Remedies Act (ICARA). This injunctive
relief is vitally necessary on an *ex parte* basis to prevent irreparable harm to
Petitioner and preserve the status quo. Specifically, under 42 U.S.C.
§11604(a) of ICARA, a district court is empowered take appropriate

J

measures “to protect the well-being of the child involved or to prevent the child’s further removal or concealment before the final disposition of the petition.” This is such a case.

This motion is supported by Petitioner’s Verified Complaint (filed on May 28, 2004) and supporting brief, filed contemporaneously herewith. As explained in those papers, on November 29, 2003, Ms. B [REDACTED], who is currently married to Petitioner, wrongfully removed their daughter, without Petitioner’s acquiescence or consent, from their familial home in Mexico and smuggled the child into the United States. Given that Respondent has already abducted the child and herself faces the risk of apprehension here (given that she is living here illegally), there obviously exists a risk that she will further secret the child and herself, in violation of the Hague Convention. Indeed, there is a substantial possibility that Respondent will refuse to appear before the Court to prevent her own return to Mexico.

By his signature below, Petitioner’s counsel hereby certifies to the Court that, based on the specific facts shown by the Verified Complaint, it clearly appears that immediate and irreparable injury, loss, or damage will result to Petitioner before Respondent or her attorney can be heard in opposition to this motion; that counsel has made no effort to give notice of this motion to Respondent, because, if notice such notice was provided,

there exists the possibility that Respondent would further secret both herself and Petitioner's daughter from both Petitioner and this Court.

Petitioner respectfully requests that the Court shorten or otherwise waive the time requirements that apply to motions, grant an immediate hearing on this motion, enter an *ex parte* temporary injunction, and further grant another hearing requiring Respondent to show cause why the relief set forth in the Verified Complaint should not be granted by this Court. Specifically, Petitioner seeks the following relief on an *ex parte* basis:

(a) Enter an immediate *ex parte* temporary restraining order prohibiting the removal of the child from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and further providing that no person acting in concert or participating with Respondent (including Respondent's brother, S [REDACTED] [REDACTED], and her boyfriend, C [REDACTED]) shall take any action to remove the child from the jurisdiction of this Court pending a determination on the merits of this case;

(b) Schedule an expedited preliminary injunction hearing on the merits of the Verified Complaint; order that Respondent show cause at this hearing why the child should not be returned to Mexico, and why such other relief requested in this Petition should not be granted; and, pursuant to

Federal Rule of Civil Procedure 65, order that the trial of the action on the merits be advanced and consolidated with the preliminary injunction hearing; and

(c) Issue a warrant seeking physical custody of the child, directing that the child, together with Respondent, be brought into this Court by any United States Marshal, federal officer or police officer to guarantee their attendance at the hearing, and further authorizing such officer to serve Respondent with notice of the hearing and the pleadings filed by Petitioner in this case.

For the Court's review and consideration, Petitioner respectfully submits a proposed order in the form attached hereto as Exhibit A.

Dated: June 1, 2004.

Respectfully submitted,

[Redacted signature]

KILPATRICK STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309
(404)815-6500 (Telephone)
(404)815-6555 (Facsimile)

[Redacted bar number]
Georgia Bar No. 065220
[Redacted bar number]

Georgia Bar No. 366750

Counsel for Plaintiff/Petitioner Isaac

[Redacted name]

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Time New Roman font in 14 point type in compliance with Local Rule 5.1(B).

Dated: June 1, 2004.

A solid black rectangular box redacting the signature of the attorney.

Attorney for Plaintiff/Petitioner

ORIGINAL

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JUN - 1 2004

LUTHER D. THOMAS, Clerk
By: *Whess*
Deputy Clerk

[REDACTED],)
)
)
Plaintiff/Petitioner,)
)
v.)
)
J [REDACTED])
)
)
Defendant/Respondent.)

CIVIL ACTION FILE
NO. 1:04-CV-1555 **TWT**

**PLAINTIFF/PETITIONER'S BRIEF IN SUPPORT OF
EX PARTE MOTION UNDER THE HAGUE CONVENTION FOR
ENTRY OF A TRO, APPLICATION FOR WARRANT SEEKING
PHYSICAL CUSTODY OF CHILD, AND SCHEDULING OF AN
EXPEDITED HEARING**

Plaintiff/Petitioner is [REDACTED] [REDACTED] [REDACTED] ("Mr. R [REDACTED]
[REDACTED]" or "Petitioner") urgently needs emergency equitable relief to
prevent Defendant/Respondent J [REDACTED] [REDACTED] ("Ms. B [REDACTED]
[REDACTED]" or "Respondent"), from further interference with Petitioner's custodial rights
over their minor child, [REDACTED] A [REDACTED] F [REDACTED] B [REDACTED] ("I [REDACTED] A [REDACTED]"),
who was, without Petitioner's acquiescence or consent, wrongfully removed
from Mexico by Respondent. As set forth in Petitioner's "VERIFIED
COMPLAINT/PETITION UNDER THE HAGUE CONVENTION FOR

RETURN OF CHILD TO PLAINTIFF/PETITIONER IN MEXICO, INCLUDING PROVISIONAL ORDERS, AN EX PARTE TEMPORARY RESTRAINING ORDER, APPLICATION FOR WARRANT SEEKING PHYSICAL CUSTODY AND AN EXPEDITED HEARING” (“Complaint”), Respondent has wrongfully removed [REDACTED] A [REDACTED] from her family home in Mexico, in violation of the Convention on the Civil Aspects of International Child Abduction (the “Hague Convention”) and the International Child Abduction Remedies Act (“ICARA”). Oct. 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986) (a copy of the Hague Convention is attached as Exhibit A to the Complaint); 42 U.S.C. §§11601-11610 (2000). Furthermore, emergency relief is authorized under 42 U.S.C. §11604(a), which provides that a court may take appropriate measures “to protect the well-being of the child involved *or to prevent the child’s further removal or concealment before the final disposition of the petition.*” (Emphasis added.)

I. FACTUAL BACKGROUND

Mr. R [REDACTED] (Petitioner) and Ms. B [REDACTED] (Respondent) are the parents of [REDACTED] A [REDACTED]. Complaint ¶ 4. On December 31, 1995, Petitioner and Respondent were married in Quechultenango, State of Guerrero, Mexico. *Id.* Copies of their marriage certificate and a translation

thereof are attached to the Complaint as Exhibits B and C. On August 9, 1996, Ms. B [REDACTED] gave birth to I [REDACTED] A [REDACTED] at Villa de las Flores, Coacalco de Berriozabal, Mexico. *Id.* Copies of I [REDACTED] A [REDACTED]'s birth certificate and a translation thereof are attached to the Complaint as Exhibits D and E. Until her wrongful removal to the United States (as detailed below), Mr. F [REDACTED] [REDACTED], his wife, and his daughter lived together in their familial residence in Mexico. *Id.* Between 1999 and the date of I [REDACTED] A [REDACTED]'s wrongful removal, the family lived at [REDACTED] [REDACTED] [REDACTED] State of Mexico. *Id.*

The Hague Convention and its remedies apply to children under sixteen years of age. Art. 4, Oct. 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986). I [REDACTED] A [REDACTED] is now seven years old, and the Hague Convention thus applies in this case. Complaint ¶ 5. While Petitioner and Respondent are still married, Petitioner has filed for divorce in Mexico seeking legal custody of I [REDACTED] A [REDACTED]. Complaint ¶ 5 & Exs. J and K thereto.

Mr. R [REDACTED] works as a maintenance technician at a DuPont plant in Mexico. Complaint ¶ 6. On November 28 and 29, 2003, he worked the night shift at the plant (from 10:45 p.m. to 6:45 a.m.). *Id.* When he returned home on the morning of November 29 at 7:15 a.m., he discovered

that his wife had taken [REDACTED] A [REDACTED] and had left him. Id. Ms. B [REDACTED] [REDACTED] left a note for Petitioner stating that she had taken her belongings and their seven-year-old daughter. Complaint ¶ 7. She instructed Petitioner “don’t look for us.” Id. Copies of the note and a translation thereof are attached to the Complaint as Exhibits F and G.

Petitioner investigated the circumstances, receiving more specific information regarding Respondent’s departure and his daughter’s removal from friends, neighbors, and Ms. B [REDACTED]’s parents. Complaint ¶ 8. Petitioner learned that Ms. B [REDACTED] had a boyfriend, a man by the name of C [REDACTED], and that they had formed a plan to leave Mexico together with [REDACTED] A [REDACTED] and move to the United States. Id. Petitioner further learned that, on December 2, 2003, Respondent phoned her parents to explain that she was at the U.S.-Mexico border and that she and her boyfriend had arranged for “coyotes” (smugglers of illegal aliens) to transport Respondent, her boyfriend, and [REDACTED] A [REDACTED] into the United States from Mexico illegally. Id. Petitioner now understands that Respondent and [REDACTED] A [REDACTED] live in Atlanta, Georgia. Id.

Respondent herself phoned Petitioner on December 3, 2003, stating that she was at the U.S.-Mexico border and intended to move to the United States. Complaint Exs. J and K. Petitioner briefly spoke with his daughter,

and implored Respondent to return home. Id. Respondent did not return home but took her daughter across the U.S.-Mexico border. Id.

On December 5, 2003, Petitioner contacted the Mexican authorities to report [REDACTED] A [REDACTED]'s wrongful removal from her family residence. Complaint ¶ 10. Copies of the report and the translation thereof are attached to the Complaint as Exhibits H and I.

Pursuant to the Hague Convention, Petitioner has formally requested the return of [REDACTED] A [REDACTED] to Mexico, and has submitted an application under the Hague Convention to the Mexican Central Authority, the office designated by Mexico to administer that country's responsibilities under the Hague Convention. Complaint ¶ 13. Copies of Petitioner's Request for Return and a translation thereof are attached to the Complaint as Exhibits L and M. The Mexican Central Authority in turn contacted the United States Central Authority under the Hague Convention by contacting the National Center for Missing and Exploited Children ("NCMEC"). Complaint ¶ 13. The NCMEC, by agreement with the United States Department of State (the Central Authority of the United States under the Hague Convention), facilitates the provision of legal aid and advice for Hague Convention applicants. Id.

Petitioner understands that Respondent and [REDACTED] A [REDACTED] now live at [REDACTED], Atlanta, GA 30329, with Respondent's brother, [REDACTED]. Complaint ¶ 9.

On April 24, 2004, Petitioner sued Respondent for divorce in Mexico, seeking custody of [REDACTED] A [REDACTED]. Complaint ¶ 11. Copies of the divorce petition and translation thereof are attached to the Complaint as Exhibits J and K.

By contacting the Mexican authorities, including petitioning the Mexican State Department for [REDACTED] A [REDACTED]'s return under the Hague Convention, and by filing for divorce in Mexico, seeking an appropriate custody determination under the Mexican Civil Code, Petitioner has done everything in this power to secure the return of his daughter. This Court is the necessary culmination of that process, and is Petitioner's last resort to seek any relief with respect to his daughter.

II. ARGUMENT AND CITATIONS OF AUTHORITY

A. Petitioner is entitled to *ex parte* emergency relief.

Federal courts are empowered to grant temporary restraining orders and preliminary injunctions. Fed. R. Civ. P. 65. Consistent with Federal Rule 65, the Local Rules of this Court authorize the grant of emergency relief. See N.D. Ga. Local Rule 7.2(B) ("Upon written motion and for good

cause shown, the court may waive the time requirements of this rule and grant an immediate hearing on any matter requiring such expedited procedure.”).

Federal Rule 65(b) further provides that “[a] temporary restraining order may be granted without written or oral notice to the adverse party or that party’s attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party’s attorney can be heard in opposition, and (2) the applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.”

Consistent with Federal Rule 65 and the exigent circumstances that typically exist in Hague Convention cases, Article 2 of the Hague Convention provides, “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.” October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986).

Applicable state law provisions are in accord.¹ O.C.G.A. §§ 19-9-81 – 19-9-104 are the Georgia Code provisions providing for the enforcement of orders entered under the Hague Convention. Under O.C.G.A. § 19-9-91(b), a court may issue a warrant to take physical custody of a child if there is an imminent likelihood that a child will be removed from the jurisdiction of the court. Likewise, under the Georgia Juvenile Code, O.C.G.A. § 15-11-1, et seq., a child may be taken into immediate custody if the possibility exists that the child will “be removed from the jurisdiction of the court or will not be brought before the court, notwithstanding the service of the summons, ...” O.C.G.A. § 15-11-49.1 (2001).

The decision to grant or deny an injunction is “within the sound discretion of the trial court.” International Cosmetics Exchange, Inc. v. Gapardis Health & Beauty, Inc., 303 F.3d 1242, 1246 (11th Cir. 2002). “A preliminary injunction may be issued to protect the moving party from irreparable injury and to preserve the power of the trial court to render a meaningful decision on the merits.” Compact Van Equip. Co., Inc. v. Leggett & Platt, Inc., 566 F.2d 952, 954 (5th Cir. 1978). The Court’s task on an application for a preliminary injunction is to find: “(1) substantial

¹ Under 42 U.S.C. § 11604(b) (2000), “No court exercising jurisdiction . . . may . . . order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.”

likelihood that the movant will ultimately prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and (4) showing that the injunction, if issued, would not be adverse to the public interest.” Id. As explained below, all of the elements for emergency equitable relief, including *ex parte* injunctive relief, are satisfied in this case.

1. There is a substantial likelihood that Petitioner will ultimately prevail on the merits.

According to the Hague Convention, the removal or retention of a child is wrongful where the removal is in breach of established custody rights defined by the law of the country in which the child was habitually resident immediately before the removal or retention, and where, at the time of removal, these custodial rights were exercised (either jointly or alone) or would have been so exercised but for the removal. Art. 3, October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986).

The legal definition of “habitual residence” is well-established. In Pesin v. Rodriguez, for example, the district court held, “Courts in both the United States and foreign jurisdictions have defined habitual residence as the

place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective." 77 F. Supp. 2d 1277, 1284 (S.D. Fla. 1999) (citations and internal quotations omitted), aff'd, 244 F.3d 1250 (11th Cir. 2001).

The facts of this case easily establish that [REDACTED] A [REDACTED] was wrongfully removed from her habitual residence (Petitioner's home) in Mexico. [REDACTED] A [REDACTED] was born in Mexico and, until her wrongful removal, spent the entirety of her life living with both of her parents. She has only recently been taken, without her father's permission, to the United States. As for whether the removal was "wrongful" within the meaning of the Hague Convention, Respondent's letter to Petitioner stating that she was leaving, taking Petitioner's daughter with her, and telling Petitioner "don't look for us" is direct evidence of that fact. Complaint ¶ 7 & Exs. F and G thereto. See also 42 U.S.C. § 11603(f)(2) (providing that "wrongful removal or retention" "include[s] a removal or retention of a child before the entry of a custody order regarding that child; . . .") (no custody order has been entered in Mexico; Petitioner has filed for divorce there, seeking custody).

Another issue is whether the custody rights of the Petitioner have been violated. This in turn depends on the law of the country or state of the

Case 1:04-cv-01555-TWT Document 2 Filed 06/01/04 Page 20 of 32

child's habitual residence. Art. 3, October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986). As [REDACTED] A [REDACTED]'s habitual residence was in Mexico, specifically, in the State of Mexico, the civil code of the State of Mexico defines the scope of Petitioner's custodial rights.

The Mexican Civil Code broadly defines the scope of parental authority and custody rights. Specifically, under Article 396 of the Civil Code for the State of Mexico, "patria potestas" (custody) is exercised by both the father and the mother.² Respondent's wrongful removal of [REDACTED] A [REDACTED] clearly violated Petitioner's "patria potestas" rights under applicable Mexican law. This is further demonstrated by a very similar case construing "patria potestas" principles under the Mexican State of Baja California Sur, where the United States Court of Appeals for the First Circuit held that the petitioner had custody rights under Mexican law that had been violated in a Hague Convention case similar to this one, because both parents exercise patria potestas rights over a child under Mexican law, and both parents must consent to the removal of such child to another

² Attached hereto as Exhibit A is a translation of the "patria potestas" code provision from the Civil Code of the State of Mexico. This was provided to Petitioner's counsel by the National Center for Missing and Exploited Children ("NCMEC"). The NCMEC, by agreement with the United States Department of State (the Central Authority of the United States under the Hague Convention), facilitates the provision of legal aid and advice for Hague Convention applicants.

country. Whallon v. Lynn, 230 F.3d 450 (1st Cir. 200). See also Furnes v. Reeves, 362 F.3d 702, 714-722 (11th Cir. 2004) (adopting a broad view of custody rights under international law and holding: “it is crucial to note that the violation of a *single* custody right suffices to make removal of a child wrongful.”) (emphasis in original).

Another inquiry, easily satisfied here, is whether Petitioner was exercising his custodial rights at the time of the wrongful removal. Art. 3, October 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494 (1986). The Complaint easily establishes this fact, given that [REDACTED] A [REDACTED] lived with Petitioner at their familial residence in Mexico up until the time of her wrongful removal. See Feder v. Evans-Feder 63 F.3d 217, 225 (3d Cir. 1995); Wanninger v. Wanninger, 850 F. Supp. 78, 80-81 (D. Mass. 1994).

This is an open and shut case. Petitioner is very likely to succeed on the merits of his Hague Convention claim. It must be noted, moreover, is that all Petitioner seeks is the child’s return to Mexico, so that a custody determination may properly be made in Mexico. He is not asking this Court

to award him custody of the child, and Respondent retains all of her rights to travel back to her homeland and contest custody there.³

2. Petitioner will suffer irreparable injury unless equitable relief issues.

Respondent is in the country illegally and herself faces the risk of apprehension. Given that Respondent has already wrongfully removed the child to the United States, there obviously exists a risk that Respondent will further secret the child and herself, in violation of the Hague Convention. Indeed, there is a substantial possibility that Respondent will refuse to appear before the Court to prevent Respondent's own return to Mexico. This easily satisfies the "irreparable injury" prong for injunctive relief under Federal Rule of Civil Procedure 65.

ICARA directly speaks to such a remedy. 42 U.S.C. §11604(a) provides that a court may take appropriate measures "to protect the well-being of the child involved *or to prevent the child's further removal or*

³ As is well-established under the Hague Convention, the Hague Convention authorizes a federal district court to determine the merits of a claim under the Hague Convention for wrongful removal or retention of a child; it does not, however, allow the district court to consider the merits of any underlying custody dispute. Morris v. Morris, 55 F. Supp. 2d 1156, 1160 (D. Colo. 1999) (recognizing that "[p]ursuant to Article 19 of the Convention, [this Court has] no power to pass on the merits of custody"). See also Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991). Accordingly, a district court's role is not to make traditional custody decisions but to determine the jurisdiction in which a proper custody determination should be made. Loos v. Manuel, 651 A.2d 1077 (N.J. Super. Ct. Ch. Div. 1994). Stated another way, a district court only has jurisdiction to decide the merits of the wrongful removal claim, as the Hague Convention is intended to restore the pre-abduction status quo and deter parents from crossing borders in search of more sympathetic courts. Lops v. Lops, 140 F.3d 927, 936 (11th Cir. 1998) (citations omitted); Barrios Gil v. Del Valle Matheas Rodriguez, 184 F. Supp. 2d 1221, 1224 (M.D. Fla. 2002).

concealment before the final disposition of the petition.” (Emphasis added.)

The requirements of state law, however, must be satisfied as well. 42 U.S.C. § 11604(b) (“No court exercising jurisdiction of an action brought under section 4(b) may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.”) The applicable state law requirements are satisfied here.

The applicable state law includes O.C.G.A. §§ 19-9-81 – 19-9-104, which are the Georgia Code provisions providing for the enforcement of orders entered under the Hague Convention. Under O.C.G.A. § 19-9-91(b), a court may issue a warrant to take physical custody of a child if there is an imminent likelihood that a child will be removed from the jurisdiction of the court.

Also applicable are the provisions under O.C.G.A. § 15-11-1, et seq. (“Juvenile Code”). Under the Juvenile Code, if the possibility exists that a child will be removed from the jurisdiction of the Court or will not be brought before the Court (notwithstanding service of process), a court may endorse on the summons an order that a law enforcement officer shall serve the summons and take the child into immediate custody and immediately bring the child before the Court. O.C.G.A. § 15-11-49.1 (2001). A child

may also be taken into custody if the child is “deprived.” A “deprived child” is a child who is without proper parental care and control, subsistence, education as required by law, or other care or control necessary for the child’s physical, mental or emotional health. O.C.G.A. §15-11-2(8)(A) (Supp. 2003).

While Petitioner understandably does not know the details of his daughter’s present health and living conditions, it certainly appears that his daughter, [REDACTED] A [REDACTED] is without proper parental care in that her mother, Ms. B [REDACTED] [REDACTED], brought her into the United States both illegally and by the use of “coyotes.” Furthermore, she is without proper parental care for her emotional and mental health because she has wrongfully been removed from her habitual residence in Mexico and has been wrongfully retained in the United States by her mother in violation of Petitioner’s custodial rights under Mexican law, and she has spoken with Petitioner, her legal and custodial parent, only sporadically since her abduction last November, thus suffering alienation from her father and the adverse effects to her emotional and mental health caused by such alienation. Finally, the child is at risk of having her physical and mental health and welfare adversely impacted by continuing to remain with Ms. B [REDACTED] [REDACTED] and at risk of having Ms. B [REDACTED] [REDACTED] remove her from the jurisdiction of the Court, given that Ms.

B [REDACTED] herself is in this country illegally. A deprived child may be returned to remain with her parent (in this case, her father), subject to appropriate conditions and limitations prescribed by the Court, including supervision as directed by the Court for the protection of the child. O.C.G.A. § 15-11-55(a)(1) (Supp. 2003).

Construing the Hague Convention and similar provisions under Iowa state law, the district court issued *ex parte* relief in Morgan v. Morgan, because it feared that “if a temporary restraining order is not issued *ex parte*, Mrs. M [REDACTED] [Respondent] and Mr. F [REDACTED] [Respondent’s boyfriend] will likely flee this jurisdiction with the child upon receiving notice of Mr. M [REDACTED] [Petitioner’s] intent to seek a temporary restraining order preventing them from doing so.” 289 F. Supp.2d 1067, 1070 (N.D. Iowa 2003).

Furthermore, it is a common-sense proposition that the separation of a parent from the parent’s child is an irreparable injury that can only be rectified by reunion with the child.

The threat of irreparable injury clearly exists. While it is possible that Respondent, an illegal alien, will comply with the summons and voluntarily attend a hearing before this federal district court, this Court must be mindful of the fact that, given that Respondent has abducted the child and is herself

here illegally, the greater possibility is that Respondent will ignore the summons and go into hiding, further concealing the child. She might even misinterpret this action as a deportation proceeding, which it clearly is not. Under these facts, emergency equitable relief is authorized under the Hague Convention. 42 U.S.C. §11604(a) (where appropriate, a district court should take measures “to prevent the child’s further removal or concealment before the final disposition of the petition.”)

3. The threatened injury to Petitioner outweighs whatever damage an injunction may cause Respondent.

In Furnes, the Eleventh Circuit articulated a legal principle that is relevant to this element of injunctive relief when it stated that the remedies under the Convention “effectively maintain the status quo with regard to custody. . . . A return order will not effect a change in custody. . . because she [Respondent] is free to accompany her child back to Norway and retain custody. . . . The specific purpose of the Hague Convention was to deter and amend the exact type of abduction in this case, not to bless it.” 362 F.3d at 717.

This analysis of course applies here. Petitioner is not seeking a custody order from this Court. He is only seeking the ability to determine

custody where it should have been properly determined in the first instance – in Mexico, the state of the child’s habitual residence.

And Respondent is no position to complain. Having abducted the child and, through her unilateral, unauthorized conduct, smuggled her into the United States, she left Petitioner with no choice but to pursue these remedies.

4. An *ex parte* injunction, if issued, would not be adverse to the public interest.

This requirement is easily met. The relief Petitioner seeks is authorized under the Hague Convention, an international treaty ratified as between Mexico, the United States, and other contracting states. The relief is further consistent with federal and state law implementing the Convention. Indeed, this lawsuit was referred to Petitioner’s counsel under the auspices of the United States Department of State, the Central Authority of the United States under the Hague Convention. There can be no public interest objection raised to the relief sought by Petitioner. The only relevant considerations are whether Petitioner satisfies the requirements of the Hague Convention, as well as the requirements under the Federal Rules of Civil Procedure for the issuance of emergency equitable relief. Those requirements are satisfied here.

III. CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Petitioner asks this Court to grant the following relief, *ex parte*:

(a) Enter an immediate *ex parte* temporary restraining order prohibiting the removal of the child from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and further providing that no person acting in concert or participating with Respondent (including Respondent's brother, S [REDACTED] [REDACTED], and her boyfriend, C [REDACTED]) shall take any action to remove the child from the jurisdiction of this Court pending a determination on the merits of this Petition;

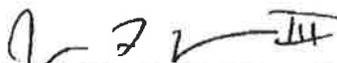
(b) Schedule an expedited preliminary injunction hearing on the merits of the Verified Complaint; order that Respondent show cause at this hearing why the child should not be returned to Mexico, and why such other relief requested in the Verified Complaint should not be granted; and, pursuant to Federal Rule of Civil Procedure 65, order that the trial of the action on the merits be advanced and consolidated with the preliminary injunction hearing;

(c) Issue a warrant seeking physical custody of the child, directing that the child, together with Respondent, be brought into this Court by any

United States Marshal, federal officer or police officer to guarantee their attendance at the hearing, and further authorizing such officer to serve Respondent with notice of the hearing and the pleadings filed by Petitioner in this case.

Dated: June 1, 2004

Respectfully submitted,



KILPATRICK STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309
(404)815-6500 (Telephone)
(404)815-6555 (Facsimile)

[Redacted]
Georgia Bar. No. 065220
[Redacted]
Georgia Bar No. 366750
Counsel for Plaintiff/Petitioner

CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Time New Roman font in 14 point type in compliance with Local Rule 5.1(B).

Dated: June 1, 2004.



Attorney for Plaintiff/Petitioner

Case 1:04-cv-01555-TWT Document 2 Filed 06/01/04 Page 31 of 32



EXHIBIT / ATTACHMENT

A

(To be scanned in place of tab)

UNOFFICIAL TRANSLATION

**CIVIL CODE
FOR THE STATE OF MEXICO**

**TITLE EIGHT
ABOUT THE PATRIA POTESTAS**

**CHAPTER I
ABOUT THE EFFECTS OF THE PATRIA POTESTAS
OVER THE CHILDREN**

ARTICLE 397.- The patria potestas (custody) is exercising under the person and property of the minors.

ARTICLE 396.- The Patria Potestas (Custody) over the children during the marriage, is exercised by:

- I The father and the mother,
- II. The parental grandparents,
- III. The maternal grandparents

ARTICLE 397.- When both parents have recognized their minor who has borned out of marriage (concubinage) and both parents live together, they have the custody of their minor.

ARTICLE 399.- In case that the concubines are living dismissed, they will decide who will has the custody of the minor in the event that they do not do it, the local family judge will solve whom maybe the most convenient for the interest of the minor.

**Proposed Order
Granting TRO and
Scheduling Hearing
on the Merits**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE THE APPLICATION OF)
K [REDACTED],)
)
Plaintiff/Petitioner)
)
v.)
)
O [REDACTED],)
)
Defendant/Respondent.)
)

Civil Action File No.: 1:07-cv-2974

**ORDER GRANTING TEMPORARY RESTRAINING ORDER UNDER
THE HAGUE CONVENTION**

Plaintiff/Petitioner, K [REDACTED] [REDACTED] having filed Plaintiff's Motion Under The Hague Convention For A Temporary Restraining Order And Scheduling Of An Expedited Hearing ("the Motion"), Plaintiff's Brief In Support Of A Motion Under The Hague Convention For A Temporary Restraining Order And Scheduling Of An Expedited Hearing, and Verified Complaint For Return of Child To Petitioner, the Court having considered these pleadings in this case, and pursuant to Federal Rule of Civil Procedure 65, the Motion is hereby GRANTED as follows:

(1) Respondent is hereby prohibited from removing the Child from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and no person acting in concert or participating with Respondent shall take any action to remove the child from the jurisdiction of this Court pending a determination on the merits of the Verified Complaint.

(2) A hearing on the merits of the Verified Complaint is hereby scheduled to be held on _____, 2007 at _____ o'clock in Courtroom ___ of this Court; and

(3) Respondent is hereby directed to show cause at the hearing scheduled in paragraph (2) above why the child should not be returned forthwith to Canada, accompanied by Petitioner, and why the other relief requested in the Verified Complaint should not be granted.

SO ORDERED, this ___ day of _____, 2007, at _____ o'clock __.m.

CHARLES A. PANNELL, JR., JUDGE
United States District Court for the
Northern District of Georgia
Atlanta Division

**Proposed Order
Granting TRO,
Issuing Warrant and
Scheduling Hearing
on the Merits**

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

I	[REDACTED])	
)	
	Plaintiff/Petitioner,)	
v.)	CIVIL ACTION FILE
)	NO. 1:04-CV-1555
J	[REDACTED])	
)	
	Defendant/Respondent.)	
)	

**ORDER GRANTING *EX PARTE* TRO AND EMERGENCY
EQUITABLE RELIEF**

Plaintiff/Petitioner I [REDACTED] [REDACTED], having filed his “*EX PARTE* MOTION UNDER THE HAGUE CONVENTION FOR ENTRY OF A TRO, APPLICATION FOR WARRANT SEEKING PHYSICAL CUSTODY OF CHILD, AND SCHEDULING OF AN EXPEDITED HEARING” (“Motion”), and the Court having conducted a hearing on the Motion, and after considering the arguments of Petitioner’s counsel and the entire record, and pursuant to Federal Rule of Civil Procedure 65, hereby GRANTS the Motion, ruling as follows:

(1) This Court finds that *ex parte* emergency relief is necessary to prevent irreparable injury. Specifically, the evidence of record shows that on November 29, 2003, Respondent, who is currently married to Petitioner, wrongfully removed their seven-year-old daughter, without Petitioner's acquiescence or consent, from their familial home in Mexico and smuggled the child into the United States. Given that Respondent has already abducted the child and herself faces the risk of apprehension here, there exists a clear risk that Respondent will further secret the child and herself, in violation of the Hague Convention, and not appear before this Court to resolve the claim presented by Petitioner. Accordingly, and pursuant to Federal Rule of Civil Procedure 65(b), the Court finds it necessary to grant this Order without notice.

(2) Respondent is hereby prohibited from removing Petitioner's daughter from the jurisdiction of this Court pending a hearing on the merits of the Verified Complaint, and no person acting in concert or participating with Respondent (including Respondent's brother, S [REDACTED], and her boyfriend, C [REDACTED]) shall take any action to remove the child from the jurisdiction of this Court pending a determination on the merits of this Petition.

(3) A preliminary injunction hearing on the merits of this Petition is hereby scheduled to be held on _____ at _____ o'clock in Courtroom __ of this Court.

(4) Respondent is hereby directed to show cause at the hearing scheduled in paragraph (3) above why the child should not be returned to Mexico, accompanied by Petitioner, where an appropriate custody determination can be made under Mexican law, and why the other relief requested in the Verified Complaint should not be granted.

(5) The Court hereby orders that the trial of this action on the merits will advanced and consolidated with the preliminary injunction hearing scheduled in paragraph (3) above.

(6) The Court hereby issues a warrant seeking physical custody of the child, and directing that the child, together with Respondent, be brought into this Court by any United States Marshal, federal officer or police officer to guarantee their attendance at the hearing.

(7) Such officer is directed to serve Respondent with this Order, as well as the pleadings filed by Petitioner in this case.

(8) Pending the hearing, Petitioner's daughter will be placed in his temporary custody.

SO ORDERED this ___ day of _____, 2004, at _____ o'clock
_.m.

Judge, United States District Court



National Center for Missing & Exploited Children
Charles B. Wang International Children's Building
699 Prince Street
Alexandria, Virginia 22314-3175
1-800-THE-LOST® (1-800-843-5678)

The National Center for Missing & Exploited Children is a 501(c)(3) tax-exempt charity as defined in sections 509(a)(1) and 170(b)(1)(A)(vi) of the Internal Revenue Code. All donations are tax-deductible to the extent allowable by law.

Learn more at www.missingkids.com

The New York Times

March 30, 2013

Immigrant Detainees and the Right to Counsel

By IAN URBINA and CATHERINE RENTZ

DO immigrants who are incarcerated while their legal status is resolved deserve a lawyer?

On a given day, roughly 34,000 immigrants are held in a patchwork of local jails and prisons, awaiting court hearings that determine whether they have the legal right to remain in the United States or will be deported. The recent revelation that roughly 300 immigration detainees are being held in solitary confinement — conditions that the United Nations special rapporteur on torture and others have said can constitute torture — highlights how punitive, costly and legally fraught American immigration policy has become.

Fifty years ago, the landmark case *Gideon v. Wainwright* required state courts to provide counsel in criminal cases for defendants who could not afford lawyers. But people who are detained do not typically have lawyers because immigration law, unlike criminal law, does not provide a right to counsel. Immigrant detainees are allowed to hire lawyers, but more often than not, they cannot afford counsel or are shuffled through the system before they have a chance to find help.

Among the detainees not guaranteed representation are children, the mentally disabled, victims of sex trafficking, refugees, torture survivors and legal permanent residents. Free representation tends to be provided by lawyers at nonprofit advocacy groups that are ill equipped to keep up with demand.

The American immigration system is already wildly expensive, and providing lawyers for immigrants would make it even more expensive. In 2012, the Obama administration's overall budget for immigration enforcement was \$18 billion, significantly more than was spent by all other major federal law enforcement agencies combined, including the Federal Bureau of Investigation, the Secret Service and the Bureau of Alcohol, Tobacco, Firearms and Explosives, according to a report by the Migration Policy Institute, a nonpartisan research group in Washington.

Advocates of tighter controls on immigration say that guaranteeing detainees counsel would make matters only worse. With guaranteed representation, they argue, more immigrants would be allowed to stay. Studies have shown that having a lawyer during removal proceedings vastly

improves an immigrant's ability to defend against deportation. Without counsel, only 3 percent prevail in their asylum cases compared with 18 percent who have legal counsel.

Jon Feere, a legal policy analyst for the Center for Immigration Studies, a research organization based in Washington that advocates for reduced immigration, pointed out that American citizens routinely deal with important civil matters like child custody, foreclosures or evictions without the benefit of guaranteed legal representation.

"Why should illegal aliens be guaranteed greater protections than citizens?" he asked.

Throwing more immigration lawyers into the mix, he said, would probably slow the process only further, especially considering that immigration lawyers are always looking to expand the scope of asylum.

Other immigration opponents add that harsh detention conditions encourage immigrants to more quickly sign papers, agreeing to leave rather than adjudicate the matter. Switch to ankle bracelets and provide more detainees with lawyers, they argue, and immigrants will linger in the hands of Immigration and Customs Enforcement that much longer — and at considerable added taxpayer cost.

But immigrant advocates, civil rights lawyers and some immigration judges argue that providing guaranteed representation would actually help lower costs, lessen backlogs in the legal system and prevent miscarriages of justice, protecting people who have a right to stay in the country against deportation. The National Association of Immigration Judges wants to see more legal help for immigrants, arguing that representation would speed processing times because properly counseled immigrants are less likely to pursue claims that have no legal basis or to appeal in cases with little chance of success.

Paul Grussendorf, an immigration judge in Philadelphia from 1997 to 2001 and then in San Francisco until 2004, said he saw many immigrants pass before his bench, and although dozens were qualified to stay in the country, they were ultimately deported because they lacked legal representation.

Dozens of detainees who could have qualified to stay gave up after months in detention, he said, because they had no prospects of ever finding counsel to help them. He cited studies indicating that I.C.E. currently pays roughly \$2 billion per year just to detain immigrants and that 80 percent of that cost could be saved by releasing immigrants but tracking them using ankle bracelets.

"The savings here could easily be used to offset the price of providing counsel for most

immigrants being processed by I.C.E.," Mr. Grussendorf said.

But Jan C. Ting, a law professor at Temple University and an assistant commissioner at the Immigration and Naturalization Service from 1990 to 1993, said that shifting to alternative means of custody like ankle bracelets risked slowing the process and raising costs because it could increase the instances when immigrants failed to show up at their hearings.

"Only those who have worked on the government side have any appreciation of how difficult and expensive it is to try to enforce our immigration laws," he added.

If Congress does not resolve questions about legal representation, civil rights advocates say they may challenge the status quo in the courts.

In what he described as a "first shot across the bow," Anthony D. Romero, the executive director of the American Civil Liberties Union, said that his organization filed a federal class-action lawsuit in 2010 aimed at testing the constitutionality of immigrants' right to counsel.

The lawsuit, filed in California, was on behalf of immigrants with severe mental disabilities who were never provided lawyers. The lead plaintiff in the case, José Antonio Franco González, who has an I.Q. below 55, was wrongfully held by I.C.E. for five years, which the A.C.L.U. argues could have been prevented if he had had a court-provided lawyer.

"If the government is going to deprive an individual of his liberty through a legal process," Mr. Romero said, "the government should provide a lawyer to those who cannot afford one."

Ian Urbina is an investigative reporter for The New York Times. Catherine Rentz is an independent journalist based at the Investigative Reporting Workshop at American University.

This article has been revised to reflect the following correction:

Correction: April 7, 2013

A news analysis article last Sunday about detained immigrants' right to counsel misspelled the surname of a legal policy analyst for the Center for Immigration Studies, a research organization that advocates for reduced immigration. He is Jon Feere, not Freere.

User Name: Uzoamaka Nzelibe
Date and Time: 07/31/2013 6:17 PM EDT
Job Number: 4036247

Document(1)

1. J. D. B. v. North Carolina, 131 S. Ct. 2394

Client/matter: -None-



Caution

As of: July 31, 2013 6:17 PM EDT

J. D. B. v. North Carolina

Supreme Court of the United States
March 23, 2011, Argued; June 16, 2011, Decided
No. 09-11121

Reporter: 131 S. Ct. 2394; 180 L. Ed. 2d 310; 2011 U.S. LEXIS 4557; 79 U.S.L.W. 4504; 22 Fla. L. Weekly Fed. S 1135

J. D. B., Petitioner v. NORTH CAROLINA

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [***1] ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

[In re J.D.B., 363 N.C. 664, 686 S.E.2d 135, 2009 N.C. LEXIS 1288 \(2009\)](#)

Disposition: [363 N. C. 664, 686 S. E. 2d 135](#), reversed and remanded.

Core Terms

custody, interrogate, adult, juvenile, confession, custodial interrogation, personal characteristics, reasonable person, clarity, warn, police officer, police questioning, prophylactic, internal quotation marks, arrest, susceptible, the, psychological, coercive, rigid, reasonable-person, involuntary, interview, terminate, suppress, youth, intelligence, safeguards, plurality, would

Case Summary

Procedural Posture

Two juvenile petitions were filed against petitioner student, alleging breaking and entering and larceny. The state trial court denied the student's motion to suppress his statements, and adjudicated him delinquent. The North Carolina Supreme Court upheld the decision. Certiorari was granted to determine whether the Miranda custody analysis includes consideration of a juvenile suspect's age.

Overview

A uniformed police officer removed the 13-year-old, seventh-grade student from his classroom and escorted him to a closed-door conference room, where he was questioned by police for at least half an hour regarding

home break-ins. Prior to the commencement of questioning, the student was not given Miranda warnings. The student confessed. In denying the student's motion to suppress, the state courts found that he was not in custody when he confessed, declining to extend the test for custody to include consideration of the age of an individual subjected to questioning by police. The Supreme Court determined that remand was warranted because a child's age properly informed the Miranda custody analysis since, inter alia, (1) a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go, and courts can account for that reality without doing any damage to the objective nature of the custody analysis, and (2) a child's age differed from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action.

Outcome

The Court reversed the judgment of the North Carolina Supreme Court and remanded for a determination whether the student was in custody under the proper analysis. 5-4 Decision; 1 Dissent.

LexisNexis® Headnotes

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile
Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN1 A child's age properly informs the Miranda custody analysis.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN2 Any police interview of an individual suspected of a crime has coercive aspects to it. Only those interrogations that occur while a suspect is in police custody, however, heighten the risk that statements obtained are not the product of the suspect's free choice.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN3 By its very nature, custodial police interrogation entails “inherently compelling pressures.”

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Notice & Warning
Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver
Evidence > Burdens of Proof > Allocation

HN4 Recognizing that the inherently coercive nature of custodial interrogation blurs the line between voluntary and involuntary statements, the Supreme Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination. Prior to questioning, a suspect must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The four warnings *Miranda* requires are invariable, but the Supreme Court has not dictated the words in which the essential information must be conveyed. And, if a suspect makes a statement during custodial interrogation, the burden is on the Government to show, as a “prerequisite” to the statement’s admissibility as evidence in the Government’s case in chief, that the defendant “voluntarily, knowingly and intelligently” waived his rights.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN5 In the *Miranda* context, because the measures protect the individual against the coercive nature of custodial interrogation, they are required only where there has been such a restriction on a person’s freedom as to render him “in custody.”

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN6 Whether a suspect is “in custody” is an objective inquiry. Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN7 Rather than demarcate a limited set of relevant circumstances, the Supreme Court has required police officers and courts to examine all of the circumstances surrounding the interrogation, including any circumstance that would have affected how a reasonable person in the suspect’s position would perceive his or her freedom to leave. On the other hand, the subjective views har-

bored by either the interrogating officers or the person being questioned are irrelevant. The test, in other words, involves no consideration of the “actual mindset” of the particular suspect subjected to police questioning.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN8 The benefit of the objective custody analysis is that it is designed to give clear guidance to the police. Police must make in-the-moment judgments as to when to administer *Miranda* warnings. By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect’s position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person’s subjective state of mind. Officers are not required to “make guesses” as to circumstances “unknowable” to them at the time. Officers are under no duty to consider contingent psychological factors when deciding when suspects should be advised of their *Miranda* rights.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile
Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN9 In some circumstances, a child’s age would have affected how a reasonable person in the suspect’s position would perceive his or her freedom to leave. That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. Courts can account for that reality without doing any damage to the objective nature of the custody analysis.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile
Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN10 A child’s age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. Such conclusions apply broadly to children as a class.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile
Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN11 No matter how sophisticated, a juvenile subject of police interrogation cannot be compared to an adult subject.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile
Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN12 Even where a “reasonable person” standard otherwise applies, the common law has reflected the reality that children are not adults.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile
Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN13 The Supreme Court’s history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults. In the Miranda context, the Court sees no justification for taking a different course here. So long as the child’s age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances “unknowable” to them, nor to anticipate the frailties or idiosyncrasies of the particular suspect whom they question. The same “wide basis of community experience” that makes it possible, as an objective matter, to determine what is to be expected of children in other contexts likewise makes it possible to know what to expect of children subjected to police questioning.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile
Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN14 A child’s age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person’s understanding of his freedom of action. Alvarado, holds, for instance, that a suspect’s prior interrogation history with law enforcement has no role to play in the custody analysis because such experience could just as easily lead a reasonable person to feel free to walk away as to feel compelled to stay in place. Because the effect in any given case would be contingent on the psychology of the individual suspect, such experience cannot be considered without compromising the objective nature of the custody analysis. A child’s age, however, is different. Precisely because childhood yields objective conclusions like those the Supreme Court has drawn itself--among others, that children are most susceptible to influence and “outside pressures”--considering age in the custody analysis in no way involves a determination of how youth subjectively affects the mindset of any particular child.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation
Education Law > Students > Search & Seizure > Student Confessions

HN15 In the Miranda context, the effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile

ings > Statements of Juvenile
Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN16 The Supreme Court has observed that accounting for a juvenile’s age in the Miranda custody analysis could be viewed as creating a subjective inquiry. The Supreme Court said nothing, however, of whether such a view would be correct under the law.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile
Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN17 So long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child’s age will be a determinative, or even a significant, factor in every case. It is, however, a reality that courts cannot simply ignore.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile
Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN18 Regarding the holding that a child’s age properly informs the Miranda custody analysis, this approach does not undermine the basic principle that an interrogating officer’s unarticulated, internal thoughts are never --in and of themselves--objective circumstances of an interrogation. Unlike a child’s youth, an officer’s purely internal thoughts have no conceivable effect on how a reasonable person in the suspect’s position would understand his freedom of action. Rather than “overturn” that settled principle, the limitation that a child’s age may inform the custody analysis only when known or knowable simply reflects the Supreme Court’s unwillingness to require officers to “make guesses” as to circumstances “unknowable” to them in deciding when to give Miranda warnings.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN19 At least some undeniably personal characteristics--for instance, whether the individual being questioned is blind--are circumstances relevant to the custody analysis.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN20 The whole point of the custody analysis is to determine whether, given the circumstances, a reasonable person would have felt he or she was at liberty to terminate the interrogation and leave. Because the Miranda custody inquiry turns on the mindset of a reasonable person in the suspect’s position, it cannot be the

case that a circumstance is subjective simply because it has an "internal" or "psychological" impact on perception. Were that so, there would be no objective circumstances to consider at all.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN21 Not once has the Supreme Court excluded from the custody analysis a circumstance that the Court determined was relevant and objective, simply to make the fault line between custodial and noncustodial "brighter." Indeed, were the guiding concern clarity and nothing else, the custody test would presumably ask only whether the suspect had been placed under formal arrest. But the Court has rejected that "more easily administered line," recognizing that it would simply enable the police to circumvent the constraints on custodial interrogations established by Miranda.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile
Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation
Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Notice & Warning

HN22 Miranda does not answer the question whether a child's age is an objective circumstance relevant to the custody analysis. Miranda simply holds that warnings must be given once a suspect is in custody, without pausing to inquire in individual cases whether the defendant was aware of his rights without a warning being given. That conclusion says nothing about whether age properly informs whether a child is in custody in the first place. Assessments of the knowledge the defendant possessed, based on information as to age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile
Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation
Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

HN23 The due process voluntariness test permits consideration of a child's age, and it erects its own barrier to admission of a defendant's inculpatory statements at trial. Courts should be instructed to take particular care to ensure that young children's incriminating statements were not obtained involuntarily. But Miranda's procedural safeguards exist precisely because the voluntariness test is an inadequate barrier when custodial interrogation is at stake. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. Reliance on the traditional totality-of-the-circumstances test raises a risk of overlooking an involuntary custodial confession. To hold that a child's age is never relevant to

whether a suspect has been taken into custody--and thus to ignore the very real differences between children and adults--would be to deny children the full scope of the procedural safeguards that Miranda guarantees to adults.

Lawyers' Edition Display

Decision

[**310] Where 13-year-old student confessed to crime during questioning by police at school without receiving Miranda warnings prior to questioning, child's age held to properly inform Miranda custody analysis.

Summary

Procedural posture: Two juvenile petitions were filed against petitioner student, alleging breaking and entering and larceny. The state trial court denied the student's motion to suppress his statements, and adjudicated him delinquent. The North Carolina Supreme Court upheld the decision. Certiorari was granted to determine whether the Miranda custody analysis includes consideration of a juvenile suspect's age.

Overview: A uniformed police officer removed the 13-year-old, seventh-grade student from his classroom and escorted him to a closed-door conference room, where he was questioned by police for at least half an hour regarding home break-ins. Prior to the commencement of questioning, the student was not given Miranda warnings. The student confessed. In denying the student's motion to suppress, the state courts found that he was not in custody when he confessed, declining to extend the test for custody to include consideration of the age of an individual subjected to questioning by police. The Supreme Court determined that remand was warranted because a child's age properly informed the Miranda custody analysis since, inter alia, (1) a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go, and courts can account for that reality without doing any damage to the objective nature of the custody analysis, and (2) a child's age differed from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action.

Outcome: The Court reversed the judgment of the North Carolina Supreme Court and remanded for a determination whether the student was in custody under the proper analysis. 5-4 Decision; 1 Dissent.

Headnotes

WITNESSES §88.5 > MIRANDA RIGHTS -- CUSTODY -- CHILD'S AGE

LEdHN[1] [1]

A child's age properly informs the Miranda custody analysis. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

EVIDENCE §683 WITNESSES §88.5 > POLICE INTERROGATION -- CUSTODY -- STATEMENTS

LEdHN[2] [2]

Any police interview of an individual suspected of a crime has coercive aspects to it. Only those interrogations that occur while a suspect is in police custody, however, heighten the risk that statements obtained are not the product of the suspect's free choice. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > CUSTODIAL POLICE INTERROGATION

LEdHN[3] [3]

By its very nature, custodial police interrogation entails "inherently compelling pressures." (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

EVIDENCE §683 WITNESSES §88.5 WITNESSES §94.5 > MIRANDA RIGHTS -- WAIVER -- STATEMENTS

LEdHN[4] [4]

Recognizing that the inherently coercive nature of custodial interrogation blurs the line between voluntary and involuntary statements, the Supreme Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination. Prior to questioning, a suspect must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The four warnings *Miranda* requires are invariable, but the Supreme Court has not dictated the words in which the essential information must be conveyed. And, if a suspect makes a statement during custodial interrogation, the burden is on the Government to show, as a "prerequisite" to the statement's admissibility as evidence in the Government's case in chief, that the defendant "voluntarily, knowingly and intelligently" waived his rights. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > MIRANDA RIGHTS -- CUSTODY REQUIREMENT

LEdHN[5] [5]

In the *Miranda* context, because the measures protect the individual against the coercive nature of custodial interrogation, they are required only where there has been such a restriction on a person's freedom as to render him "in custody." (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > CUSTODY DETERMINATION -- OBJEC-

TIVE TEST

LEdHN[6] [6]

Whether a suspect is "in custody" is an objective inquiry. Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed [**312], the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > CUSTODY DETERMINATION -- TOTALITY OF CIRCUMSTANCES

LEdHN[7] [7]

Rather than demarcate a limited set of relevant circumstances, the Supreme Court has required police officers and courts to examine all of the circumstances surrounding the interrogation, including any circumstance that would have affected how a reasonable person in the suspect's position would perceive his or her freedom to leave. On the other hand, the subjective views harbored by either the interrogating officers or the person being questioned are irrelevant. The test, in other words, involves no consideration of the "actual mindset" of the particular suspect subjected to police questioning. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > MIRANDA RIGHTS -- CUSTODY DETERMINATION -- OBJECTIVE TEST

LEdHN[8] [8]

The benefit of the objective custody analysis is that it is designed to give clear guidance to the police. Police must make in-the-moment judgments as to when to administer *Miranda* warnings. By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind. Officers are not required to "make guesses" as to circumstances "unknownable" to them at the time. Officers are under no duty to consider contingent psychological factors when deciding when suspects should be advised of their *Miranda* rights. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > CUSTODY DETERMINATION -- CHILD'S AGE

LEdHN[9] [9]

In some circumstances, a child's age would have affected how a reasonable person in the suspect's position

would perceive his or her freedom to leave. That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. Courts can account for that reality without doing any damage to the objective nature of the custody analysis. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

MINORS §1 > CHILD'S AGE
LEdHN[10] [10]

A child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. Such conclusions apply broadly to children as a class. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > POLICE INTERROGATION -- JUVENILE SUBJECT
LEdHN[11] [11]

No matter how sophisticated, a juvenile subject of police interrogation cannot be compared to an adult subject. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

MINORS §1 > "REASONABLE PERSON" STANDARD -- CHILDREN
LEdHN[12] [12]

Even where a "reasonable person" standard otherwise applies, the common law has reflected the reality that children are not adults. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > MIRANDA RIGHTS -- CUSTODY DETERMINATION -- CHILD'S AGE
LEdHN[13] [13]

The Supreme Court's history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults. In the Miranda context, the Court sees no justification for taking a different course here. So long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances "unknowable" to them, nor to anticipate the frailties or idiosyncrasies of the particular suspect whom they question. The same "wide basis of community experience" that makes it possible, as an objective matter, to determine what is to be expected of children in other contexts likewise makes it possible to know what to expect of children subjected to police questioning. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > CUSTODY DETERMINATION -- OBJECTIVE TEST -- CHILD'S AGE
LEdHN[14] [14]

A child's age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action. Alvarado, holds, for instance, that a suspect's prior interrogation history with law enforcement has no role to play in the custody analysis because such experience could just as easily lead a reasonable person to feel free to walk away as to feel compelled to stay in place. Because the effect in any given case would be contingent on the psychology of the individual suspect, such experience cannot be considered without compromising the objective nature of the custody analysis. A child's age, however, is different. Precisely because childhood yields objective conclusions like those the Supreme Court has drawn itself--among others, that children are most susceptible to influence and "outside pressures"--considering age in the custody analysis in no way involves a determination of how youth subjectively affects the mindset of any particular child. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > MIRANDA RIGHTS -- QUESTIONING AT SCHOOL
LEdHN[15] [15]

In the Miranda context, the effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > MIRANDA RIGHTS -- CUSTODY -- CHILD'S AGE
LEdHN[16] [16]

The Supreme Court has observed that accounting for a juvenile's age in the Miranda custody analysis could be viewed as creating a subjective inquiry. The Supreme Court said nothing, however, of whether such a view would be correct under the law. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > CUSTODY DETERMINATION -- OBJECTIVE TEST -- CHILD'S AGE
LEdHN[17] [17]

So long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case. It is, however, a reality that courts cannot simply ignore. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > MIRANDA RIGHTS -- CUSTODY DETERMINATION -- CHILD'S AGE
LEdHN[18] [18]

Regarding the holding that a child's age properly informs the Miranda custody analysis, this approach does

not undermine the basic principle that an interrogating officer's unarticulated, internal thoughts are never--in and of themselves--objective circumstances of an interrogation. Unlike a child's youth, an officer's purely internal thoughts have no conceivable effect on how a reasonable person in the suspect's position would understand his freedom of action. Rather than "overturn" that settled principle, the limitation that a child's age may inform the custody analysis only when known or knowable simply reflects the Supreme Court's unwillingness to require officers to "make guesses" as to circumstances "unknowable" to them in deciding when to give Miranda warnings. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > CUSTODY DETERMINATION -- PERSONAL CHARACTERISTICS
LEdHN[19] [19]

At least some undeniably personal characteristics--for instance, whether the individual being questioned is blind--are circumstances relevant to the custody analysis. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > MIRANDA RIGHTS -- CUSTODY DETERMINATION -- REASONABLE PERSON
LEdHN[20] [20]

The whole point of the custody analysis is to determine whether, given the circumstances, a reasonable person would have felt he or she was at liberty to terminate the interrogation and leave. Because the Miranda custody inquiry turns on the mindset of a reasonable person in the suspect's position, it cannot be the case that a circumstance is subjective simply because it has an "internal" or "psychological" impact on perception. Were that so, there would be no objective circumstances to consider at all. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > MIRANDA RIGHTS -- CUSTODY DETERMINATION
LEdHN[21] [21]

Not once has the Supreme Court excluded from the custody analysis a circumstance that the Court determined was relevant and objective, simply to make the fault line between custodial and noncustodial "brighter." Indeed, were the guiding concern clarity and nothing else, the custody test would presumably ask only whether the suspect had been placed under formal arrest. But the Court has rejected that "more easily administered line," recognizing that it would simply enable the police **[**315]** to circumvent the constraints on custodial interrogations established by Miranda. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

WITNESSES §88.5 > MIRANDA RIGHTS -- CUSTODY DETERMINATION -- CHILD'S AGE
LEdHN[22] [22]

Miranda does not answer the question whether a child's age is an objective circumstance relevant to the custody analysis. Miranda simply holds that warnings must be given once a suspect is in custody, without pausing to inquire in individual cases whether the defendant was aware of his rights without a warning being given. That conclusion says nothing about whether age properly informs whether a child is in custody in the first place. Assessments of the knowledge the defendant possessed, based on information as to age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

EVIDENCE §683 WITNESSES §88.5 > MIRANDA RIGHTS -- VOLUNTARINESS TEST -- CHILD'S AGE
LEdHN[23] [23]

The due process voluntariness test permits consideration of a child's age, and it erects its own barrier to admission of a defendant's inculpatory statements at trial. Courts should be instructed to take particular care to ensure that young children's incriminating statements were not obtained involuntarily. But Miranda's procedural safeguards exist precisely because the voluntariness test is an inadequate barrier when custodial interrogation is at stake. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. Reliance on the traditional totality-of-the-circumstances test raises a risk of overlooking an involuntary custodial confession. To hold that a child's age is never relevant to whether a suspect has been taken into custody--and thus to ignore the very real differences between children and adults--would be to deny children the full scope of the procedural safeguards that Miranda guarantees to adults. (Sotomayor, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ.)

Syllabus

[*2396] **[**316]** Police stopped and questioned petitioner J. D. B., a 13-year-old, seventh-grade student, upon seeing him near the site of two home break-ins. Five days later, after a digital camera matching one of the stolen items was found at J. D. B.'s school and seen in his possession, Investigator DiCostanzo went to the school. A uniformed police officer on detail to the school took J. D. B. from his classroom to a closed-door conference room, where police and school administrators questioned him for at least 30 minutes. Before beginning, they did not give him *Miranda* warnings or the opportunity to call his grandmother, his legal guardian, nor tell him he was free to leave the room. He first denied his involvement, but later confessed after officials urged him to tell the truth and told him about the prospect of juvenile detention. DiCostanzo only then told him that he could refuse to answer questions and was free

to leave. Asked whether he understood, J. D. B. nodded and provided further detail, including the location of the stolen items. He also wrote a statement, at DiCostanzo's [***2] request. When the school day ended, he was permitted to leave to catch the bus home. Two juvenile petitions were filed against J. D. B., charging him with breaking and entering and with larceny. His public defender moved to suppress his statements and the evidence derived therefrom, arguing that J. D. B. had been interrogated in a custodial setting without being afforded *Miranda* warnings and that his statements were involuntary. The trial court denied the motion. J. D. B. entered a transcript of admission to the charges, but renewed his objection to the denial of his motion to suppress. The court adjudicated him delinquent, and the North Carolina Court of Appeals and State Supreme Court affirmed. The latter court declined to find J. D. B.'s age relevant to the determination whether he was in police custody.

Held:

A child's age properly informs *Miranda*'s custody analysis. Pp. ___ - ___, 180 L. Ed. 2d, at 321-329.

(a) Custodial police interrogation entails "inherently compelling pressures," *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694, that "can induce [*2397] a frighteningly [**317] high percentage of people to confess to crimes they never committed," *Coreley v. United States*, 556 U.S. 303, 321, 129 S. Ct. 1558, 173 L. Ed. 2d 443, 458. Recent studies suggest that risk is all the [***3] more acute when the subject of custodial interrogation is a juvenile. Whether a suspect is "in custody" for *Miranda* purposes is an objective determination involving two discrete inquiries: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (footnote omitted). The police and courts must "examine all of the circumstances surrounding the interrogation," *Stansbury v. California*, 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L. Ed. 2d 293, including those that "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave," *id.*, at 325, 114 S. Ct. 1526, 128 L. Ed. 2d 293. However, the test involves no consideration of the particular suspect's "actual mindset." *Yarborough v. Alvarado*, 541 U.S. 652, 667, 124 S. Ct. 2140, 158 L. Ed. 2d 938. By limiting analysis to objective circumstances, the test avoids burdening police with the task of anticipating each suspect's idiosyncrasies and divining how those particular traits affect that suspect's subjective state of mind. *Berkemer v. McCarty*, 468 U.S. 420, 430-431, 104 S. Ct. 3138, 82 L. Ed. 2d 317. Pp. ___ - ___, 180 L. Ed. 2d, at 321-323.

(b) In some circumstances, a child's age [***4] "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." *Stansbury*, 511 U.S., at 325, 114 S. Ct. 1526, 128 L. Ed. 2d 293. Courts can account for that reality without doing any damage to the objective nature of the custody analysis. A child's age is far "more than a chronological fact." *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1. It is a fact that "generates commonsense conclusions about behavior and perception," *Alvarado*, 541 U.S., at 674, 124 S. Ct. 2140, 158 L. Ed. 2d 938, that apply broadly to children as a class. Children "generally are less mature and responsible than adults," *Eddings*, 455 U.S., at 115, 102 S. Ct. 869, 71 L. Ed. 2d 1; they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S. Ct. 3035, 61 L. Ed. 2d 797; and they "are more vulnerable or susceptible to . . . outside pressures" than adults, *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1. In the specific context of police interrogation, events that "would leave a man cold and unimpressed can overawe and overwhelm a" teen. *Haley v. Ohio*, 332 U.S. 596, 599, 68 S. Ct. 302, 92 L. Ed. 224. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess [***5] only an incomplete ability to understand the world around them. Legal disqualifications on children as a class--e.g., limitations on their ability to marry without parental consent--exhibit the settled understanding that the differentiating characteristics of youth are universal.

Given a history "replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults, *Eddings*, 455 U.S., at 115-116, 102 S. Ct. 869, 71 L. Ed. 2d 1, there is [***318] no justification for taking a different course here. So long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to a reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances "unknownable" to them, *Berkemer*, 468 U.S., at 430, 104 S. Ct. 3138, 82 L. Ed. 2d 317, nor to "'anticipat[e] the frailties or idiosyncrasies? [*2398] of the particular suspect being questioned.'" ' ' *Alvarado*, 541 U.S., at 662, 124 S. Ct. 2140, 158 L. Ed. 2d 938. Precisely because childhood yields objective conclusions, considering age in the custody analysis does not involve a determination of how youth affects a particular child's subjective state of mind. In fact, were the court precluded from taking J. D. B.'s youth into account, [***6] it would be forced to evaluate the circumstances here through the eyes of a reasonable adult, when some objective circumstances surrounding an interrogation at school are specific to children. These conclusions are not undermined by the Court's observation in *Alvarado* that accounting for a juvenile's age in the *Miranda* custody analysis "could be

viewed as creating a subjective inquiry,” [541 U.S., at 668, 124 S. Ct. 2140, 158 L. Ed. 2d 938](#). The Court said nothing about whether such a view would be correct under the law or whether it simply merited deference under the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214. So long as the child’s age was known to the officer, or would have been objectively apparent to a reasonable officer, including age in the custody analysis is consistent with the *Miranda* test’s objective nature. This does not mean that a child’s age will be a determinative, or even a significant, factor in every case, but it is a reality that courts cannot ignore. Pp. ___ - ___, [180 L. Ed. 2d, at 323-327](#).

(c) Additional arguments that the State and its *amici* offer for excluding age from the custody inquiry are unpersuasive. Pp. ___ - ___, [180 L. Ed. 2d, at 327-329](#).

(d) On remand, the state courts are to address the question whether J. D. B. was in custody [***7] when he was interrogated, taking account of all of the relevant circumstances of the interrogation, including J. D. B.’s age at the time. P. ___, [180 L. Ed. 2d, at 329](#).

[363 N. C. 664, 686 S. E. 2d 135](#), reversed and remanded.

Counsel: Barbara S. Blackman argued the cause for petitioner.

Roy Cooper argued the cause for respondent.

Eric J. Feigin argued the cause for the United States, as amicus curiae, by special leave of court.

Judges: Sotomayor, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Kagan, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Scalia and Thomas, JJ., joined.

Opinion by: SOTOMAYOR

Opinion

Justice **Sotomayor** delivered the opinion of the Court.

This case presents the question whether the age of a child subjected to police questioning is relevant to the custody analysis of [Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 \(1966\)](#). It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances [*2399] would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that [*319] commonsense reality, we hold that

HNI LEdHN[1] [1] a child’s age properly informs the *Miranda* custody analysis.

I

A

Petitioner J. D. B. was a 13-year-old, seventh-grade student attending class at Smith Middle School in Chapel Hill, North Carolina when he was removed from his classroom by a uniformed police officer, escorted to a closed-door conference [***8] room, and questioned by police for at least half an hour.

This was the second time that police questioned J. D. B. in the span of a week. Five days earlier, two home break-ins occurred, and various items were stolen. Police stopped and questioned J. D. B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police also spoke to J. D. B.’s grandmother--his legal guardian--as well as his aunt.

Police later learned that a digital camera matching the description of one of the stolen items had been found at J. D. B.’s middle school and seen in J. D. B.’s possession. Investigator DiCostanzo, the juvenile investigator with the local police force who had been assigned to the case, went to the school to question J. D. B. Upon arrival, DiCostanzo informed the uniformed police officer on detail to the school (a so-called school resource officer), the assistant principal, and an administrative intern that he was there to question J. D. B. about the break-ins. Although DiCostanzo asked the school administrators to verify J. D. B.’s date of birth, address, and parent contact information from school records, neither the police officers nor the school [***9] administrators contacted J. D. B.’s grandmother.

The uniformed officer interrupted J. D. B.’s afternoon social studies class, removed J. D. B. from the classroom, and escorted him to a school conference room.¹ There, J. D. B. was met by DiCostanzo, the assistant principal, and the administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J. D. B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J. D. B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room.

Questioning began with small talk--discussion of sports and J. D. B.’s family life. DiCostanzo asked, and J. D. B. agreed, to discuss the events of the prior weekend. Denying any wrongdoing, J. [***10] D. B. explained that he

¹ Although the State suggests that the “record is unclear as to who brought J. D. B. to the conference room, and the trial court made no factual findings on this specific point,” Brief for Respondent 3, n. 1, the State agreed at the certiorari stage that “the SRO [school resource officer] escorted petitioner” to the room, Brief in Opposition 3.

had been in the neighborhood where the crimes occurred because he was seeking work mowing lawns. DiCostanzo pressed J. D. B. for additional detail about his efforts to obtain work; asked J. D. B. to explain a prior incident, when one of the victims returned home to find J. D. B. behind her house; and confronted J. D. B. with the stolen camera. The assistant principal urged J. D. B. to “do the right thing,” warning J. D. B. that “the truth always comes out in the end.” App. 99a, 112a.

[**320] Eventually, J. D. B. asked whether he would “still be in trouble” if he returned the “stuff.” *Ibid.* In response, DiCostanzo explained that return of the stolen items would be helpful, but “this thing is going [*2400] to court” regardless. *Id.*, at 112a; *ibid.* (“[W]hat’s done is done[;] now you need to help yourself by making it right”); see also *id.*, at 99a. DiCostanzo then warned that he may need to seek a secure custody order if he believed that J. D. B. would continue to break into other homes. When J. D. B. asked what a secure custody order was, DiCostanzo explained that “it’s where you get sent to juvenile detention before court.” *Id.*, at 112a.

After learning of the prospect of juvenile [***11] detention, J. D. B. confessed that he and a friend were responsible for the break-ins. DiCostanzo only then informed J. D. B. that he could refuse to answer the investigator’s questions and that he was free to leave.² Asked whether he understood, J. D. B. nodded and provided further detail, including information about the location of the stolen items. Eventually J. D. B. wrote a statement, at DiCostanzo’s request. When the bell rang indicating the end of the schoolday, J. D. B. was allowed to leave to catch the bus home.

B

Two juvenile petitions were filed against J. D. B., each alleging one count of breaking and entering and one count of larceny. J. D. B.’s public defender moved to suppress his statements and the evidence derived therefrom, arguing that suppression was necessary because J. D. B. had been “interrogated by police in a custodial setting without being afforded *Miranda* warning[s],” App. 89a, and because his statements were involuntary un-

der the totality of the circumstances test, *id.*, at 142a; see [Schneckloth v. Bustamonte](#), 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (due process precludes admission of a confession where “a defendant’s will was overborne” by the circumstances of the interrogation). After a suppression hearing at which DiCostanzo [***13] and J. D. B. testified, the trial court denied the motion, deciding that J. D. B. was not in custody at the time of the schoolhouse interrogation and that his statements were voluntary. As a result, J. D. B. entered a transcript of admission to all four counts, renewing his objection to the denial of his motion to suppress, and the court adjudicated J. D. B. delinquent.

A divided panel of the North Carolina Court of Appeals affirmed. [In re J. D. B.](#), 196 N. C. App. 234, 674 S. E. 2d 795 (2009). The North Carolina Supreme Court held, over two dissents, that J. D. B. was not in custody when he confessed, “declin[ing] [**321] to extend the test for custody to include consideration of the age . . . of an individual subjected to questioning by police.” [In re J. D. B.](#), 363 N. C. 664, 672, 686 S. E. 2d 135, 140 (2009).³

[*2401] We granted certiorari to determine whether the *Miranda* custody [***14] analysis includes consideration of a juvenile suspect’s age. [562 U.S.](#), [131 S. Ct. 502](#), [178 L. Ed. 2d 368](#) (2010).

II

A

HN2 LEdHN[2] [2] Any police interview of an individual suspected of a crime has “coercive aspects to it.” [Oregon v. Mathiason](#), 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) (*per curiam*). Only those interrogations that occur while a suspect is in police custody, however, “heighte[n] the risk” that statements obtained are not the product of the suspect’s free choice. [Dickerson v. United States](#), 530 U.S. 428, 435, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

HN3 LEdHN[3] [3] By its very nature, custodial police interrogation entails “inherently compelling pressures.”

² The North Carolina Supreme Court noted that the trial court’s factual findings were “uncontested and therefore . . . binding” on it. [In re J. D. B.](#), 363 N. C. 664, 668, 686 S. E. 2d 135, 137 (2009). The court described the sequence of events set forth in the text. See *id.*, at 670-671, 686 S. E. 2d, at 139. (“Immediately following J. D. B.’s initial confession, Investigator DiCostanzo informed J. D. B. that he did not have to speak with him and that he was free to leave” (internal quotation marks and alterations omitted)). Though less than perfectly explicit, the trial court’s order indicates a finding that J. D. B. initially confessed prior to DiCostanzo’s warnings. [***12] See App. 99a.

Nonetheless, both parties’ submissions to this Court suggest that the warnings came after DiCostanzo raised the possibility of a secure custody order but before J. D. B. confessed for the first time. See Brief for Petitioner 5; Brief for Respondent 5. Because we remand for a determination whether J. D. B. was in custody under the proper analysis, the state courts remain free to revisit whether the trial court made a conclusive finding of fact in this respect.

³ J. D. B.’s challenge in the North Carolina Supreme Court focused on the lower courts’ conclusion that he was not in custody for purposes of [Miranda v. Arizona](#), 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The North Carolina Supreme Court did not address the trial court’s holding that the statements were voluntary, and that question is not before us.

Miranda, 384 U.S., at 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694. Even for an adult, the physical and psychological isolation of custodial interrogation can “undermine the individual’s will to resist and . . . compel him to speak where he would not otherwise do so freely.” *Ibid*. Indeed, the pressure of custodial interrogation is so immense that it “can induce a frighteningly high percentage of people to confess to crimes they never committed.” *Corley v. United States*, 556 U.S. 303, 321, 129 S. Ct. 1558, 173 L. Ed. 2d 443, 458 (2009) (citing Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N. C. L. Rev. 891, 906-907 (2004)); see also *Miranda*, 384 U.S., at 455, n. 23, 86 S. Ct. 1602, 16 L. Ed. 2d 694. That [***15] risk is all the more troubling--and recent studies suggest, all the more acute--when the subject of custodial interrogation is a juvenile. See Brief for Center on Wrongful Convictions of Youth et al. as *Amici Curiae* 21-22 (collecting empirical studies that “illustrate the heightened risk of false confessions from youth”).

HN4 LEdHN[4] [4] Recognizing that the inherently coercive nature of custodial interrogation “blurs the line between voluntary and involuntary statements,” *Dickerson*, 530 U.S., at 435, 120 S. Ct. 2326, 147 L. Ed. 2d 405, this Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination. Prior to questioning, a suspect “must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” 384 U.S., at 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694; see also *Florida v. Powell*, 559 U.S. , , 130 S. Ct. 1195, 175 L. Ed. 2d 1009, 1018 (2010) (“The four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed”). And, if a suspect makes a statement during custodial interrogation, the burden is on [***16] the Government to show, as a “prerequisite[e]” to the statement’s admissibility as evidence [**322] in the Government’s case in chief, that the defendant “voluntarily, knowingly and intelligently” waived his rights.⁴ *Miranda*, 384 U.S., at 444, 475-476, 86 S. Ct. 1602, 16 L. Ed. 2d 694; *Dickerson*, 530 U.S., at 443-444, 120 S. Ct. 2326, 147 L. Ed. 2d 405.

[*2402] **HN5 LEdHN[5]** [5] Because these measures protect the individual against the coercive nature of custodial interrogation, they are required “only where there has been such a restriction on a person’s freedom as to render him “in custody.” ’ ’ *Stansbury v. California*, 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) (*per curiam*) (quoting *Oregon v. Mathiason*,

429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) (*per curiam*)). As we have repeatedly emphasized, **HN6 LEdHN[6]** [6] whether a suspect is “in custody” is an objective inquiry.

“Two discrete inquiries are essential to the determination: first, what were the circumstances [***17] surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.” *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995) (internal quotation marks, alteration, and footnote omitted).

See also *Yarborough v. Alvarado*, 541 U.S. 652, 662-663, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004); *Stansbury*, 511 U.S., at 323, 114 S. Ct. 1526, 128 L. Ed. 2d 293; *Berkemer v. McCarty*, 468 U.S. 420, 442, and n. 35, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). **HN7 LEdHN[7]** [7] Rather than demarcate a limited set of relevant circumstances, we have required police officers and courts to “examine all of the circumstances surrounding the interrogation,” *Stansbury*, 511 U.S., at 322, 114 S. Ct. 1526, 128 L. Ed. 2d 293, including any circumstance that “would have affected how a reasonable person” in the suspect’s position “would perceive his or her freedom to leave,” *id.*, at 325, 114 S. Ct. 1526, 128 L. Ed. 2d 293. On the other hand, the “subjective views harbored by either the interrogating officers or the person being questioned” are irrelevant. *Id.*, at 323, 114 S. Ct. 1526, 128 L. Ed. 2d 293. [***18] The test, in other words, involves no consideration of the “actual mindset” of the particular suspect subjected to police questioning. *Alvarado*, 541 U.S., at 667, 124 S. Ct. 2140, 158 L. Ed. 2d 938; see also *California v. Beheler*, 463 U.S. 1121, 1125, n. 3, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (*per curiam*).

HN8 LEdHN[8] [8] The benefit of the objective custody analysis is that it is “designed to give clear guidance to the police.” *Alvarado*, 541 U.S., at 668, 124 S. Ct. 2140, 158 L. Ed. 2d 938. But see *Berkemer*, 468 U.S., at 441, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (recognizing the “occasional . . . difficulty” that police and courts nonetheless have in “deciding exactly when a suspect has been taken into custody”). Police must make in-the-

⁴ *Amici* on behalf of J. D. B. question whether children of all ages can comprehend *Miranda* warnings and suggest that additional procedural safeguards may be necessary to protect their *Miranda* rights. Brief for Juvenile Law Center et al. as *Amici Curiae* 13-14, n. 7. Whatever the merit of that contention, it has no relevance here, where no *Miranda* warnings were administered at all.

moment judgments as to [**323] when to administer *Miranda* warnings. By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind. See *id.*, at 430-431, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (officers are not required to "make guesses" as to circumstances "unknowable" to them at the time); *Alvarado*, 541 U.S., at 668, 124 S. Ct. 2140, 158 L. Ed. 2d 938 [***19] (officers are under no duty "to consider . . . contingent psychological factors when deciding when suspects should be advised of their *Miranda* rights").

B

The State and its *amici* contend that a child's age has no place in the custody analysis, no matter how young the child subjected to police questioning. We cannot agree. *HN9 LEdHN[9]* [9] In some circumstances, a [**2403] child's age "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." *Stansbury*, 511 U.S., at 325, 114 S. Ct. 1526, 128 L. Ed. 2d 293. That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.

HN10 LEdHN[10] [10] A child's age is far "more than a chronological fact." *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); accord, *Gall v. United States*, 552 U.S. 38, 58, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993). It is a fact that "generates common-sense conclusions about behavior and perception." *Alvarado*, 541 U.S., at 674, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (Breyer, J., dissenting). Such conclusions apply broadly to [***20] children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

Time and again, this Court has drawn these common-sense conclusions for itself. We have observed that children "generally are less mature and responsible than adults," *Eddings*, 455 U.S., at 115-116, 102 S. Ct. 869, 71 L. Ed. 2d 1; that they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979) (plurality opinion); that they "are more vulnerable or susceptible to . . . outside pressures" than adults, *Roper*, 543 U.S., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1; and so on. See *Graham v. Florida*, 560 U.S. _____, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (finding no reason to "reconsider" these observations about the common "nature of juveniles"). Addressing the specific context of police interrogation, we have observed that events that "would leave a man cold and unimpressed can overwhelm and overwhelm a lad in his early teens." *Haley v. Ohio*, 332 U.S. 596, 599, 68 S. Ct. 302, 92 L. Ed. 224 (1948) (plurality opinion); see also *Gallegos v. Colorado*, 370 U.S. 49, 54, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962) [**324] (*HN11 LEdHN[11]* [11] "[N]o matter how sophisticated," a juvenile subject of police interrogation "cannot be compared" [***21] to an adult subject). Describing no one child in particular, these observations restate what "any parent knows"--indeed, what any person knows--about children generally. *Roper*, 543 U.S., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1.⁵

Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. See, e.g., 1 W. Blackstone, Commentaries on the Laws of England *464-*465 (hereinafter Blackstone) (explaining that limits on children's legal capacity under the common law "secure them from hurting themselves by their own improvident acts"). Like this Court's own generalizations, the legal disqualifications placed on children as a class--e.g., limitations [***22] on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent--exhibit the settled [**2404] understanding that the differentiating characteristics of youth are universal.⁶

Indeed, *HN12 LEdHN[12]* [12] even where a "reason-

⁵ Although citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions, the literature confirms what experience bears out. See, e.g., *Graham v. Florida*, 560 U.S. _____, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds").

⁶ See, e.g., 1 E. Farnsworth, Contracts § 4.4, p. 379, and n. 1 (1990) ("Common law courts early announced the prevailing view that a minor's contract is 'voidable' at the instance of the minor" (citing 8 W. Holdsworth, History of English Law 51 (1926))); 1 D. Kramer, Legal Rights of Children § 8.1, p. 663 (rev. 2d ed. 2005) ("[W]hile minor children have the right to acquire and own property, they are considered incapable of property management" (footnote omitted)); 2 J. Kent, Commentaries on American Law *78-*79, *90 (G. Comstock ed., 11th ed. 1867); see generally *id.*, at *233 (explaining that, under the common law, "[t]he necessity of guardians results from the inability of infants to take care of themselves . . . and this inability continues, in contemplation of law, until the infant has attained the age of [21]"); 1 Blackstone *465 ("It is generally true, that an infant can neither

able person” standard otherwise applies, the common law has reflected the reality that children are not adults. In negligence suits, for instance, where liability turns on what an objectively reasonable person would do in the circumstances, “[a]ll American jurisdictions accept the idea that a person’s childhood is a relevant circumstance” to be considered. Restatement (Third) of Torts § 10, *Comment b*, p. 117 (2005); see also *id.*, Reporters’ Note, pp. 121-122 (collecting cases); *Restatement (Second) of Torts § 283A, Comment b*, p. 15 (1963-1964) (“[T]here is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of [children]”).

As this discussion establishes, *HN13 LEdHN[13]* [13] “[o]ur history is replete with laws and judicial recognition” that children cannot be viewed simply as miniature adults. *Eddings*, 455 U.S., at 115-116, 102 S. Ct. 869, 71 L. Ed. 2d 1. [***24] We see no justification for taking a different course here. So long as the child’s age [***325] was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances “unknowable” to them, *Berkemer*, 468 U.S., at 430, 104 S. Ct. 3138, 82 L. Ed. 2d 317, nor to “anticipat[e] the frailties or idiosyncrasies” of the particular suspect whom they question, *Alvarado*, 541 U.S., at 662, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (internal quotation marks omitted). The same “wide basis of community experience” that makes it possible, as an objective matter, “to determine what is to be expected” of children in other contexts, *Restatement (Second) of Torts § 283A*, at 15; see *supra*, at ___, 180 L. Ed. 2d, at 324, and n. 6, likewise makes it possible to know what to expect of children subjected to police questioning.

HN14 LEdHN[14] [14] In other words, a child’s age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person’s understanding of his freedom of action. *Alvarado*, holds, for instance, that a suspect’s prior interrogation history with law enforcement has no role to play in the custody analysis [***25] because such experience could just as easily lead a reasonable person to feel free to walk away as to feel compelled to stay in place. *541 U.S., at 668, 124 S. Ct. 2140, 158 L. Ed. 2d 938*. Because the effect in any given case would be “contingent [on the] psycholog[y]” of

the individual suspect, the Court explained, such experience cannot be considered without compromising the objective nature of the custody analysis. *Ibid.* A child’s age, however, is different. Precisely because childhood yields objective conclusions like those we [***2405] have drawn ourselves--among others, that children are “most susceptible to influence,” *Eddings*, 455 U.S., at 115, 102 S. Ct. 869, 71 L. Ed. 2d 1, and “outside pressures,” *Roper*, 543 U.S., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 --considering age in the custody analysis in no way involves a determination of how youth “subjectively affect[s] the mindset” of any particular child, Brief for Respondent 14.⁷

In fact, in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect’s age. This case is a prime example. Were the court precluded from taking J. D. B.’s youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer; being encouraged by his assistant principal to “do the right thing”; and being warned by a police investigator of the prospect of juvenile detention and separation from his guardian and primary caretaker? To describe such an inquiry is to demonstrate its absurdity. Neither officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without [***326] accounting for the age of the child subjected to those circumstances.

Indeed, although the dissent suggests that concerns “regarding the application of the *Miranda* custody rule to minors can be accommodated by considering the unique circumstances [***27] present when minors are questioned in school,” *post*, at ___, 180 L. Ed. 2d, at 339 (opinion of Alito, J.), *HN15 LEdHN[15]* [15] the effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned. A student--whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action--is in a far different position than, say, a parent volunteer on school grounds to chaperone an event, or an adult from the community on school grounds to attend a basketball game. Without asking whether the person “questioned in school” is a “minor,” *ibid.*, the coercive effect of the schoolhouse setting is unknowable.

aliene his lands, nor do any legal act, nor make a deed, nor indeed any manner [***23] of contract, that will bind him”); *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (“In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent”).

⁷ Thus, contrary to the dissent’s protestations, today’s holding neither invites consideration of whether a particular suspect is “unusually meek or compliant,” *post*, at ___, 180 L. Ed. 2d, at 335 (opinion of Alito, J.), nor “expans[ds]” the *Miranda* custody analysis, *post*, at ___, 180 L. Ed. 2d, at 334, into a test that requires officers to anticipate and account for a suspect’s every personal characteristic, [***26] see *post*, at ___, 180 L. Ed. 2d, at 335-336.

Our prior decision in *Alvarado* in no way undermines these conclusions. In that case, we held that a state-court decision that failed to mention a 17-year-old's age as part of the *Miranda* custody analysis was not objectively unreasonable under the deferential standard of review set forth by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. Like the North Carolina Supreme Court here, see [363 N. C., at 672, 686 S. E. 2d, at 140, HN16 LEdHN\[16\]](#) [16] we observed that accounting for a juvenile's age in the *Miranda* custody analysis "could be viewed as creating [***28] a subjective inquiry," [541 U.S., at 668, 124 S. Ct. 2140, 158 L. Ed. 2d 938](#). We said nothing, however, of whether such a view would be correct under the law. Cf. [Renico v. Lett, 559 U.S. _____, n. 3, 130 S. Ct. 1855, 176 L. Ed. 2d 678 \(2010\)](#) ("[W]hether the [state court] was right or wrong is not the pertinent question under AEDPA"). To the contrary, Justice O'Connor's concurring opinion explained that a suspect's age may indeed "be relevant to the 'custody' inquiry." [Alvarado, 541 U.S., at 669, 124 S. Ct. 2140, 158 L. Ed. 2d 938](#).

[*2406] Reviewing the question *de novo* today, we hold that [HN17 LEdHN\[17\]](#) [17] so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.⁸ This is not to say that a child's age will be a determinative, or even a significant, factor in every case. Cf. *ibid.* (O'Connor, J., concurring) (explaining that a state-court decision omitting any mention of the defendant's age was not unreasonable under AEDPA's deferential standard of review where the defendant "was almost 18 years old at the time of his [***327] interview"); [post, at _____, 180 L. Ed. 2d, at 339](#) (suggesting that "teenagers nearing the age of majority" are likely [***29] to react to an interrogation as would a "typical 18-year-old in similar circumstances"). It is, however, a reality that courts cannot simply ignore.

III

The State and its *amici* offer numerous reasons that courts must blind themselves to a juvenile defendant's age. None is persuasive.

To start, the State contends that a child's [***30] age must be excluded from the custody inquiry because age is a personal characteristic specific to the suspect himself rather than an "external" circumstance of the interrogation. Brief for Respondent 21; see also *id.*, at 18-19 (distinguishing "personal characteristics" from "objective facts related to the interrogation itself" such as the location and duration of the interrogation). Despite the supposed significance of this distinction, however, at oral argument counsel for the State suggested without hesitation that [HN19 LEdHN\[19\]](#) [19] at least some undeniably personal characteristics--for instance, whether the individual being questioned is blind--are circumstances relevant to the custody analysis. See Tr. of Oral Arg. 41. Thus, the State's quarrel cannot be that age is a personal characteristic, without more.⁹

The State further argues that age is irrelevant to the custody analysis because it "go[es] to how a suspect may internalize and perceive the circumstances of an interrogation." Brief for Respondent 12; see also Brief for United States as *Amicus Curiae* 21 (hereinafter U. S. Brief) (arguing that a child's age has no place in the custody analysis because it goes to whether a suspect is "particularly susceptible" to the external circumstances of the interrogation (some internal quotation marks omitted)). But the same can be said of every objective circumstance that the [*2407] State agrees is relevant to the custody analysis: Each circumstance goes to how a reasonable person would "internalize and perceive" every other. See, e.g., [Stansbury, 511 U.S., at 325, 114 S. Ct. 1526, 128 L. Ed. 2d 293](#). Indeed, this is the very reason that we ask whether the objective circumstances "add up to custody," [Keohane, 516 U.S., at 113, 116 S. Ct. 457, 133 L. Ed. 2d 383](#), instead of evaluating the circumstances one by one.

In the same vein, the State and its *amici* protest that the "effect of . . . age on [the] perception of custody is internal," Brief for Respondent 20, or "psychological," U. S. Brief 21. [HN20 LEdHN\[20\]](#) [20] But the whole point of the custody analysis [***32] is to determine whether, given the circumstances, "a reasonable person [would] have felt he or she was . . . at liberty to terminate the interrogation and leave." [Keohane, 516 U.S., at 112, 116](#)

⁸ [HN18 LEdHN\[18\]](#) [18] This approach does not undermine the basic principle that an interrogating officer's unarticulated, internal thoughts are never--in and of themselves--objective circumstances of an interrogation. See [supra, at _____, 180 L. Ed. 2d, at 322; Stansbury v. California, 511 U.S. 318, 323, 114 S. Ct. 1526, 128 L. Ed. 2d 293 \(1994\)](#) (*per curiam*). Unlike a child's youth, an officer's purely internal thoughts have no conceivable effect on how a reasonable person in the suspect's position would understand his freedom of action. See [id., at 323-325, 114 S. Ct. 1526, 128 L. Ed. 2d 293; Berkemer v. McCarty, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L. Ed. 2d 317 \(1984\)](#). Rather than "overtur[n]" that settled principle, [post, at _____, 180 L. Ed. 2d, at 337](#), the limitation that a child's age may inform the custody analysis only when known or knowable simply reflects our unwillingness to require officers to "make guesses" as to circumstances "unknowable" to them in deciding when to give *Miranda* warnings, [Berkemer, 468 U.S., at 430-431, 104 S. Ct. 3138, 82 L. Ed. 2d 317](#).

⁹ The State's purported distinction between blindness and age--that taking account of a suspect's youth requires a court "to get into the mind" of the child, whereas taking account of a suspect's blindness does not, Tr. of Oral Arg. 41-42--is mistaken. In either case, the question becomes how a reasonable person would understand the circumstances, either from the perspective of a blind [***31] person or, as here, a 13-year-old child.

S. Ct. 457, 133 L. Ed. 2d 383. Because the *Miranda* custody inquiry turns on the mindset of a reasonable person in the suspect's position, it cannot be the case that a circumstance is subjective simply because it has an "internal" or "psychological" impact on perception. Were that so, [***328] there would be no objective circumstances to consider at all.

Relying on our statements that the objective custody test is "designed to give clear guidance to the police," *Alva-rado*, 541 U.S., at 668, 124 S. Ct. 2140, 158 L. Ed. 2d 938, the State next argues that a child's age must be excluded from the analysis in order to preserve clarity. Similarly, the dissent insists that the clarity of the custody analysis will be destroyed unless a "one-size-fits-all reasonable-person test" applies. *Post*, at _____, 180 L. Ed. 2d, at 337. In reality, however, ignoring a juvenile defendant's age will often make the inquiry more artificial, see *supra*, at _____, 180 L. Ed. 2d, at 325-326, and thus only add confusion. And in any event, a child's age, when known or apparent, is hardly an obscure factor to assess. Though the State and the dissent worry [***33] about gradations among children of different ages, that concern cannot justify ignoring a child's age altogether. Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age. Indeed, they are competent to do so even though an interrogation room lacks the "reflective atmosphere of a [jury] deliberation room," *post*, at _____, 180 L. Ed. 2d, at 338. The same is true of judges, including those whose childhoods have long since passed, see *post*, at _____, 180 L. Ed. 2d, at 338. In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.

There is, however, an even more fundamental flaw with the State's plea for clarity and the dissent's singular focus on simplifying the analysis: *HN21 LE dHN[21]* [21] Not once have we excluded from the custody analysis a circumstance that we determined was relevant and objective, simply to make the [***34] fault line between custodial and noncustodial "brighter." Indeed, were the guiding concern clarity and nothing else, the custody test would presumably ask only whether the suspect had been placed under formal arrest. *Berkemer*, 468

U.S., at 441, 104 S. Ct. 3138, 82 L. Ed. 2d 317; see *ibid.* (acknowledging the "occasional[ly] . . . difficulty" police officers confront in determining when a suspect has been taken into custody). But we have rejected that "more easily administered line," recognizing that it would simply "enable the police to circumvent the constraints on custodial interrogations established by *Miranda*." *Ibid.*; see also *ibid.*, n. 33.¹⁰

[*2408] Finally, the State and the dissent suggest that excluding age from the custody analysis comes at no cost to [***329] juveniles' constitutional rights because the due process voluntariness test independently accounts for a child's youth. To be sure, *HN23 LE dHN[23]* [23] that test permits consideration of a child's age, and it erects its own barrier to admission of a defendant's inculpatory statements at trial. See *Gallegos*, 370 U.S., at 53-55, 82 S. Ct. 1209, 8 L. Ed. 2d 325; *Haley*, 332 U.S., at 599-601, 68 S. Ct. 302, 92 L. Ed. 234; see also *post*, at _____, 180 L. Ed. 2d, at 340 ("[C]ourts should be instructed to take particular care to ensure that [young children's] incriminating statements were not obtained involuntarily"). But *Miranda*'s procedural safeguards exist precisely because the voluntariness test is an inadequate barrier when custodial interrogation is at stake. See 384 U.S., at 458, 86 S. Ct. 1602, 16 L. Ed. 2d 694 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice"); *Dickerson*, 530 U.S., at 442, 120 S. Ct. 2326, 147 L. Ed. 2d 405 [***36] ("[R]eliance on the traditional totality-of-the-circumstances test raise[s] a risk of overlooking an involuntary custodial confession"); see also *supra*, at _____, 180 L. Ed. 2d, at 321-322. To hold, as the State requests, that a child's age is never relevant to whether a suspect has been taken into custody--and thus to ignore the very real differences between children and adults--would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.

* * *

The question remains whether J. D. B. was in custody when police interrogated him. We remand for the state courts to address that question, this time taking account of all of the relevant circumstances of the interrogation, including J. D. B.'s age at the time. The judgment of the North Carolina Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

¹⁰ Contrary to the dissent's intimation, see *post*, at _____, 180 L. Ed. 2d, at 334 *HN22 LE dHN[22]* [22] *Miranda* does not answer the question whether a child's age is an objective circumstance relevant to the custody analysis. *Miranda* simply holds that warnings must be given once a suspect is in custody, without "paus[ing] to inquire in individual cases whether the defendant was aware of his rights without a warning being given." 384 U.S., at 468, 86 S. Ct. 1602, 16 L. Ed. 2d 694; see also *id.*, at 468-469, 86 S. Ct. 1602, 16 L. Ed. 2d 694 ("Assessments of the knowledge the defendant possessed, based on information as to age, education, intelligence, or prior contact with authorities, can never [***35] be more than speculation; a warning is a clearcut fact" (footnote omitted)). That conclusion says nothing about whether age properly informs whether a child is in custody in the first place.

It is so ordered.

Dissent by: Alito

Dissent

Justice **Alito**, with whom The **Chief Justice**, Justice **Scalia**, and Justice **Thomas** join, dissenting.

The Court's decision in this case may seem on first consideration to be modest and sensible, but in truth it is neither. It is fundamentally inconsistent with one of the main justifications for the *Miranda*¹ rule: the [***37] perceived need for a clear rule that can be easily applied in all cases. And today's holding is not needed to protect the constitutional rights of minors who are questioned by the police.

Miranda's prophylactic regime places a high value on clarity and certainty. Dissatisfied with the highly fact-specific constitutional rule against the admission of involuntary confessions, the *Miranda* [*2409] Court set down rigid standards that often require courts to ignore personal characteristics that may be highly relevant to a particular suspect's actual susceptibility to police pressure. This rigidity, however, has brought with it one of *Miranda*'s principal strengths--"the ease and clarity of its application" by law enforcement officials and courts. See *Moran v. Burbine*, [***330] 475 U.S. 412, 425-426, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). A key contributor to this clarity, at least up until now, has been *Miranda*'s objective reasonable-person test for determining custody.

Miranda's custody requirement is based on the proposition that the risk of unconstitutional coercion is heightened when a suspect is placed under formal arrest or is subjected to some functionally equivalent limitation on freedom [***38] of movement. When this custodial threshold is reached, *Miranda* warnings must precede police questioning. But in the interest of simplicity, the custody analysis considers only whether, under the circumstances, a hypothetical reasonable person would consider himself to be confined.

Many suspects, of course, will differ from this hypothetical reasonable person. Some, including those who have been hardened by past interrogations, may have no need for *Miranda* warnings at all. And for other suspects--those who are unusually sensitive to the pressures of police questioning--*Miranda* warnings may come too late to be of any use. That is a necessary consequence of *Miranda*'s rigid standards, but it does not mean that the constitutional rights of these especially sensitive suspects are left unprotected. A vulnerable defendant can still turn to the constitutional rule against *actual* coercion and contend that that his confession was extracted against his

will.

Today's decision shifts the *Miranda* custody determination from a one-size-fits-all reasonable-person test into an inquiry that must account for at least one individualized characteristic--age--that is thought to correlate with susceptibility [***39] to coercive pressures. Age, however, is in no way the only personal characteristic that may correlate with pliability, and in future cases the Court will be forced to choose between two unpalatable alternatives. It may choose to limit today's decision by arbitrarily distinguishing a suspect's age from other personal characteristics--such as intelligence, education, occupation, or prior experience with law enforcement--that may also correlate with susceptibility to coercive pressures. Or, if the Court is unwilling to draw these arbitrary lines, it will be forced to effect a fundamental transformation of the *Miranda* custody test--from a clear, easily applied prophylactic rule into a highly fact-intensive standard resembling the voluntariness test that the *Miranda* Court found to be unsatisfactory.

For at least three reasons, there is no need to go down this road. First, many minors subjected to police interrogation are near the age of majority, and for these suspects the one-size-fits-all *Miranda* custody rule may not be a bad fit. Second, many of the difficulties in applying the *Miranda* custody rule to minors arise because of the unique circumstances present when the police conduct [***40] interrogations at school. The *Miranda* custody rule has always taken into account the setting in which questioning occurs, and accounting for the school setting in such cases will address many of these problems. Third, in cases like the one now before us, where the suspect is especially young, courts applying the constitutional voluntariness standard can take special care to ensure that incriminating statements were not obtained through coercion.

[*2410] Safeguarding the constitutional rights of minors does not require the [***331] extreme makeover of *Miranda* that today's decision may portend.

I

In the days before *Miranda*, this Court's sole metric for evaluating the admissibility of confessions was a voluntariness standard rooted in both the *Fifth Amendment's Self-Incrimination Clause* and the Due Process Clause of the Fourteenth Amendment. See *Bram v. United States*, 168 U.S. 532, 542, 18 S. Ct. 183, 42 L. Ed. 568 (1897) (*Self-Incrimination Clause*); *Brown v. Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936) (due process). The question in these voluntariness cases was whether the particular "defendant's will" had been "overborne." *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963). Courts

¹ See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

took into account both “the details of the interrogation” and “the characteristics [***41] of the accused,” *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), and then “weigh[ed] . . . the circumstances of pressure against the power of resistance of the person confessing.” *Stein v. New York*, 346 U.S. 156, 185, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953).

All manner of individualized, personal characteristics were relevant in this voluntariness inquiry. Among the most frequently mentioned factors were the defendant’s education, physical condition, intelligence, and mental health. *Withrow v. Williams*, 507 U.S. 680, 693, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993); see *Clewis v. Texas*, 386 U.S. 707, 712, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967) (“only a fifth-grade education”); *Greenwald v. Wisconsin*, 390 U.S. 519, 520-521, 88 S. Ct. 1152, 20 L. Ed. 2d 77 (1968) (*per curiam*) (had not taken blood-pressure medication); *Payne v. Arkansas*, 356 U.S. 560, 562, n. 4, 567, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958) (“mentally dull” and “‘slow to learn’ ”); *Fikes v. Alabama*, 352 U.S. 191, 193, 196, 198, 77 S. Ct. 281, 1 L. Ed. 2d 246 (1957) (“low mentality, if not mentally ill”). The suspect’s age also received prominent attention in several cases, *e.g.*, *Gallegos v. Colorado*, 370 U.S. 49, 54, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962), especially when the suspect was a “mere child.” *Haley v. Ohio*, 332 U.S. 596, 599, 68 S. Ct. 302, 92 L. Ed. 224 (1948) (plurality opinion). The weight assigned to any one consideration varied from case to case. But all of these [***42] factors, along with anything else that might have affected the “individual’s . . . capacity for effective choice,” were relevant in determining whether the confession was coerced or compelled. See *Miranda v. Arizona*, 384 U.S. 436, 506-507, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (Harlan, J., dissenting).

The all-encompassing nature of the voluntariness inquiry had its benefits. It allowed courts to accommodate a “complex of values,” *Schneckloth, supra*, at 223, 224, 93 S. Ct. 2041, 36 L. Ed. 2d 854, and to make a careful, highly individualized determination as to whether the police had wrung “a confession out of [the] accused against his will.” *Blackburn v. Alabama*, 361 U.S. 199, 206-207, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960). But with this flexibility came a decrease in both certainty and predictability, and the voluntariness standard proved difficult “for law enforcement officers to conform to, and for courts to apply in a consistent manner.” *Dickerson v. United States*, 530 U.S. 428, 444, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

In *Miranda*, the Court supplemented the voluntariness inquiry [**332] with a “set of prophylactic measures” designed to ward off the “‘inherently compelling pressures’ of custodial interrogation.” See *Maryland* [*2411]

v. Shatzer, 559 U.S. _____, 130 S. Ct. 1213, 175 L. Ed. 2d 1045, 1052 (2010) (quoting *Miranda*, 384 U.S., at 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694). *Miranda* [***43] greatly simplified matters by requiring police to give suspects standard warnings before commencing any custodial interrogation. See *id.*, at 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694. Its requirements are no doubt “rigid,” see *Fare v. Michael C.*, 439 U.S. 1310, 1314, 99 S. Ct. 3, 58 L. Ed. 2d 19 (1978) (Rehnquist, J., in chambers), and they often require courts to suppress “trustworthy and highly probative” statements that may be perfectly “voluntary under [a] traditional *Fifth Amendment* analysis.” *Fare v. Michael C.*, 442 U.S. 707, 718, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979). But with this rigidity comes increased clarity. *Miranda* provides “a workable rule to guide police officers,” *New York v. Quarles*, 467 U.S. 649, 658, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984) (internal quotation marks omitted), and an administrable standard for the courts. As has often been recognized, this gain in clarity and administrability is one of *Miranda*’s “principal advantages.” *Berkemer v. McCarty*, 468 U.S. 420, 430, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); see also *Missouri v. Seibert*, 542 U.S. 600, 622, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004) (Kennedy, J., concurring in judgment).

No less than other facets of *Miranda*, the threshold requirement that the suspect be in “custody” is “designed to give clear guidance to the police.” *Yarborough v. Alvarado*, 541 U.S. 652, 668, 669, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004). Custody under *Miranda* [***44] attaches where there is a “formal arrest” or a “restraint on freedom of movement” akin to formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (*per curiam*) (internal quotation marks omitted). This standard is “objective” and turns on how a hypothetical “reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.” *Stansbury v. California*, 511 U.S. 318, 322-323, 325, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) (*per curiam*) (internal quotation marks omitted).

Until today, the Court’s cases applying this test have focused solely on the “objective circumstances of the interrogation,” *id.*, at 323, 114 S. Ct. 1526, 128 L. Ed. 2d 293, not the personal characteristics of the interrogated. *E.g.*, *Berkemer, supra*, at 442, and n. 35, 104 S. Ct. 3138, 82 L. Ed. 2d 317; but cf. *Schneckloth*, 412 U.S., at 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (voluntariness inquiry requires consideration of “the details of the interrogation” and “the characteristics of the accused”). Relevant factors have included such things as where the questioning occurred,² how long it lasted,³ what was said,⁴ any physical restraints placed on the suspect’s move-

² *Maryland v. Shatzer*, 559 U.S. _____, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010).

³ *Berkemer v. McCarty*, 468 U.S. 420, 437-438, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

ment,⁵ and whether the suspect was allowed to leave when the questioning [**333] was through.⁶ The totality of *these* circumstances--the [***45] external circumstances, that is, of the interrogation itself--is what has mattered in this Court's cases. Personal characteristics of suspects have consistently been rejected or ignored as irrelevant under a one-size-fits-all reasonable-person standard. *Stansbury, supra*, at 323, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (“[C]ustody [**2412] depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned”).

For example, in *Berkemer v. McCarty, supra*, police officers conducting a traffic stop questioned a man who had been drinking and smoking marijuana before he was pulled over. *Id.*, at 423, 104 S. Ct. 3138, 82 L. Ed. 2d 317. Although the suspect's inebriation was readily apparent to the officers at the scene, *ibid.*, the Court's analysis did not advert to this or any other individualized consideration. Instead, the Court focused only on the external circumstances of the interrogation [***46] itself. The opinion concluded that a typical “traffic stop” is akin to a “Terry stop”⁷ and does not qualify as the equivalent of “formal arrest.” *Id.*, at 439, 104 S. Ct. 3138, 82 L. Ed. 2d 317.

California v. Beheler, supra, is another useful example. There, the circumstances of the interrogation were “remarkably similar” to the facts of the Court's earlier decision in *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) (*per curiam*)--the suspect was “not placed under arrest,” he “voluntarily [came] to the police station,” and he was “allowed to leave unhindered by police after a brief interview.” 463 U.S., at 1123, 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275. A California court in *Beheler* had nonetheless distinguished *Mathiason* because the police knew that Beheler “had been drinking earlier in the day” and was “emotionally distraught.” 463 U.S., at 1124-1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275. In a summary reversal, this Court explained that the fact “[t]hat the police knew more” personal information about Beheler than they did about Mathiason was “irrelevant.” *Id.*, at 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275. Neither one of them was in custody under the objective reasonable-person standard. *Ibid.*; see also *Alvarado, supra*, at 668, 669, 124 S. Ct.

2140, 158 L. Ed. 2d 938 (experience with law enforcement irrelevant to *Miranda* custody [***47] analysis “as a *de novo* matter”).⁸

The glaring absence of reliance on personal characteristics in these and other custody cases should come as no surprise. To account for such individualized considerations would be to contradict *Miranda*'s central premise. The *Miranda* Court's decision to adopt its inflexible prophylactic requirements was expressly based on the notion that “[a]ssessments of the [**334] knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation.” 384 U.S., at 468-469, 86 S. Ct. 1602, 16 L. Ed. 2d 694.

II

In light of this established practice, there is no denying that, by incorporating age [***48] into its analysis, the Court is embarking on a new expansion of the established custody standard. And since *Miranda* is this Court's rule, “not a constitutional command,” it is up to the Court “to justify its expansion.” Cf. *Arizona v. Roberson*, 486 U.S. 675, 688, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988) (Kennedy, J., dissenting). This the Court fails to do.

In its present form, *Miranda*'s prophylactic regime already imposes “high [**2413] cost[s]” by requiring suppression of confessions that are often “highly probative” and “voluntary” by any traditional standard. *Oregon v. Elstad*, 470 U.S. 298, 312, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985); see *Dickerson*, 530 U.S., at 444, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (under *Miranda* “statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result”). Nonetheless, a “core virtue” of *Miranda* has been the clarity and precision of its guidance to “police and courts.” *Withrow v. Williams*, 507 U.S. 680, 694, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993) (internal quotation marks omitted); see *Moran*, 475 U.S., at 425, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (“[O]ne of the principal advantages of *Miranda* is the ease and clarity of its application” (internal quotation marks omitted)). This increased clarity “has been thought to outweigh the [***49] bur-

⁴ *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) (*per curiam*).

⁵ *New York v. Quarles*, 467 U.S. 649, 655, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984).

⁶ *California v. Beheler*, 463 U.S. 1121, 1122-1123, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (*per curiam*).

⁷ See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

⁸ The Court claims that “[n]ot once” have any of our cases “excluded from the custody analysis a circumstance that we determined was relevant and objective, simply to make the fault line between custodial and noncustodial ‘brighter.’ ” *Ante*, at _____, 180 L. Ed. 2d, at 328. Surely this is incorrect. The very act of adopting a reasonable-person test necessarily excludes all sorts of “relevant and objective” circumstances--for example, all the objective circumstances of a suspect's life history--that might otherwise bear on a custody determination.

dens” that *Miranda* imposes. [Fare, 442 U.S., at 718, 99 S. Ct. 2560, 61 L. Ed. 2d 197](#). The Court has, however, repeatedly cautioned against upsetting the careful “balance” that *Miranda* struck, [Moran, supra, at 424, 106 S. Ct. 1135, 89 L. Ed. 2d 410](#), and it has “refused to sanction attempts to expand [the] *Miranda* holding” in ways that would reduce its “clarity.” See [Quarles, 467 U.S., at 658, 104 S. Ct. 2626, 81 L. Ed. 2d 550](#) (citing cases). Given this practice, there should be a “strong presumption” against the Court’s new departure from the established custody test. See [United States v. Patane, 542 U.S. 630, 640, 124 S. Ct. 2620, 159 L. Ed. 2d 667 \(2004\)](#) (plurality opinion). In my judgment, that presumption cannot be overcome here.

A

The Court’s rationale for importing age into the custody standard is that minors tend to lack adults’ “capacity to exercise mature judgment” and that failing to account for that “reality” will leave some minors unprotected under *Miranda* in situations where they perceive themselves to be confined. See [ante, at _____, 180 L. Ed. 2d, at 317, 323](#). I do not dispute that many suspects who are under 18 will be more susceptible to police pressure than the average adult. As the Court notes, our pre-*Miranda* cases were particularly attuned to this “reality” in applying the constitutional requirement of voluntariness in fact. [***50] [Ante, at _____, 180 L. Ed. 2d, at 323](#) (relying on [Haley, 332 U.S., at 599, 68 S. Ct. 302, 92 L. Ed. 224](#) (plurality opinion), and [Gallegos, 370 U.S., at 54, 82 S. Ct. 1209, 8 L. Ed. 2d 325](#)). It is no less a “reality,” however, that many persons *over* the age of 18 are also more susceptible to police [***335] pressure than the hypothetical reasonable person. See [Payne, 356 U.S., at 567, 78 S. Ct. 844, 2 L. Ed. 2d 975](#) (fact that defendant was a “mentally dull 19-year-old youth” relevant in voluntariness inquiry). Yet the *Miranda* custody standard has never accounted for the personal characteristics of these or any other individual defendants.

Indeed, it has always been the case under *Miranda* that the unusually meek or compliant are subject to the same fixed rules, including the same custody requirement, as those who are unusually resistant to police pressure. [Berkemer, 468 U.S., at 442, and n. 35, 104 S. Ct. 3138, 82 L. Ed. 2d 317](#) (“[O]nly relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation”). *Miranda*’s rigid standards are both overinclusive and underinclusive. They are overinclusive to the extent that they provide a windfall to the most hardened and savvy of suspects, who often have no need for *Miranda*’s protections. Compare [Miranda, supra, at 471-472, 86 S. Ct. 1602, 16 L. Ed. 2d 694](#) (“[N]o amount of circumstantial evidence that the person [***51] may have been aware of” his rights can overcome *Miranda*’s requirements), with [Orozco v. Texas, 394 U.S. 324, 329, 89 S. Ct. 1095, 22 L. Ed. 2d 311 \(1969\)](#) (White, J., dissenting) (“Where the defendant himself [w]as a lawyer, policeman, professional [***2414] crimi-

nal, or otherwise has become aware of what his right to silence is, it is sheer fancy to assert that his answer to every question asked him is compelled unless he is advised of those rights with which he is already intimately familiar”). And *Miranda*’s requirements are underinclusive to the extent that they fail to account for “frailties,” “idiosyncrasies,” and other individualized considerations that might cause a person to bend more easily during a confrontation with the police. See [Alvarado, 541 U.S., at 662, 124 S. Ct. 2140, 158 L. Ed. 2d 938](#) (internal quotation marks omitted). Members of this Court have seen this rigidity as a major weakness in *Miranda*’s “code of rules for confessions.” See [384 U.S., at 504, 86 S. Ct. 1602, 16 L. Ed. 2d 694](#) (Harlan, J., dissenting); [Fare, 439 U.S., at 1314, 99 S. Ct. 3, 58 L. Ed. 2d 19](#) (Rehnquist, J., in chambers) (“[T]he rigidity of [*Miranda*’s] prophylactic rules was a principal weakness in the view of dissenters and critics outside the Court”). But if it is, then the weakness is an inescapable consequence of the *Miranda* Court’s [***52] decision to supplement the more holistic voluntariness requirement with a one-size-fits-all prophylactic rule.

That is undoubtedly why this Court’s *Miranda* cases have never before mentioned “the suspect’s age” or any other individualized consideration in applying the custody standard. See [Alvarado, supra, at 666, 124 S. Ct. 2140, 158 L. Ed. 2d 938](#). And unless the *Miranda* custody rule is now to be radically transformed into one that takes into account the wide range of individual characteristics that are relevant in determining whether a confession is voluntary, the Court must shoulder the burden of explaining why age is different from these other personal characteristics.

Why, for example, is age different from intelligence? Suppose that an officer, upon going to a school to question a student, is told by the principal that the student has an I. Q. of 75 and is in a special-education class. Cf. [In re J. D. B., 363 N. C. 664, 666, 686 S. E. 2d 135, 136-137 \(2009\)](#). Are those facts more or less important than the [***336] student’s age in determining whether he or she “felt . . . at liberty to terminate the interrogation and leave”? See [Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 \(1995\)](#). An I. Q. score, like age, is more than just a number. [***53] [Ante, at _____, 180 L. Ed. 2d, at 323](#) (“[A]ge is far ‘more than a chronological fact’”). And an individual’s intelligence can also yield “conclusions” similar to those “we have drawn ourselves” in cases far afield of *Miranda*. [Ante, at _____, 180 L. Ed. 2d, at 325](#). Compare *ibid.* (relying on [Ed-dings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 \(1982\)](#), and [Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 \(2005\)](#)), with [Smith v. Texas, 543 U.S. 37, 44-45, 125 S. Ct. 400, 160 L. Ed. 2d 303 \(2004\)](#) (*per curiam*).

How about the suspect’s cultural background? Suppose the police learn (or should have learned, see [ante, at _____, 180 L. Ed. 2d, at 324](#)) that a suspect they wish to ques-

tion is a recent immigrant from a country in which dire consequences often befall any person who dares to attempt to cut short any meeting with the police.⁹ Is this really less relevant than the fact that a suspect is a month or so away from his 18th birthday?

The defendant's education is another personal characteristic that may generate "conclusions about behavior and perception." *Ante*, at _____, 180 L. Ed. 2d, at 323 (internal quotation marks omitted). Under [***54] today's decision, why should police officers and courts [***2415] "blind themselves," *ante*, at _____, 180 L. Ed. 2d, at 318, to the fact that a suspect has "only a fifth-grade education"? See *Clewis*, 386 U.S., at 712, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (voluntariness case). Alternatively, what if the police know or should know that the suspect is "a college-educated man with law school training"? See *Crooker v. California*, 357 U.S. 433, 440, 78 S. Ct. 1287, 2 L. Ed. 2d 1448 (1958), overruled by *Miranda*, *supra*, at 479, and n. 48, 86 S. Ct. 1602, 16 L. Ed. 2d 694. How are these individual considerations meaningfully different from age in their "relationship to a reasonable person's understanding of his freedom of action"? *Ante*, at _____, 180 L. Ed. 2d, at 325. The Court proclaims that "[a] child's age . . . is different," *ante*, at _____, 180 L. Ed. 2d, at 325, but the basis for this *ipse dixit* is dubious.

I have little doubt that today's decision will soon be cited by defendants--and perhaps by prosecutors as well--for the proposition that all manner of other individual characteristics should be treated like age and taken into account in the *Miranda* custody calculus. Indeed, there are already lower court decisions that take this approach. See *United States v. Beraun-Panez*, 812 F.2d 578, 581, modified 830 F.2d 127 (CA9 1987) ("reasonable person who was an alien"); *In re Jorge D.*, 202 Ariz. 277, 280, 43 P. 3d 605, 608 (App. 2002) [***55] (age, maturity, and experience); *State v. Doe*, 130 Idaho 811, 818, 948 P.2d 166, 173 (1997) (same); *In re Joshua David C.*, 116 Md. App. 580, 594, 698 A.2d 1155, 1162 (1997) ("education, age, and intelligence").

In time, the Court will have to confront these issues, and it will be faced with a difficult choice. It may choose to distinguish today's decision and [***337] adhere to the arbitrary proclamation that "age . . . is different." *Ante*, at _____, 180 L. Ed. 2d, at 325. Or it may choose to extend today's holding and, in doing so, further undermine the very rationale for the *Miranda* regime.

B

If the Court chooses the latter course, then a core virtue of *Miranda*--the "ease and clarity of its application"--will be lost. *Moran*, 475 U.S., at 425, 106 S. Ct. 1135, 89

L. Ed. 2d 410; see *Fare*, 442 U.S., at 718, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (noting that the clarity of *Miranda*'s requirements "has been thought to outweigh the burdens that the decision . . . imposes"). However, even today's more limited departure from *Miranda*'s one-size-fits-all reasonable-person test will produce the very consequences that prompted the *Miranda* Court to abandon exclusive reliance on the voluntariness test in the first place: The Court's test will be hard for the police to follow, and it will be hard for [***56] judges to apply. See *Dickerson v. United States*, 530 U.S. 428, 444, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

The Court holds that age must be taken into account when it "was known to the officer at the time of the interview," or when it "would have been objectively apparent" to a reasonable officer. *Ante*, at _____, 180 L. Ed. 2d, at 318. The first half of this test overturns the rule that the "initial determination of custody" does not depend on the "subjective views harbored by . . . interrogating officers." *Stansbury*, 511 U.S., at 323, 114 S. Ct. 1526, 128 L. Ed. 2d 293. The second half will generate time-consuming satellite litigation over a reasonable officer's perceptions. When, as here, the interrogation takes place in school, the inquiry may be relatively simple. But not all police questioning of minors takes place in schools. In many cases, courts will presumably have to make findings as to whether a particular suspect had a sufficiently youthful look to alert a reasonable officer to the possibility that the suspect was under 18, or whether a reasonable officer would have recognized that a suspect's I. D. was a fake. The inquiry will be both "time-consuming and disruptive" for the police and the courts. [***2416] See *Berkemer*, 468 U.S., at 432, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (refusing to modify the custody test [***57] based on similar considerations). It will also be made all the more complicated by the fact that a suspect's dress and manner will often be different when the issue is litigated in court than it was at the time of the interrogation.

Even after courts clear this initial hurdle, further problems will likely emerge as judges attempt to put themselves in the shoes of the average 16-year-old, or 15-year-old, or 13-year-old, as the case may be. Consider, for example, a 60-year-old judge attempting to make a custody determination through the eyes of a hypothetical, average 15-year-old. Forty-five years of personal experience and societal change separate this judge from the days when he or she was 15 years old. And this judge may or may not have been an average 15-year-old. The Court's answer to these difficulties is to state that "no imaginative powers, knowledge of developmental psychology, [or] training in cognitive science" will be necessary. *Ante*, at _____, 180 L. Ed. 2d, at 328. Judges "simply need the common sense," the Court assures, "to know

⁹ Cf. *United States v. Chalan*, 812 F.2d 1302, 1307 (CA10 1987) (rejecting claim that Native American suspect was "in custody" for *Miranda* purposes because, by custom, obedience to tribal authorities was "expected of all tribal members").

that a 7-year-old is not a 13-year-old and neither is [**338] an adult.” *Ante*, at [___](#), 180 L. Ed. 2d, at 328. [***58] It is obvious, however, that application of the Court’s new rule demands much more than this.

Take a fairly typical case in which today’s holding may make a difference. A 16-year-old moves to suppress incriminating statements made prior to the administration of *Miranda* warnings. The circumstances are such that, if the defendant were at least 18, the court would not find that he or she was in custody, but the defendant argues that a reasonable 16-year-old would view the situation differently. The judge will not have the luxury of merely saying: “It is common sense that a 16-year-old is not an 18-year-old. Motion granted.” Rather, the judge will be required to determine whether the differences between a typical 16-year-old and a typical 18-year-old with respect to susceptibility to the pressures of interrogation are sufficient to change the outcome of the custody determination. Today’s opinion contains not a word of actual guidance as to how judges are supposed to go about making that determination.

C

Petitioner and the Court attempt to show that this task is not unmanageable by pointing out that age is taken into account in other legal contexts. In particular, the Court relies on [***59] the fact that the age of a defendant is a relevant factor under the reasonable-person standard applicable in negligence suits. *Ante*, at [___](#), 180 L. Ed. 2d, at 324 (citing *Restatement (Third) of Torts § 10, Comment b*, p. 117 (2005)). But negligence is generally a question for the jury, the members of which can draw on their varied experiences with persons of different ages. It also involves a *post hoc* determination, in the reflective atmosphere of a deliberation room, about whether the defendant conformed to a standard of care. The *Miranda* custody determination, by contrast, must be made in the first instance by police officers in the course of an investigation that may require quick decision-making. See *Quarles*, 467 U.S., at 658, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (noting “the importance” under *Miranda* of providing “a workable rule” to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront”); *Alvarado*, 541 U.S., at 668, 669, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (“[T]he custody inquiry states an objective rule designed to give clear guidance to the police”).

Equally inapposite are the *Eighth Amendment* cases the Court cites in support [*2417] of its new rule. *Ante*, at [___](#), 180 L. Ed. 2d, at 323, 324, 325 [***60] (citing *Eddings*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1, *Roper*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1, and *Graham v. Florida*, 560 U.S. [___](#), 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). Those decisions involve the “judicial exercise of independent judgment” about the constitutionality of certain punishments. *E.g.*, *id.*, at [___](#), 130 S. Ct. 2011, 176 L. Ed. 2d 825. Like the negligence standard, they do not require on-the-spot judgments by the police.

Nor do state laws affording extra protection for juveniles during custodial interrogation provide any support for petitioner’s arguments. See Brief for Petitioner 16-17. States are free to enact additional restrictions on the police over and above those demanded by the Constitution or *Miranda*. In addition, these state [***339] statutes generally create clear, workable rules to guide police conduct. See Brief for Petitioner 16-17 (citing statutes that require or permit parents to be present during custodial interrogation of a minor, that require minors to be advised of a statutory right to communicate with a parent or guardian, and that require parental consent to custodial interrogation). Today’s decision, by contrast, injects a new, complicating factor into what had been a clear, easily applied prophylactic rule. See *Alvarado*, *supra*, at 668-669, 124 S. Ct. 2140, 158 L. Ed. 2d 938. [***61]¹⁰

III

The Court’s decision greatly diminishes the clarity and administrability that have long been recognized as “principal advantages” of *Miranda*’s prophylactic requirements. See, *e.g.*, *Moran*, 475 U.S., at 425, 106 S. Ct. 1135, 89 L. Ed. 2d 410. But what is worse, the Court takes this step [***62] unnecessarily, as there are other, less disruptive tools available to ensure that minors are not coerced into confessing.

As an initial matter, the difficulties that the Court’s standard introduces will likely yield little added protection for most juvenile defendants. Most juveniles who are subjected to police interrogation are teenagers nearing the

¹⁰ The Court also relies on North Carolina’s concession at oral argument that a court could take into account a suspect’s blindness as a factor relevant to the *Miranda* custody determination. *Ante*, at [___](#), 180 L. Ed. 2d, at 327, and n. 9. This is a far-fetched hypothetical, and neither the parties nor their *amici* cite any case in which such a problem has actually arisen. Presumably such a case would involve a situation in which a blind defendant was given “a typed document advising him that he [was] free to leave.” See Brief for Juvenile Law Center as *Amicus Curiae* 23. In such a case, furnishing this advice in a form calculated to be unintelligible to the suspect would be tantamount to failing to provide the advice at all. And advice by the police that a suspect is or is not free to leave at will has always been regarded as a circumstance regarding the conditions of the interrogation that must be taken into account in making the *Miranda* custody determination.

age of majority.¹¹ These defendants' reactions to police pressure are unlikely to be much different from the reaction of a typical 18-year-old in similar circumstances. A one-size-fits-all *Miranda* custody rule thus provides a roughly reasonable fit for these defendants.

In addition, many of the concerns that petitioner raises regarding the application of the *Miranda* custody rule to minors can be accommodated by considering the unique circumstances present when minors are questioned [***63] in school. See Brief for [*2418] Petitioner 10-11 (reciting at length the factors petitioner believes to be relevant to the custody determination here, including the fact that petitioner was removed from class by a police officer, that the interview took place in a school conference room, and that a uniformed officer and a vice principal were present). The *Miranda* custody rule has always taken into account the setting in which questioning occurs, restrictions on a suspect's freedom of movement, and the presence of police officers or other authority figures. See *Alvarado, supra*, at 665, 124 S. Ct. 2140, 158 L. Ed. 2d 938; *Maryland v. Shatzer*, 559 U.S. _____, [**340] 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010). It can do so here as well.¹²

Finally, in cases like the one now before us, where the suspect is much younger than the typical juvenile defendant, courts should be instructed to take particular care to ensure that incriminating statements were not obtained [***64] involuntarily. The voluntariness inquiry is flexible and accommodating by nature, see *Schneckloth*, 412 U.S., at 224, 93 S. Ct. 2041, 36 L. Ed. 2d 854, and the Court's precedents already make clear that "special care" must be exercised in applying the voluntariness test where the confession of a "mere child" is at issue. *Haley*, 332 U.S., at 599, 68 S. Ct. 302, 92 L. Ed. 224 (plurality opinion). If *Miranda*'s rigid, one-size-fits-all standards fail to account for the unique needs of juveniles, the response should be to rigorously apply the constitutional rule against coercion to ensure that the rights of minors are protected. There is no need to run *Miranda* off the rails.

* * *

The Court rests its decision to inject personal characteristics into the *Miranda* custody inquiry on the principle

that judges applying *Miranda* cannot "blind themselves to . . . commonsense reality." *Ante*, at _____, 180 L. Ed. 2d, at 318, 322, 324, 326. But the Court's shift is fundamentally at odds with the clear prophylactic rules that *Miranda* has long enforced. *Miranda* frequently requires judges to blind themselves to the reality that many un-Mirandized custodial confessions are "by no means involuntary" or coerced. *Dickerson*, 530 U.S., at 444, 120 S. Ct. 2326, 147 L. Ed. 2d 405. It also requires police to provide a rote recitation of *Miranda* [***65] warnings that many suspects already know and could likely recite from memory.¹³ Under today's new, "reality"-based approach to the doctrine, perhaps these and other principles of our *Miranda* jurisprudence will, like the custody standard, now be ripe for modification. Then, bit by bit, *Miranda* will lose the clarity and ease of application that has long been viewed as one of its chief justifications.

I respectfully dissent.

References

- U.S.C.S., *Constitution, Amendment 5*
- 2 *Criminal Constitutional Law* § 4.02 (Matthew Bender)
- 1 *Criminal Defense Techniques* § 3.03 (Matthew Bender)
- 27 *Moore's Federal Practice* § 644.11 (Matthew Bender 3d ed.)
- L Ed Digest, Witnesses* § 88.5
- L Ed Index, Miranda v Arizona*
- The progeny of Miranda v. Arizona in the Supreme Court.* 46 L. Ed. 2d 903.
- Admissibility of pretrial confession in criminal case-- Supreme Court cases.* 1 L. Ed. 2d 1735, 4 L. Ed. 2d 1833, 12 L. Ed. 2d 1340, 16 L. Ed. 2d 1294, 22 L. Ed. 2d 872.

¹¹ See Dept of Justice, Federal Bureau of Investigation, 2008 Crime in the United States (Sept. 2009), online at http://www2.fbi.gov/ucr/cius2008/data/table_38.html (all Internet materials as visited June 8, 2011, and available in Clerk of Court's case file) (indicating that less than 30% of juvenile arrests in the United States are of suspects who are under 15).

¹² The Court thinks it would be "absur[d]" to consider the school setting without accounting for age, *ante*, at _____, 180 L. Ed. 2d, at 325, but the real absurdity is for the Court to require police officers to get inside the head of a reasonable minor while making the quick, on-the-spot determinations that *Miranda* demands.

¹³ Surveys have shown that "[l]arge majorities" of the public are aware that "individuals arrested for a crime" have a right to "remain[n] silent (81%)," a right to "a lawyer (95%)," and a right to have a lawyer "appointed" if the arrestee "cannot afford one (88%)." See Belden, Russonello & Stewart, Developing a National Message for Indigent Defense: Analysis of National Survey 4 (Oct. 2001), online at <http://www.nlada.org/DMS/Documents/1211996548.53/Polling%20results%20report.pdf>.

Midwest Coalition for Human Rights

Advocating for fairness and human dignity

LETTER OF ALLEGATION REGARDING THE CLOSING OF 49 PUBLIC ELEMENTARY SCHOOLS IN CHICAGO, ILLINOIS, UNITED STATES OF AMERICA

ADDRESSED TO:

Kishore Singh, *United Nations Special Rapporteur on the Right to Education*
Rita Izsák, *United Nations Independent Expert on Minority Issues*
Mutuma Ruteere, *United Nations Special Rapporteur on Contemporary Forms of
Racism, Racial Discrimination, Xenophobia, and Related Intolerance*

Office of the High Commissioner on Human Rights
United Nations
8-14 Avenue de la Paix
1211 Geneva 10
Switzerland
Fax: +41 22 917 90 06
Email: urgent-action@ohchr.org

JULY 24, 2013

TABLE OF CONTENTS

1. EXECUTIVE SUMMARY.....	1
2. FACTUAL BACKGROUND ON THE SCHOOL CLOSINGS.....	4
A. The school closings disproportionately impact African American children.....	4
B. The school closures will have a negative impact on disabled children.....	5
C. Children traveling to school through certain areas and children attending new schools in hostile neighborhoods will face a significant risk of violence.....	5
D. Quality of Education: Class sizes will increase and most students will not move to better schools.	7
E. The manner in which decisions regarding the school closures were made denied parents, community members, and teachers the ability to participate in an important public policy decision.	9
F. Financial considerations do not justify the school closures.	11
3. APPLICABLE INTERNATIONAL HUMAN RIGHTS LAWS	13
A. The right to equality and non-discrimination in education	13
1. Discrimination against minorities	13
2. Discrimination against children with disabilities.....	16
B. The right to be free from violence and the right to life	16
C. The right to quality of education	17
D. The right and opportunity to take part in the conduct of public affairs	19
E. The closings cannot be justified due to a lack of financial resources.....	20
4. CONCLUSION	21

Midwest Coalition for Human Rights

Advocating for fairness and human dignity

Kishore Singh, *United Nations Special Rapporteur on the Right to Education*

Rita Izsák, *United Nations Independent Expert on Minority Issues*

Mutuma Ruteere, *United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance*

Dear Dr. Singh, Ms. Izsák, and Mr. Ruteere:

We write to you pursuant to your mandate to “examine, monitor, and advise and publicly report on human rights situations in specific countries.”¹ The United States is a party to a number of UN international human rights treaties that are implicated in the closing of 49 public schools, which account for nearly 10% of public schools in Chicago, Illinois. The Midwest Coalition for Human Rights (on behalf of itself and the undersigned organizations and individuals) requests that you investigate and take preventative measures to address the potential domestic and international human rights violations that may result from these school closings.

1. EXECUTIVE SUMMARY

The City of Chicago announced in March 2013 – and is currently implementing – the closure of 49 public elementary schools. This is the largest wave of school closures in the United States’ history, encompassing 10% of all public schools in Chicago, the third largest city in the country. Although many schools are considered “underutilized” in Chicago, the schools targeted for closure are predominately in African American communities. Nearly 30,000 students, over 80% of whom are African American, will be displaced in a matter of months as a result of the closings. Due to the prevalence of gangs in many of these communities, students forced to go to new schools this coming August will face an increased risk of violence. Education quality will suffer for students who need it most. Ignoring widespread opposition by parents, students, teachers, and community members to the school closings, the Chicago Board of Education continues forward with its massive school closure plan.

The United States is bound to comply with certain international treaties and other documents. The Universal Declaration of Human Rights (UDHR) effectively binds the United States as customary international law.² The United States has ratified the UN International Covenant on Civil and Political Rights (ICCPR)³ and the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).⁴ The United States of America has

¹ UN Office of the United Nations High Commissioner for Human Rights, *Special Procedures of the Human Rights Council, Urgent Appeals and Letters of Allegation on Human Rights Violations Brochure*, available at http://www2.ohchr.org/english/bodies/chr/special/docs/communicationsbrochure_en.pdf.

² Antônio Augusto Cançado Trindade, *Universal Declaration of Human Rights*, AUDIOVISUAL LIBR. OF INT’L L. (2008) (“The international community as a whole, moved by the universal juridical conscience, conferred upon the Universal Declaration the dimension that it has today, recognized in the international case law, incorporated in the domain of customary international law, and gave expression to some general principles of law universally recognized.”).

³ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

⁴ International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 (current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en).

signed (but not ratified) the UN Convention on the Rights of the Child (CRC),⁵ the UN International Covenant on Economic, Social and Cultural Rights (ICESCR),⁶ and the UN Convention on the Rights of Persons with Disabilities (CRPD).⁷ Even though the United States Congress has failed to ratify the CRC, the City Council of the City of Chicago adopted the CRC in a 2009 resolution and directed all city agencies to advance policies that are consistent with it.⁸ The massive wave of school closings in Chicago calls these laws and principles into question.

First, in contravention of the right to equality and nondiscrimination enshrined in the ICCPR, ICERD, CRC, and CRPD, the school closings disproportionately and negatively impact minority and disabled children.⁹ African American children make up 42% of the students in Chicago's public schools, but 80% of the children impacted by the school closures are African American.¹⁰ Hastily closing 49 public schools in a matter of months will also impact disabled children who will be forced to move to new schools without any guarantee that their special needs will be met.

Second, in violation of the right of children to be free from violence in the CRC and right to life in the ICCPR, the school closings place children at greater risk of violence and death. When the school-year begins in August 2013, approximately 30,000 children will be forced to attend new schools,¹¹ many of which are farther from their homes than their original schools.¹² Many Chicago neighborhoods are gang-controlled. When children or adults from one gang-dominated neighborhood travel to another neighborhood – or even from one block to another block – they are at risk of violence even if they are not affiliated with any gang.¹³ The Chicago Board of Education is attempting to provide “safe passage” to children scheduled to attend schools in such neighborhoods.¹⁴ The effectiveness of this program is questionable given that it merely enlists community members to watch students on their way to school.¹⁵ If the city of

⁵ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en).

⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3; current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-3&chapter=4&lang=en.

⁷ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007) (current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-15&chapter=4&lang=en).

⁸ City of Chicago Resolution Adopting the UN Convention on the Rights of the Child (Feb. 11, 2009), available at <http://www.njcn.org/uploads/digital-library/City-of-Chicago-Resolution-UN-Convention-on-Rights-of-Child-2.11.09.pdf>.

⁹ Lauren Fitzpatrick and Art Golab, *Black Students Most Likely to Have Their School on CPS Closure List*, CHI. SUN-TIMES (Mar. 6, 2013), <http://www.suntimes.com/news/education/18626817-418/black-students-far-more-likely-to-see-their-cps-school-closed-than-others-sun-times-analysis.html>.

¹⁰ Alex Keefe, *Emanuel: CPS School Closures 'Not Taken Lightly,' but Must be Done*, WBEZ91.5 (Mar. 23, 2013), <http://www.wbez.org/news/emanuel-cps-school-closures-not-taken-lightly-must-be-done-106253>.

¹¹ Judy Wang, *CPS Announces New Hires for Safe Passage and Welcoming Programs*, WGN TV (Jul. 1, 2013), <http://wgntv.com/2013/07/01/cps-announces-new-hires-for-safe-passage-and-welcoming-programs/>.

¹² Stephanie Farmer, Isaura Pulido, Pamela J. Konkol, Kate Phillippo, David Stovall and Mike Klonsky, *CRATE Research Brief on School Closures*, CHICAGOLAND RESEARCHERS AND ADVOC. FOR TRANSFORMATIVE EDUC. (Mar. 2013), <http://www.createchicago.org/2013/03/create-releases-research-brief-on.html> (CRATE is a Chicago-based network of academics who research education and school policy).

¹³ For a high profile example, see Tracy Connor, *Chicago Shooting Victim Hadiya Pendleton Starred in Anti-Gang Video*, NBC NEWS (Jan. 31, 2013), http://usnews.nbcnews.com/_news/2013/01/31/16792373-chicago-shooting-victim-hadiya-pendleton-starred-in-anti-gang-video?lite.

¹⁴ Sarah Karp, *CPS Won't Take Recommendations Against Closings*, CATALYST CHI. (May 7, 2013), <http://www.catalyst-chicago.org/notebook/2013/05/07/21041/cps-wont-take-recommendations-against-closings> (Catalyst Chicago is published by the Community Renewal Society, a respected civil society organization which focuses on local public affairs).

¹⁵ *Id.*

Chicago does not sell the closed school buildings, these vacant buildings may become a center for criminal activity and violence in the communities.¹⁶

Third, the right to education, which includes quality of education, will be eroded with increasing class sizes. Many transferred students, as well as students in receiving schools, will encounter class sizes larger than in the prior school year due to the school closings.¹⁷ Larger class sizes can have a negative impact on learning, particularly in vulnerable communities.¹⁸ Additionally, many displaced students from closed schools will not go to schools with better academic records than their prior schools.¹⁹

Fourth, the city of Chicago effectively denied people the right to participate in deciding whether or not to close the schools. Since the Chicago Board of Education announced the school closings in March 2013, parents, community residents, and teachers have resoundingly and consistently objected to the closures in many public hearings, street demonstrations, and direct pleas to members of the Board of Education.²⁰ The Chicago Board of Education did not change its decision because of these views. Additionally, Chicago's Board of Education rejected most of the findings of an independent commission of hearing officers appointed by the school district.²¹ If a governmental body can simply ignore the views of the people they claim to represent, the right to participate in governmental affairs is meaningless.²²

The closing of 49 public schools in Chicago implicates the human rights of children, their parents and guardians to non-discrimination and equality, to be free from violence, to education, and to participate in public policy decisions. On behalf of parents, students, teachers, community members, and the undersigned civil society organizations, the Midwest Coalition for Human Rights files this Letter of Allegation to request that you urge the United States to investigate and prevent these human rights violations. This Letter of Allegation is based on input from parents, community members, and teachers provided at a meeting held at the University of Chicago Law School on June 18, 2013 and research conducted by International Human Rights Clinic at the University of Chicago Law School and the Human Rights Program of the University of Chicago.

¹⁶ Natalie Moore, *School Closures Only Add to Blight in Some Chicago Neighborhoods*, WBEZ91.5 (May 23, 2013), <http://www.wbez.org/news/school-closures-only-add-blight-some-chicago-neighborhoods-107345>.

¹⁷ Linda Lutton, *50,421 Chicago Kids in Homerooms Over the Class Size Limit*, WBEZ91.5 (May 16, 2013), <http://www.wbez.org/news/education/50421-chicago-kids-homerooms-over-class-size-limit-107196>.

¹⁸ Council of Economic Advisors, the Domestic Policy Council, and the National Economic Council, *Investing in Our Future: Returning Teachers to the Classroom*, EXECUTIVE OFFICE OF THE PRESIDENT (Aug. 2012), http://www.whitehouse.gov/sites/default/files/Investing_in_Our_Future_Report.pdf.

¹⁹ Linda Lutton, *Few Chicago School Closings Will Move Kids to Top-Performing Schools*, WBEZ91.5 (May 19, 2013), <http://www.wbez.org/news/few-chicago-school-closings-will-move-kids-top-performing-schools-107261>.

²⁰ Steven Yaccino, *Protests Fail to Deter Chicago From Shutting 49 Schools*, N.Y. TIMES, May 22, 2013, at A20, available at <http://www.nytimes.com/2013/05/23/education/despite-protests-chicago-closing-schools.html>.

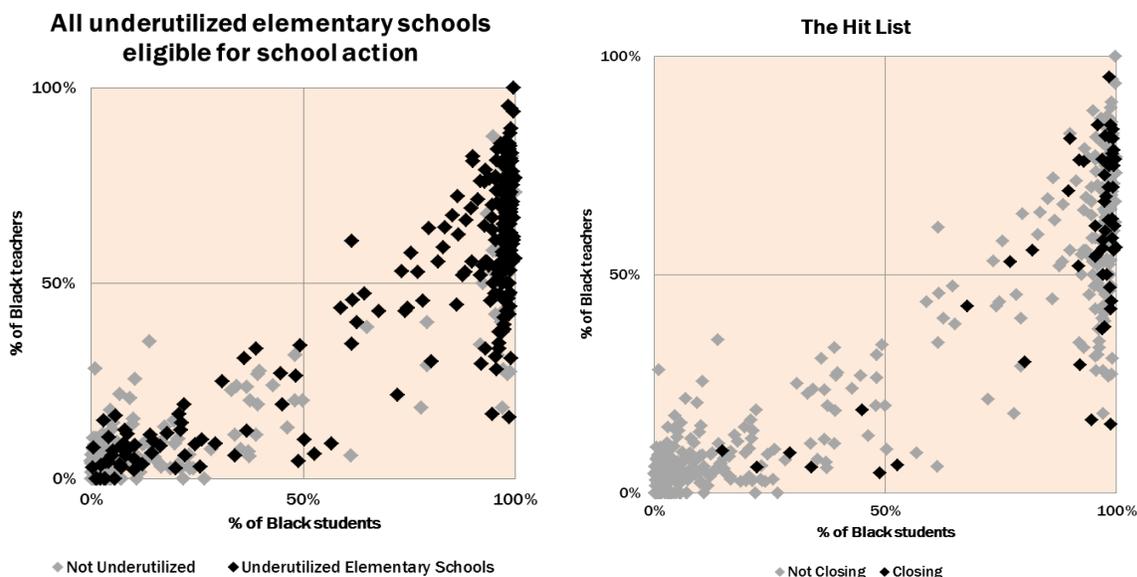
²¹ *Teachers Union Files New LawsUIT To Stop School Closings*, CBS CHI. (May 29, 2013), <http://chicago.cbslocal.com/2013/05/29/teachers-union-files-new-lawsuit-to-stop-school-closings/>.

²² Rick Perlstein, *Chicago Rising!*, THE NATION (July 2, 2013), <http://www.thenation.com/article/175085/chicago-rising#axzz2ZXhvXLrn> (“A recent Chicago Tribune/WGN poll found that more than 60 percent of Chicago citizens opposed the closings, and a healthy cross section of them had turned out for the first of three straight days of marches in protest.”).

2. FACTUAL BACKGROUND ON THE SCHOOL CLOSINGS

A. The school closings disproportionately impact African American children.

Public schools in Chicago are the most racially segregated schools in the United States.²³ The 49 school closings are concentrated in predominantly African American neighborhoods and will disproportionately impact African American students.²⁴ African American children are 42% of Chicago's public school students, but represent 80% of the children who would be impacted by the school closings.²⁵ In addition, 87% of the schools marked for closure are majority African American.²⁶ The Chicago Teachers Union (CTU) analyzed the racial impact of the school closures and found that schools with a majority African American population and teaching staff were ten times more likely to be closed or "turned around" than schools with a minority African American student population and teaching staff.²⁷ Although many schools are considered "underutilized" in Chicago, the schools that were targeted for closure are in minority communities. As seen in the charts below,²⁸ the final list of schools to be closed (the "Hit List") contains many more schools that are majority African American children and teachers than were on the original list of schools to be considered for closure ("All underutilized elementary schools eligible for school action").



²³ Ford Fessenden, *A Portrait of Segregation in New York City's Schools*, N.Y. TIMES (May 11, 2012), <http://www.nytimes.com/interactive/2012/05/11/nyregion/segregation-in-new-york-city-public-schools.html?ref=education>.

²⁴ Lauren Fitzpatrick and Art Golab, *Black Students Most Likely to Have Their School on CPS Closure List*, CHI. SUN-TIMES (Mar. 6, 2013), <http://www.suntimes.com/news/education/18626817-418/black-students-far-more-likely-to-see-their-cps-school-closed-than-others-sun-times-analysis.html>.

²⁵ Alex Keefe, *Emanuel: CPS School Closures 'Not Taken Lightly,' but Must be Done*, WBEZ91.5 (Mar. 23, 2013), <http://www.wbez.org/news/emanuel-cps-school-closures-not-taken-lightly-must-be-done-106253>.

²⁶ *Id.*

²⁷ CTU Research, *School Closures: Facts and Statistics*, CHI. TEACHER'S UNION (Apr. 18, 2013), <http://www.ctunet.com/blog/school-closures-facts-and-statistics>; <http://www.ctunet.com/pdf/SchoolClosingsFactsStats.pdf>. (Schools "turned around" are schools over which central authorities take control due to poor performance.)

²⁸ *Id.* Note: Since this chart was created, four schools were removed from the list of schools targeted for closing.

B. The school closures will have a negative impact on disabled children.

The school closures will have a greater negative impact on students with disabilities. Twelve percent of the students that will be displaced by the schools closings receive some type of special education service.²⁹ Parents and a commissioned panel of retired judges have expressed fears that these children's needs have been ignored during the accelerated closure process.³⁰ School closings were announced in March and became effective in June 2013. Chicago's Board of Education promised that special-needs teachers will be trained in the receiving schools to meet disabled students' needs, but parents have alleged that this training may prove inadequate.³¹ For example, Lafayette Elementary School's special program for autistic children places them in general education classrooms for a portion of each day, which their new school does not do.³² A few months may not be enough time to train teachers in sign language or to integrate autistic children into regular classrooms.³³

C. Children traveling to school through certain areas and children attending new schools in hostile neighborhoods will face a significant risk of violence.

There is an epidemic of violence against children in Chicago. From 2008 to early 2012, "more than 530 youth have been killed in Chicago with nearly 80 percent of the homicides occurring in 22 African American or Latino community areas on the city's South, Southwest and West sides."³⁴ Students forced to transfer to schools outside their neighborhoods will face a greatly increased risk of violence. The Chicago Board of Education estimates that students will need to travel an additional one to one-and-a-half miles to reach their new schools.³⁵ Parts of Chicago are gang-controlled and when individuals, including children, from one neighborhood travel to another neighborhood (or even from one block to another block), they are at risk even if they are not affiliated with any gang.³⁶ Recently, parents and community activists walked some of the routes their children will navigate when the school year starts.³⁷ An alderman expressed safety concerns about the walk and one parent asserted she did not want her children "walk[ing] through the gangs."³⁸ Other parents have expressed similar concerns about their children

²⁹ Emily Feldman, *Specter of School Closings Weighs Heavily on Parents of Special Needs Students*, NBC CHI. (Apr. 11, 2013), <http://www.nbcchicago.com/news/local/NATL-School-Closings-Impact-Special-Needs-Students-198977761.html>.

³⁰ Fran Spielman and Tina Sfondeles, *Mayor Isn't Promising to Follow Hearing Officers' School-Closing Recommendations*, CHI. SUN-TIMES (May 8, 2013), <http://www.suntimes.com/news/cityhall/19978282-418/cps-parents-want-mayor-to-walk-new-routes-reconsider-school-closings.html>.

³¹ Complaint at 97, *Swan v. Byrd-Bennett*, No. 13-CV-03623, (N.D. Ill. May 15, 2013).

³² Federico R. Waitoller, *A Perfect Storm: Chicago's School Closings and Students of Color with Special Needs*, WWW.PUREPARENTS.ORG, <http://pureparents.org/wp-content/uploads/2013/05/WaitollerA-Perfect-Storm-final.pdf>.

³³ *Id.*

³⁴ Kari Lydersen and Carlos Javier Ortiz, *More Young People are Killed in Chicago Than Any Other American City*, THE CHI. REP. (Jan. 25, 2012), <https://www.chicagoreporter.com/news/2012/01/more-young-people-are-killed-chicago-any-other-american-city>.

³⁵ Stephanie Farmer, Isaura Pulido, Pamela J. Konkol, Kate Phillippo, David Stovall and Mike Klonsky, *CREATE Research Brief on School Closures*, CHICAGOLAND RESEARCHERS AND ADVOC. FOR TRANSFORMATIVE EDUC. (Mar. 2013), <http://www.createchicago.org/2013/03/create-releases-research-brief-on.html>.

³⁶ For a high profile example, see Tracy Connor, *Chicago Shooting Victim Hadiya Pendleton Starred in Anti-Gang Video*, NBC NEWS (Jan. 31, 2013), http://usnews.nbcnews.com/_news/2013/01/31/16792373-chicago-shooting-victim-hadiya-pendleton-starred-in-anti-gang-video?lite.

³⁷ Aaron Cynic, *CPS Parents 'Walk The Walk' to Highlight Safety Issues of School Closings*, CHICAGOIST (Apr. 10, 2013), http://chicagoist.com/2013/04/10/cps_parents_walk_the_walk_to_highli.php.

³⁸ *Id.*

crossing over into dangerous territories.³⁹ Retired Judge Paddy McNamara, a commissioned hearing officer on the school closures, found that some neighboring schools have long histories of gang rivalries.⁴⁰ Such gang activity may result in violence directed at parents and children. One expert has found that closures have already begun to aggravate gang conflicts.⁴¹

The majority of the closing schools are in South Side and West Side neighborhoods with high levels of gang activity.⁴² In fact, “nearly half of the 1,054 youths murdered in Chicago during the past five years were killed within census tracts where schools are closing.”⁴³ Many students walk to school,⁴⁴ making street safety a paramount concern given the gang lines they must traverse.⁴⁵ The Chicago Board of Education maintains that it consulted maps of gang lines during the closure process to minimize the impact of gang activity.⁴⁶ But according to the *Chicago Reporter*, a highly respected local journal that reports on race discrimination and related issues, “[o]n a map, it seems what CPS is doing is straightforward enough. The receiving schools are all near those that are closing. But in neighborhoods like Englewood, crossing from one block to another can mean entering enemy turf.”⁴⁷ In these areas, children are regularly forced into gang or clique affiliation along neighborhood lines, even if they have no desire to be part of any gang-related activities.⁴⁸

Even students that resist gang recruitment face danger – a student living on a certain street automatically “represents his street and, to some degree, its gang.”⁴⁹ As a result, many students encounter gang activity and violence simply by virtue of where they live or go to school. A change in just one block of a commute can result in entering enemy turf and invite gang-related violence.⁵⁰

Since 2001, the Chicago school district has closed approximately 100 schools.⁵¹ Prior school closures in Chicago that forced students to transfer to schools outside their immediate neighborhood resulted in spikes in violence in elementary and high schools.⁵² A tragic example

³⁹ Fran Spielman and Tina Sfondeles, *Mayor Isn't Promising to Follow Hearing Officers' School-Closing Recommendations*, CHI. SUN-TIMES (May 8, 2013), <http://www.suntimes.com/news/cityhall/19978282-418/cps-parents-want-mayor-to-walk-new-routes-reconsider-school-closings.html>.

⁴⁰ *Id.*

⁴¹ Michael Tarm, Expert: *Chicago School Closings Will Endanger Kids*, AP (July 18, 2013), <http://abcnews.go.com/US/wireStory/expert-chicago-school-closings-endanger-kids-19693926>.

⁴² Elliott Ramos, *In Chicago, Gangs Abound, but Where Are They?*, WBEZ91.5 (Sept. 24, 2012), <http://www.wbez.org/programs/afternoon-shift/2012-09-24/chicago-gangs-abound-where-are-they-102612>.

⁴³ James Reddick, *Chicago Public Schools Closings Point Up the Dangers of Geography*, CHI. NOW (Apr. 30, 2013), <http://www.chicagonow.com/chicago-muckrakers/2013/04/chicago-public-school-closings-point-up-the-dangers-of-geography/>.

⁴⁴ CPS Safe Passage Program Guide, CPS.EDU, http://www.cps.edu/Programs/Wellness_and_transportation/SafetyandSecurity/SafePassage/Pages/Safepassage.aspx; http://www.cps.edu/Programs/Wellness_and_transportation/SafetyandSecurity/SafePassage/Documents/SafePassageGuide.pdf.

⁴⁵ Kim Janssen, *School Closings Mean Students Must Traverse New Gang Landscape, Prof Testifies*, CHI. SUN-TIMES (July 18, 2013), <http://www.suntimes.com/news/education/21377422-418/story.html>

⁴⁶ Sara Burnett, *Chicago School Closings: Gang Boundaries Consulted by District Amid Student Safety Concerns*, THE HUFFINGTON POST (Apr. 15, 2013), http://www.huffingtonpost.com/2013/04/15/chicago-school-closings-g_n_3087215.html.

⁴⁷ James Reddick, *Deadly Dismissals*, CHI. REP. (July 1, 2013), <http://www.chicagoreporter.com/news/2013/07/deadly-dismissals>.

⁴⁸ *Chicago Kids Say They're Assigned To Gangs*, NPR (Feb. 21, 2013), <http://www.npr.org/2013/02/21/172593743/chicago-kids-say-theyre-assigned-to-gangs>.

⁴⁹ James Reddick, *Deadly Dismissals*, CHI. REP. (July 1, 2013), <http://www.chicagoreporter.com/news/2013/07/deadly-dismissals>.

⁵⁰ *Id.*

⁵¹ Steven Yaccino, *Protests Fail to Deter Chicago From Shutting 49 Schools*, N.Y. TIMES, May 22, 2013, at A20, available at <http://www.nytimes.com/2013/05/23/education/despite-protests-chicago-closing-schools.html>.

⁵² Pauline Lipman, Janet Smith, Eric Gutstein, and Lisa Dallacqua, *Examining CPS' Plan to Close, Turnaround, or Phase Out 17 Schools*, UNIVERSITY OF ILLINOIS-CHICAGO (Feb. 21, 2012), at 18, http://www.uic.edu/cuppa/voorheesctr/Publications/DD2012_Report_2_21_2012.pdf.

after Chicago school closings in 2009 is the case of honor roll student Derrion Albert who was beaten to death, on video, as part of a long-running neighborhood dispute between the various neighborhoods that were combined at Fenger High School.⁵³

To prepare for the re-opening of schools in August, Chicago has set up a “safe passage” program in an attempt to shield children from gang violence on the way to their new schools.⁵⁴ Within a month of the closure announcements, “city agencies tasked with helping children safely to new schools next year said they had already dealt with 11,000 requests for service along the school routes.”⁵⁵ The effectiveness of this program is questionable as it merely enlists community members to watch students on their way to school.⁵⁶

In other large cities, school closures resulted in the “doubling of the likelihood of dropping out of school, increased school violence, lowered likelihood of enrolling in summer school programs in the summer following school closure, higher rates of school-to-school mobility, disrupted peer relationships, and weaker relationships with adults.”⁵⁷

Closing neighborhood schools may increase violence and crime in communities impacted by school closures. According to the Woodstock Institute, a Chicago public policy research organization, if buildings of the closed schools are not maintained or sold, the abandoned buildings may result in “negative impacts in terms of attracting crime or affecting property values or neighborhood stability.”⁵⁸

D. Quality of Education: Class sizes will increase and most students will not move to better schools.

School closures in Chicago will displace over 30,000 students from kindergarten through eighth grade who must transfer to other Chicago public schools.⁵⁹ As a result, class sizes will increase in receiving schools, as admitted by school officials.⁶⁰ From research on prior school closings, Chicagoland Researchers and Advocates for Transformative Education (CRATE) found that “closings often lead to increased class sizes and overcrowding in receiving schools.”⁶¹

⁵³ *School Closings Root of Chicago Teen Violence?*, AP (Oct. 6, 2009), http://www.nbcnews.com/id/33200246/ns/us_news-education/t/school-closings-root-chicago-teen-violence/#.Uauiz0CpySo.

⁵⁴ *CPS Seeks Community Partners to Expand Safe Passage to All Welcoming Schools This Fall*, CPS PRESS RELEASE (Mar. 27, 2013), http://www.cps.edu/News/Press_releases/Pages/3_27_2013_PR1.aspx.

⁵⁵ Lauren Fitzpatrick, *11,000 Requests for Service Received Along CPS ‘Safe Passage’ Routes*, CHI. SUN-TIMES (June 14, 2013), <http://www.suntimes.com/news/education/20739983-418/11000-requests-for-service-received-along-cps-safe-passage-routes.html>.

⁵⁶ Sarah Karp, *CPS Won't Take Recommendations Against Closings*, CATALYST CHI. (May 7, 2013), <http://www.catalyst-chicago.org/notebook/2013/05/07/21041/cps-wont-take-recommendations-against-closings>.

⁵⁷ Stephanie Farmer, Isaura Pulido, Pamela J. Konkol, Kate Phillippo, David Stovall and Mike Klonsky, *CRATE Research Brief on School Closures*, CHICAGOLAND RESEARCHERS AND ADVOC. FOR TRANSFORMATIVE EDUC. (Mar. 2013), at 1-2, <http://www.createchicago.org/2013/03/create-releases-research-brief-on.html>.

⁵⁸ Natalie Moore, *School Closures Only Add to Blight in Some Chicago Neighborhoods*, WBEZ91.5 (May 23, 2013), <http://www.wbez.org/news/school-closures-only-add-blight-some-chicago-neighborhoods-107345>.

⁵⁹ Noreen S. Ahmed-Ullah and Bob Secter, *CPS to Close 61 Buildings, Affecting 30,000 Kids*, CHI. TRIB. (Mar. 22, 2013), http://articles.chicagotribune.com/2013-03-22/news/ct-met-cps-school-closings-0322-20130322_1_school-buildings-elementary-schools-todd-babbitz.

⁶⁰ Linda Lutton, *50,421 Chicago kids in Homerooms Over the Class Size Limit*, WBEZ91.5 (May 16, 2013), <http://www.wbez.org/news/education/50421-chicago-kids-homerooms-over-class-size-limit-107196>.

⁶¹ Stephanie Farmer, Isaura Pulido, Pamela J. Konkol, Kate Phillippo, David Stovall and Mike Klonsky, *CRATE Research Brief on School Closures*, CHICAGOLAND RESEARCHERS AND ADVOC. FOR TRANSFORMATIVE EDUC. (Mar. 2013), at 1, <http://www.createchicago.org/2013/03/create-releases-research-brief-on.html>; See also Sarah Karp, *For the Record: Class Sizes, Closing Schools*, CATALYST CHI. (May 15, 2013), <http://www.catalyst-chicago.org/notebook/2013/05/15/21058/record-class-sizes-closing-schools>.

Such increases have been shown to have a negative impact on both transferred students and those in receiving schools.⁶²

The Chicago Board of Education argued that schools that were closed were underutilized because there were too few students per class.⁶³ The Chicago Board of Education published standards that put the ideal class size at 30 per classroom.⁶⁴ Arguably, even 30 students per teacher create a challenging learning environment for students.⁶⁵ Chicago has the 14th highest class size average across the elementary grades (K-8) compared to other school districts in the State of Illinois.⁶⁶

Moreover, even under the Chicago Board of Education's own standards, the school closures and transfers will move many students into classrooms in receiving schools that are above mandated class sizes.⁶⁷ For example, Mollison Elementary School is considered underutilized because there are only 13 students per classroom. When students from nearby Overton Elementary School transfer to Mollison, however, it will balloon to more than 37 students per class (which is greater than the mandated size set by the Chicago Board of Education).⁶⁸ McCutcheon Elementary will also become overcrowded when it receives new students from a closed school nearby.⁶⁹ Although a school targeted for closing may have "underutilized classrooms," when students are moved to receiving schools, classrooms in those schools may become larger than the standards set by the Chicago Board of Education. Additionally, "CPS officials have admitted the [utilization] formula does not take reduced special education class size requirements into account in the formula."⁷⁰ Therefore, an "underutilized classroom" may, in fact, be a special education room that "can have no more than eight students per teacher or 13 if there are two teachers" due to Illinois state law.⁷¹ This effect is compounded by the fact that schools in Chicago already have larger classroom sizes than schools in other parts of the state of Illinois.

Many groups and parents assert that these increases in class sizes will negatively impact learning outcomes for many students.⁷² Studies show that smaller classroom sizes positively impact learning outcomes for students, particularly low-income and African American

⁶² See generally Pauline Lipman and Alecia S. Person, *Students As Collateral Damage?: A Preliminary Study of Renaissance 2010 School Closings in the Midsouth*, <http://www.uic.edu/educ/ceje/articles/midsouth%20initial%20report%201-31-07.pdf>.

⁶³ Chuck Sudo, *CPS To Close About 50 Schools; List Could Be Released Today*, CHICAGOIST (Mar. 21, 2013), http://chicagoist.com/2013/03/21/cps_to_close_up_to_50_schools_list.php.

⁶⁴ Chicago Public Schools Space Utilization Standards, WWW.CPS.EDU (Dec. 28, 2011),

http://www.cps.edu/About_CPS/Policies_and_guidelines/Documents/SpaceUtilizationStandards.pdf.

⁶⁵ Stephanie Gadlin, *CPS Target of 30 to 40 Students in a Classroom is a Dangerous Benchmark for Utilization 'Crisis'*, CHI. TEACHERS UNION (Mar. 7, 2013), <http://www.ctunet.com/media/press-releases/cps-target-of-30-to-40-students-in-a-classroom-is-a>.

⁶⁶ *CTU Analysis Shows Chicago's School Class Sizes are Among the Highest in the State*, CTUNET.COM, <http://www.ctunet.com/quest-center/research/position-papers/class-sizes>.

⁶⁷ Tanveer Ali, *CPS School Closings: Plan Would Push Some Schools Over Capacity, Data Shows*, DNAINFO CHI. (Apr. 22, 2013), <http://www.dnainfo.com/chicago/20130422/chicago/cps-closings-would-push-some-schools-over-capacity-data-shows>.

⁶⁸ *Id.*

⁶⁹ Patrick Boylan, *Trumbull Closing Will Cause More Utilization Issues*, THE WELLES PARK BULLDOG (Apr. 26, 2013), <http://www.wellesparkbulldog.com/news/trumbull-closing-will-cause-more-utilization-issues>.

⁷⁰ Becky Vevea and Linda Lutton, *Fact Check: Chicago School Closings*, WBEZ91.5 (May 16, 2013), <http://www.wbez.org/news/fact-check-chicago-school-closings-107216>.

⁷¹ *Id.*

⁷² Bob Sexter, Noreen S. Ahmed-Ullah and Alex Richards, *School Closing Critics Question CPS' 'Ideal' Class Size of 30 Students*, CHI. TRIB. (Mar. 6, 2013), http://articles.chicagotribune.com/2013-03-06/news/ct-met-cps-school-closing-class-size-20130306_1_class-size-state-records-high-schools/2.

children.⁷³ Unfortunately, these are the vast majority of children that will be affected by the school closures. Additionally, education experts also regard smaller schools as providing better educational opportunities, particularly for low-income students, as principals can be more familiar with each individual student and – together with teachers and parents – create a sense of community, which fosters learning.⁷⁴

While Chicago authorities claim students from underperforming schools will be moved to better performing schools, few of the transferred students will move to schools that are better performing. On the contrary, these school closures will move many students from the lowest-level closed schools to the lowest-level receiving schools.⁷⁵ The only schools where positive improvements have been shown to occur for displaced students are top quartile schools.⁷⁶ In fact, in prior Chicago school closings, 80% of students from closed elementary schools simply shifted from a school in the bottom half in terms of certain educational indicators to another school in the bottom half.⁷⁷ Only 6% of displaced students enrolled at a top quartile receiving school and it is only the top quartile receiving schools that show improvements in displaced student learning.⁷⁸ In this round of school closings, only in three cases will students from the lowest performing schools be moving to top quartile “receiving schools.”⁷⁹ There is no doubt that class sizes will increase as a result of the school closings and most students are unlikely to improve their educational outcomes. This may negatively impact the quality of education for many students.

E. The manner in which decisions regarding the school closures were made denied parents, community members, and teachers the ability to participate in an important public policy decision.

Although the Chicago Board of Education held many public meetings with respect to the school closings, participation in some hearings was compromised by discriminatory rules on participation.⁸⁰ Additionally, a large majority of opinions opposed the school closings and were ignored. This is true of the public meetings convened by the Board of Education as well as the hearings before appointed judges.⁸¹ The right to participate lacks any meaning if the public’s opinion is ignored.

⁷³ Council of Economic Advisors, the Domestic Policy Council, and the National Economic Council, *Investing in Our Future: Returning Teachers to the Classroom*, EXECUTIVE OFFICE OF THE PRESIDENT (Aug. 2012), http://www.whitehouse.gov/sites/default/files/Investing_in_Our_Future_Report.pdf.

⁷⁴ Jordan Hylden, *What’s So Big About Small Schools? The Case for Small Schools: Nationwide and in North Dakota*, at 3-7, <http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG05-05Hylden.pdf>.

⁷⁵ Becky Vevea and Linda Lutton, *Fact Check: Chicago School Closings*, WBEZ91.5 (May 16, 2013), <http://www.wbez.org/news/fact-check-chicago-school-closings-107216>.

⁷⁶ Linda Lutton, *Few Chicago School Closings Will Move Kids to Top-Performing Schools*, WBEZ91.5 (May 19, 2013), <http://www.wbez.org/news/few-chicago-school-closings-will-move-kids-top-performing-schools-107261>.

⁷⁷ Marisa de la Torre and Julia Gwynne, *When Schools Close: Effects on Displaced Students in Chicago Public Schools*, THE U. CHI. CONSORTIUM ON CHI. SCH. RES. (Oct. 2009), at 15-16, <http://ccsr.uchicago.edu/sites/default/files/publications/CCSRSchoolClosings-Final.pdf>.

⁷⁸ *Id.*

⁷⁹ Becky Vevea and Linda Lutton, *Fact Check: Chicago School Closings*, WBEZ91.5 (May 16, 2013), <http://www.wbez.org/news/fact-check-chicago-school-closings-107216>.

⁸⁰ George N. Schmidt, *Kafka on Clark Street*, SUBSTANCE NEWS (June 4, 2013), <http://www.substanceneeds.net/articles.php?page=4318>.

⁸¹ *Id.*

Over 20,000 students, parents, and teachers voiced opposition in over 30 community sessions before the April school-closing list was issued.⁸² More than 9,000 attended meetings organized by the Chicago Board of Education in neighborhoods and public hearings by appointed judicial officers.⁸³ Parents and community residents have held public demonstrations, including the occupation of a school, to protest the lack of transparency and access to decision-making in the determination of the closures,⁸⁴ to protest racial discrimination against African American students,⁸⁵ to contest the need for deep budget cuts,⁸⁶ to object to the increased class sizes that will result,⁸⁷ and to voice their concern regarding danger to children forced to enroll in schools outside their neighborhoods.⁸⁸

These large turnouts occurred despite reported instances of a lack of advance notice⁸⁹ and limitations placed on participation.⁹⁰ The Chicago Board of Education, for the first time in its history, restricted the number of individuals “permitted to sign up to speak and bring issues before the Board's monthly meetings.”⁹¹ Public participation was limited to two hours at each meeting with each individual limited to two minutes of speaking time.⁹² The option to participate was limited to those who could register online and meetings were filled on a first-come, first served basis. People are also permitted to call or sign up for speaking slots in person. As a result, participation was limited for “poor and working class citizens who do not own their own personal computers, or who are not able to access a computer at precisely 8:00 a.m. on the day of registration.”⁹³ Thus, despite limitations in access, many residents expressed their opposition to the school closings, but those views were ignored and the school closings were finalized notwithstanding the opposition.

An independent panel of experts, retired federal and state judges (hearing officers) appointed by the Board of Education, made explicit recommendations against ten of the slated closures and had reservations about several others.⁹⁴ The officers found many of the closing

⁸² Noreen S. Ahmed-Ullah, *At Chicago School Closing Hearings, Crowds Fade*, CHI. TRIB. (Apr. 25, 2013), http://articles.chicagotribune.com/2013-04-25/news/ct-met-cps-closing-hearings-20130426_1_schools-chief-barbara-byrd-bennett-final-list-two-community-meetings.

⁸³ *Id.*

⁸⁴ Aaron Cynic, *Families Occupy Lafayette Elementary School To Fight First Wave of Closures*, CHICAGOIST (June 20, 2013), http://chicagoist.com/2013/06/20/families_occupy_elementary_school_t.php.

⁸⁵ *Parents Of Schools Set To Close Want Kids Enrolled At Pritzker On North Side*, CBS CHI. (May 30, 2013), <http://chicago.cbslocal.com/2013/05/30/parents-of-schools-set-to-close-want-kids-enrolled-on-north-side/>.

⁸⁶ Noreen S. Ahmed-Ullah and Rick Pearson, *CPS Leader Predicts Happier Ties with Teachers Union*, CHI. TRIB. (June 18, 2013), http://articles.chicagotribune.com/2013-06-18/news/ct-met-chicago-forward-byrd-bennett-20130619_1_chicago-forward-teachers-union-union-president-karen-lewis.

⁸⁷ Diane Ravitch, *Major Rally Today in Chicago to Protest Budget Cuts*, DIANERAVITCH.NET (June 21, 2013), <http://dianeravitch.net/2013/06/21/major-rally-today-in-chicago-to-protest-budget-cuts/>.

⁸⁸ Judy Keen, *Chicago School Closings Ignite Furor and Fears*, USA TODAY (Mar. 29, 2013), <http://www.usatoday.com/story/news/nation/2013/03/28/fears-of-gang-fights-cloud-chicago-school-closings/2029411/>.

⁸⁹ Noreen S. Ahmed-Ullah, *At Chicago School Closing Hearings, Crowds Fade*, CHI. TRIB. (Apr. 25, 2013), http://articles.chicagotribune.com/2013-04-25/news/ct-met-cps-closing-hearings-20130426_1_schools-chief-barbara-byrd-bennett-final-list-two-community-meetings.

⁹⁰ George N. Schmidt, *Kafka on Clark Street*, SUBSTANCE NEWS (June 4, 2013), <http://www.substancenews.net/articles.php?page=4318>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Becky Schlikerman and Tina Sfondeles, *Hearing Officers Oppose 10 Planned CPS Closures, Have Reservations About Others*, CHI. SUN-TIMES (May 7, 2013), <http://www.suntimes.com/news/education/19951788-418/hearing-officers-oppose-14-planned-cps-closures.html>.

decisions “were insensitive to children, particularly special needs students.”⁹⁵ In particular, the hearing officers expressed concern regarding the transition plan and safety program, as well as the needs of special needs children.⁹⁶ Former Cook County Circuit Court Judge Carl McCormick described the plan as a “promise of an omelet with a crisp waffle then what is delivered are broken eggs, whose contents are oozing out and a burnt pancake.”⁹⁷ Mayor Emanuel resisted promising to follow the recommendations of the hearing officers.⁹⁸ The Board of Education, contrary to *both* public opinion *and* reservations expressed by the independent hearing officers, took only four schools off the list and proceeded to close 49 schools.⁹⁹

Additionally, unlike the vast majority of public school districts across the country, the mayoral appointment structure of the Chicago Board of Education removes it from direct accountability to the public. Chicago is the only school district of almost 900 in Illinois where the mayor has the power to appoint the members of the Board of Education.¹⁰⁰ Across the United States, 96% of school boards are elected.¹⁰¹ Thus, the entire system is accountable to the Mayor of Chicago rather than the local constituencies they are entrusted to serve.¹⁰² Indeed, the State Legislature previously expressed concern about the lack of democratic participation in Chicago school decisions. It adopted a statute that became effective in 2011 intended “to ensure that school facility-related decisions are made with the input of the community and reflect educationally sound and fiscally responsible criteria.”¹⁰³

F. Financial considerations do not justify the school closures.

Mayor Emanuel and the Chicago Board of Education claim the school closures are necessary to “address the district’s \$1 billion deficit, make better use of resources, and improve education.”¹⁰⁴ The cost-savings from the school closings may have been overstated by the Chicago city government. Shortly after announcing the 2013 school closures, the Chicago Board of Education acknowledged that it overestimated the cost savings from the closures, dropping the initial figure of \$560 million to \$438 million over 10 years.¹⁰⁵ According to a report by The Pew Charitable Trusts, the savings may prove to be even lower because savings estimates assume the

⁹⁵ Noreen S. Ahmed-Ullah and John Byrne, *Fewer than 5 CPS Schools Expected to be Spared*, CHI. TRIB. (May 21, 2013), http://articles.chicagotribune.com/2013-05-21/news/ct-met-school-closing-march-0521-20130521_1_closings-list-schools-chief-barbara-byrd-bennett-president-david-vitale.

⁹⁶ *Id.*

⁹⁷ Bob Sexter and Noreen S. Ahmed-Ullah, *Hearing Officers Oppose 13 of Closings Planned by CPS*, CHI. TRIB. (May 8, 2013), http://articles.chicagotribune.com/2013-05-08/news/chi-chicago-public-schools-closings-20130507_1_hearing-officers-closures-closing-schools.

⁹⁸ *Emanuel Won’t Promise to Follow Hearing Officers’ Recommendations on School Closings*, CBS CHI. (May 9, 2013), <http://chicago.cbslocal.com/2013/05/09/emanuel-wont-promise-to-follow-hearing-officers-recommendations-on-school-closings/>.

⁹⁹ Steven Yaccino, *Protests Fail to Deter Chicago From Shutting 49 Schools*, N.Y. TIMES, May 22, 2013, at A20, available at <http://www.nytimes.com/2013/05/23/education/despite-protests-chicago-closing-schools.html>.

¹⁰⁰ Pauline Lipman and Eric Gutstein, *Should Chicago Have an Elected Representative School Board? A Look at the Evidence*, UNIVERSITY OF ILLINOIS AT CHICAGO (Feb. 2011), at 9, <http://www.uic.edu/educ/ceje/articles/Printed%20school%20board%20report.pdf>.

¹⁰¹ *Id.* at 8.

¹⁰² *Id.* at 5.

¹⁰³ 105 Ill. Comp. Stat. Ann. 5/34-18.43 (West).

¹⁰⁴ BJ Lutz & Michelle Relerford, *CPS to Shutter 54 Schools in Closure Plan*, NBC CHI. (Mar. 21, 2013), <http://www.nbcchicago.com/blogs/ward-room/chicago-public-school-closures-199247301.html>.

¹⁰⁵ Tanveer Ali, *CPS School Closings: Critics Again Tell Rahm to ‘Walk the Walk’*, DNAINFO CHI. (May 8, 2013), <http://www.dnainfo.com/chicago/20130508/chicago/cps-school-closings-critics-again-tell-rahm-walk-walk>.

Board of Education can lease, sell, or repurpose the closed buildings.¹⁰⁶ The report found that, by the end of 2012, 24 school buildings in Chicago were still on the market, with some being vacant for a decade or more.¹⁰⁷ Abandoned school buildings that are not sold to private parties require the government to spend considerable sums for maintenance and to prevent the buildings from becoming sites for gang-activity.¹⁰⁸

Other sources of funding are available to the City of Chicago to pay for quality public schools. Journalists and social scientists, as well as Chicago residents, have criticized the Mayor's failure to allocate tax increment financing (TIF) funds (a special discretionary revenue fund) to improve public schools in Chicago.¹⁰⁹ The city possesses "a tremendous amount of autonomy and flexibility in TIF fund allocation decisions" that is largely unregulated and informal.¹¹⁰ The Mayor can propose projects "without consulting [Chicago public schools], parents, or Local School Councils, as well as to port funds from one TIF district to another without consulting [Chicago public schools] or the Aldermen whose wards fall in the TIF districts."¹¹¹ Last year, Chicago had over \$1.2 billion surplus TIF funds.¹¹² Criticism increased dramatically after Mayor Emanuel announced a \$173 million basketball arena for DePaul University – a private, Catholic college – soon after the public school closings.¹¹³ Critics assert that the city's TIF investment of \$33 million in the DePaul project (as well as other TIF monies) could have been spent on education expenses or to address the budget concerns.¹¹⁴

¹⁰⁶ Emily Dowdall and Susan Warner, *Shattered Public Schools: The Struggle to Bring Old Buildings New Life*, THE PEW CHARITABLE TRUSTS (Feb. 11, 2013), at 16, http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Philadelphia_Research_Initiative/Philadelphia-School-Closings.pdf.

¹⁰⁷ *Id.* at 4.

¹⁰⁸ Gary Younge, *Chicago's South Siders Vow to Fight to the Last in Battle to Save Their Schools*, THE GUARDIAN (Apr. 9, 2013), <http://www.guardian.co.uk/world/2013/apr/09/chicago-public-schools-teachers-closures>.

¹⁰⁹ *A Primer on Tax Increment Financing*, THE BOARD OF REGENTS OF THE UNIVERSITY OF ILLINOIS AT CHICAGO, http://www.uic.edu/cuppa/voorheesctr/tif/public_html/tif101.html; Stephanie Farmer, *Tax Increment Financing and Chicago Public Schools Construction Projects*, CHICAGOLAND RESEARCHERS AND ADVOC. FOR TRANSFORMATIVE EDUC. (June 2012), <http://www.chicagobusiness.com/assets/downloads/rooseveltreport.pdf>; Ben Joravsky and Mike Dumke, *Shedding Light on the Shadow Budget*, CHI. READER (Dec. 10, 2009), <http://www.chicagoreader.com/chicago/shadow-budget-tif/Content?oid=1251320>; Chuck Sudo, *Emanuel Blames CPS Budget Woes On Pensions, Conveniently Ignores TIFs*, CHICAGOIST (June 26, 2013), http://chicagoist.com/2013/06/26/emanuel_blames_cps_budget_woes_on_p.php;

¹¹⁰ *A Primer on Tax Increment Financing*, THE BOARD OF REGENTS OF THE UNIVERSITY OF ILLINOIS AT CHICAGO, http://www.uic.edu/cuppa/voorheesctr/tif/public_html/tif101.html.

¹¹¹ *Factsheet on Tax Increment Financing (TIF)*, CHICAGOLAND RESEARCHERS AND ADVOC. FOR TRANSFORMATIVE EDUC., <http://www.createchicago.org/p/fact-sheets-and-research-briefings.html>.

¹¹² Valerie F. Leonard, *Five Reasons Why Chicago Should Have an Elected School Board*, CATALYST CHI. (Oct. 22, 2012), <http://www.catalyst-chicago.org/news/2012/10/22/20522/five-reasons-why-chicago-should-have-elected-school-board>.

¹¹³ Ben Strauss, *Critics Say Chicago Shouldn't Aid DePaul Arena With Schools Closing*, N.Y. TIMES, June 23, 2013, at D8, available at <http://www.nytimes.com/2013/06/24/sports/ncaabasketball/critics-say-chicago-shouldnt-aid-depaul-arena-with-schools-being-shut-down.html>.

¹¹⁴ *Id.*

3. APPLICABLE INTERNATIONAL HUMAN RIGHTS LAWS

The Universal Declaration of Human Rights effectively binds the United States as customary international law.¹¹⁵ The United States of America has ratified the UN International Covenant on Civil and Political Rights¹¹⁶ and the UN International Convention on the Elimination of All Forms of Racial Discrimination.¹¹⁷ The United States of America has signed the Convention on the Rights of the Child,¹¹⁸ the International Covenant on Economic, Social and Cultural Rights,¹¹⁹ and the Convention on the Rights of Persons with Disabilities.¹²⁰ Under the Vienna Convention, even with respect to treaties the United States has signed but not ratified, it is bound not to defeat its “object and purpose.”¹²¹ Moreover, the Chicago City Council specifically adopted the Convention on the Rights of Child and directed all city agencies that work on issues impacting children to “advance policies and practices that are in harmony with the principles on the Convention of the Rights of the Child.”¹²²

A. The right to equality and non-discrimination in education

1. Discrimination against minorities

The United States is bound by numerous international conventions that require equality and prohibit discrimination on any ground, including race. Specifically, the United States is a State Party to the International Covenant on Civil and Political Rights (ICCPR).¹²³ Article 26 of the ICCPR states that:

All persons are equal before the law and are entitled without any discrimination, to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any

¹¹⁵ Antônio Augusto Cançado Trindade, *Universal Declaration of Human Rights*, AUDIOVISUAL LIBR. OF INT’L L. (2008) (“The international community as a whole, moved by the universal juridical conscience, conferred upon the Universal Declaration the dimension that it has today, recognized in the international case law, incorporated in the domain of customary international law, and gave expression to some general principles of law universally recognized.”).

¹¹⁶ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

¹¹⁷ International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 (current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en).

¹¹⁸ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

¹¹⁹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 (current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en).

¹²⁰ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007) (current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en).

¹²¹ Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

¹²² City of Chicago Resolution Adopting the Convention on the Rights of the Child, February 11, 2009, available at <http://www.njcn.org/uploads/digital-library/City-of-Chicago-Resolution-UN-Convention-on-Rights-of-Child-2.11.09.pdf>.

¹²³ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹²⁴

This provision is autonomous, thus widening the scope of non-discrimination beyond only the rights in the ICCPR under Article 3.¹²⁵ The United States is also a State Party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).¹²⁶ Article 2 of ICERD condemns racial discrimination, obliging States Parties to eliminate discrimination in all forms, as follows:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms... and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons... and to assure that all public authorities and public institutions, national and local, shall act in conformity with this obligation... (c) Each State Party shall take effective measures to review governmental, national, and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.¹²⁷

The Convention on the Rights of the Child (CRC) also prohibits governments from discriminating against children with respect to all rights set forth in the Convention. Article 2 of the CRC states that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.¹²⁸

The prohibition against discrimination applies to all laws and policies, including those with regard to education. The International Covenant on Economic, Social and Cultural Rights (ICESCR), to which the United States is a signatory, states in Article 2.2 that there should be no discrimination of any kind with respect to the rights in the Covenant, which includes the right to education:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind

¹²⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

¹²⁵ O.P. Dhiman, *Understanding Human Rights: An Overview* 121 (2011) (“Article 26 contains a revolutionary and unique norm by providing an autonomous equality principle which is not dependent upon another right under the convention being infringed. This has the effect of widening the scope of the non-discrimination principle beyond the scope of ICCPR.”).

¹²⁶ International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 (current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en).

¹²⁷ International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195.

¹²⁸ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

as to race, colour, sex, language, religions, political or other opinion, national or social origin, property, birth, or other status.¹²⁹

The closure of 49 public elementary schools in Chicago denies the right to equal protection and violates African American students' right to be free from racial discrimination because the closings disproportionately impact African American students. As discussed in Section 2.A above (Factual Background on School Closings), African American children are 42% of all students enrolled in public schools in Chicago but 80% of the children who will be impacted by the school closures.¹³⁰ In addition, 87% of the schools marked for closure were majority African American.¹³¹

Law and policies that have a disproportionate impact on minorities can give rise to violations even if there is no intent to discriminate on the part of the government. For example, in *D.H. and Others v. Czech Republic*, the European Court of Human Rights held that the disproportionate assignment of Roma children in the Czech Republic to special schools amounted to a violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights read in conjunction with Article 2 of Protocol 1 (right to education).¹³² The Court further elaborated that it was not necessary to prove discriminatory intent on behalf of the State to establish a disparate impact claim.¹³³

This disproportionate impact on African American students will have many negative consequences. First, African American children in Chicago will be at greater risk of violence in their home communities (see Section 3.B below). Second, African American children will disproportionately suffer the effects of a reduced quality of education (see Section 3.C below). The discriminatory impact on African American students of the school closures violates both the ICCPR and ICERD, both binding on the United States, and the CRC, which the Chicago City Council adopted.

Additionally, several lawsuits have recently been filed in U.S. Federal Courts in Illinois seeking to enjoin the school closures on the basis that they violate domestic law.¹³⁴ One complaint alleges that “by repeatedly selecting African American students to bear the costs of the closings” the Board of Education is unlawfully subjecting African American children to discrimination because of race, in violation of Section 5 of the Illinois Civil Rights Act of 2003 (ICRA), 740 ILCS 23/5.¹³⁵ A Federal court in Chicago, Illinois held a hearing during the week of July 15, 2013 to determine whether school closings be stopped pending resolution of the lawsuits.¹³⁶

¹²⁹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

¹³⁰ Alex Keefe, *Emanuel: CPS School Closures 'Not Taken Lightly,' but Must be Done*, WBEZ91.5 (Mar. 23, 2013), <http://www.wbez.org/news/emanuel-cps-school-closures-not-taken-lightly-must-be-done-106253>.

¹³¹ *Id.*

¹³² *D.H. and Others v. Czech Republic*, 57325/00 Eur. Ct. H.R. (2006), available at <http://www.unhcr.org/refworld/docid/469e020e2.html>.

¹³³ *Id.*

¹³⁴ Noreen S. Ahmed-Ullah, *Hearings Today on Lawsuits Against CPS School Closings*, CHI. TRIB. (July 16, 2013), http://articles.chicagotribune.com/2013-07-16/news/ct-met-cps-federal-hearing-20130715_1_closings-today-chicago-teachers-union.

¹³⁵ Complaint at 5, *McDaniel v. Bd. of Educ. of the City of Chicago*, No. 13-CV-03624, (N.D. Ill. May 14, 2013), available at http://blogs.edweek.org/edweek/District_Dossier/School%20Closing%20ICRA%20Complaint%20Clean.pdf.

¹³⁶ Jessica D'Onofrio and Sarah Schulte, *Chicago Public Schools Closings Fight Moves to Federal Court With Injunction Hearing*, ABC CHIC. (July 16, 2013), <http://abclocal.go.com/wls/story?section=news/local&id=9173735>.

2. Discrimination against children with disabilities

The right to equality and non-discrimination provisions mentioned in Section 2.A.1 above also protects children with disabilities. Other provisions that relate to children with disabilities in the educational context are also relevant. First, the United States has signed the Convention on the Rights of Child (CRC), which the Chicago City Council has specifically adopted.¹³⁷ Article 23 of the CRC recognizes the right of disabled children to special care.¹³⁸ Article 23(2) states specifically that:

States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.¹³⁹

Second, President Obama signed the Convention on the Rights of Persons with Disabilities, which specifically requires “States Parties recognize the right of persons with disabilities to education.”¹⁴⁰ It further provides that “[p]ersons with disabilities are not excluded from the general education system on the basis of disability”¹⁴¹ and that “[r]easonable accommodation of the individual's requirements” be provided.¹⁴²

As described in Section 2.B above (Factual Background on School Closings), many schools slated for closure offer extensive services for students with special needs and it is not clear whether the receiving schools will offer the same kind of services required to sufficiently provide for these children. The larger class sizes may violate the requirements under local laws that mandate educational programs designed to meet the needs of each individual child.

Additionally, the lawsuits filed in the U.S. District Court for the Northern District of Illinois also raise objections to the school closures on the grounds that the closings will have a disproportionate impact on disabled students. One complaint alleges that the Board of Education is “carrying out a program of school closings that will do more harm to children with disabilities than it will to their non-disabled classmates.”¹⁴³

B. The right to be free from violence and the right to life

International treaties guarantee all Americans the right to be free from violence, the right to life, and the right to accessible education. Article 6 of the ICCPR provides that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”¹⁴⁴ Article 19 of the CRC requires the United States government

¹³⁷ City of Chicago Resolution Adopting the Convention on the Rights of the Child, February 11, 2009, available at <http://www.njcn.org/uploads/digital-library/City-of-Chicago-Resolution-UN-Convention-on-Rights-of-Child-2.11.09.pdf>.

¹³⁸ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹³⁹ *Id.*

¹⁴⁰ Convention on the Rights of Persons with Disabilities, art. 24(1), G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007).

¹⁴¹ *Id.* at art. 24(2)(a).

¹⁴² *Id.* at art. 24(2)(c).

¹⁴³ Complaint at 2, *McDaniel v. Bd. of Educ. of the City of Chicago*, No. 13-CV-03624, (N.D. Ill. May 14, 2013), available at http://blogs.edweek.org/edweek/District_Dossier/School%20Closing%20ICRA%20Complaint%20Clean.pdf.

¹⁴⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.”¹⁴⁵ The United Nations committee that monitors compliance with the CRC recently stated in General Comment No. 13 that “[n]o violence against children is justifiable; all violence against children is preventable.”¹⁴⁶

Additionally, Article 13 of the ICESCR requires state parties to “recognize the right of everyone to education.”¹⁴⁷ The Committee on Economic, Social, and Cultural Rights, a UN body that monitors implementation of the ICESCR, has stated in General Comment No. 13 that educational institutions must be accessible to everyone, without discrimination.¹⁴⁸ This includes physical accessibility, which means that the educational facilities must be within safe physical reach or convenient geographic location.¹⁴⁹

The school closings jeopardize the right of children to be free from violence, their right to life, and right to accessible education. As discussed in Section 2.C (Factual Background on School Closings) the closing of 49 schools have occurred in communities where there is significant violence and now many students will have to travel through neighborhoods that may be unsafe and put their lives at risk. Other children will be in new schools with classmates who may threaten them because of assumed gang-affiliations based on their place of residence. Some of these children may stop attending school due to violence or threats of violence. In disregard to the requirement of Article 28 of the CRC that requires the City of Chicago to reduce drop-out rates, the school closings are likely to increase them.

The CRC, adopted by Chicago’s City Council, requires that the government take measures to prevent violence against children and the ICCPR guarantees each person the right to life. Contrary to this requirement, the Chicago Board of Education has placed children at increased risk of violence and death with the closing of nearly 10% of all Chicago Public Schools. The schools that students will be forced to attend will also be farther away and physically less accessible than their prior schools in contravention of the ICESCR.

C. The right to quality of education

The right to education is a foundational human right in the United States’ democracy. Nearly every state constitution contains an education provision,¹⁵⁰ including the Illinois constitution.¹⁵¹ The Universal Declaration of Human Rights (UDHR), although not a treaty, is considered to effectively bind all member states of the United Nations as customary international law.¹⁵² Article 26 of the UDHR declares that “everyone has a right to

¹⁴⁵ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹⁴⁶ Comm. on the Rights of the Child, *General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence (art. 19)*, ¶ 3, U.N. Doc. CRC/C/GC/13 (Apr. 18, 2001), available at http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf.

¹⁴⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3

¹⁴⁸ Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 13: The Right to Education (art. 13)*, ¶ 6 & ¶ 43, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999), available at <http://www.unhcr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument>.

¹⁴⁹ *Id.* at ¶ 6.

¹⁵⁰ William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 (1989).

¹⁵¹ Ill. Const. art. 10.

¹⁵² Antônio Augusto Cançado Trindade, *Universal Declaration of Human Rights*, AUDIOVISUAL LIBR. OF INT’L L. (2008) (“The international community as a whole, moved by the universal juridical conscience, conferred upon the Universal Declaration the

education.”¹⁵³ The CRC, to which the United States is a signatory, protects the child’s right to education in Articles 28 and 29.¹⁵⁴ It requires that countries that are party to it “recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity” and “take measures to encourage regular attendance at schools and the reduction of drop-out rates.”¹⁵⁵ Although the United States has signed, but not ratified, the CRC, the Chicago City Council has adopted it and required all city agencies to comply with it. Additionally, ICESCR, to which the United States is a signatory, guarantees the right to education in Article 13.¹⁵⁶ It provides that countries that are party to the Covenant “recognize the right of everyone to education.”¹⁵⁷ The United States has signed, but not ratified, the ICESCR. The United States, however, cannot engage in activities that would defeat the object and purpose of the ICESCR or CRC.¹⁵⁸

It is not enough for a government to simply provide a spot to each student in a school, but the education must also be of a certain, high quality. The UN Special Rapporteur on the Right to Education recently stated that quality of education is extremely important.¹⁵⁹ The UN committee that interprets the CRC asserted in General Comment No. 1 that there is “a qualitative dimension” to the right to education “which reflects the rights and inherent dignity of the child.”¹⁶⁰ Additionally, General Comment No. 13, adopted by the UN committee that monitors the ICESCR, requires that education be “acceptable.”¹⁶¹ This means that “teaching methods ... have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students.”¹⁶² That committee has also stated that “education offered must be adequate in quality, relevant to the child and must promote the realization of the child’s other rights.”¹⁶³ Illinois state law also stresses the quality of education: “Quality educational facilities are essential for fostering the maximum educational development of all persons through their educational experience from pre-kindergarten through high school.”¹⁶⁴

The actions of the Mayor of Chicago and the Chicago Board of Education put at risk the right to a quality education of the thousands of students who will be subjected to classes of larger sizes than previously existed. Students will not always be transferred to higher performing schools. A study conducted after a prior wave of school closings in Chicago found that the

dimension that it has today, recognized in the international case law, incorporated in the domain of customary international law, and gave expression to some general principles of law universally recognized.”)

¹⁵³ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

¹⁵⁴ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

¹⁵⁵ *Id.*

¹⁵⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 (current signatory and ratification status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en).

¹⁵⁷ *Id.*

¹⁵⁸ Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

¹⁵⁹ *Report of the Special Rapporteur on the right to education, Kishore Singh*, Human Rights Council (Twentieth session, May 2, 2012), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/133/55/PDF/G1213355.pdf?OpenElement>.

¹⁶⁰ Comm. on the Rights of the Child, *General Comment No. 1: The Aims of Education (art. 29)*, ¶ 2, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2001.1.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2001.1.En).

¹⁶¹ Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 13: The Right to Education (art. 13)*, ¶ 6, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999), available at <http://www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument>.

¹⁶² *Id.*

¹⁶³ Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 11: Plans of Action for Primary Education (art. 14)*, ¶ 6, U.N. Doc. E/C.12/1999/4 (May 10, 1999), available at <http://www.unhchr.ch/tbs/doc.nsf/0/59c6f685a5a919b8802567a50049d460?Opendocument>.

¹⁶⁴ 105 Ill. Comp. Stat. Ann. 5/34-18.43(a) (West).

transferred students did not improve their educational outcomes.¹⁶⁵ Additionally, as discussed in Section 2.D (Factual Background on School Closings), increased class size can have a detrimental impact on student learning, particularly for minority communities. Consequently, the school closings may negatively impact education quality.

Moreover, the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, which are non-binding principles, require that once States provide a certain level of rights, they must not regress.¹⁶⁶ Closing 10% of all public schools in Chicago is a retrogression of the right to education. As a result of the closings, class size in the schools receiving new students will increase, likely reducing the quality of education.

D. The right and opportunity to take part in the conduct of public affairs

Article 25 of the ICCPR provides that every citizen must have the opportunity to “take part in the conduct of public affairs.”¹⁶⁷ The Human Rights Committee, a UN body that interprets and monitors compliance with the ICCPR, stated in General Comment No. 25 that participation may be achieved by citizens “taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government.”¹⁶⁸

Illinois law also requires public participation and input in all decision-making regarding school closures. In response to a prior wave of school closings, the Illinois State Legislature amended the School Code, effective August 2011, to add provisions regarding democratic participation in school closing decisions:

School openings, school closings, school consolidations, school turnarounds, school phase-outs, school construction, school repairs, school modernizations, school boundary changes, and other related school facility decisions often have a profound impact on education in a community. In order to minimize the negative impact of school facility decisions on the community, these decisions should be implemented according to a clear system-wide criteria and with the significant involvement of local school councils, parents, educators, and the community in decision-making.¹⁶⁹

The Illinois legislature also established the Chicago Educational Facilities Task Force to monitor compliance with the new law.¹⁷⁰ The Task Force issued a report regarding to the prior set of school closures in which it found that certain guidelines adopted by the Chicago Board of Education did not satisfy the requirements of Illinois State law.¹⁷¹ Commenting on the current

¹⁶⁵ Marisa de la Torre and Julia Gwynne, *When Schools Close: Effects on Displaced Students in Chicago Public Schools*, THE U. CHI. CONSORTIUM ON CHI. SCH. RES. (Oct. 2009), at 18-26, <http://ccsr.uchicago.edu/sites/default/files/publications/CCSRSchoolClosings-Final.pdf>.

¹⁶⁶ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Jan. 22-26, 1997), at Section 14(e), http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html.

¹⁶⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

¹⁶⁸ International Covenant on Civil and Political Rights, *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (art. 25)*, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996), available at <http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb>.

¹⁶⁹ Adopted by Public Act 096-0803 (effective Aug. 2011) and codified as 105 Ill. Comp. Stat. Ann. 5/34-18.43 (West).

¹⁷⁰ 105 Ill. Comp. Stat. Ann. 5/34-18.43 (West).

¹⁷¹ *Record of Action from the January 12, 2012 Meeting*, CHI. EDUC. FACILITIES TASK FORCE, http://www.isbe.state.il.us/CEF/pdf/ceftf_findings_011212.pdf.

school closures, the Task Force found that “Chicago’s most vulnerable students are at greatest risk” and that the relevant authorities have “failed to provide details for addressing support of special needs students.”¹⁷²

Although the Chicago Board of Education held hearings with community residents about the school closures, those without Internet access found it difficult to obtain speaking spots at the meetings.¹⁷³ In these hearings, the overwhelming majority of parents objected to the school closures. Additionally, the independent hearing officers appointed by the school district who presided over other public hearings filed conclusions and recommendations that raised general objections and recommended against the closing of particular schools.¹⁷⁴ A number of academic experts who studied the school closures also raised numerous objections to the plan.¹⁷⁵ The Chicago Board of Education has not heeded the public’s concerns; instead, it pushes forward with a massive set of widely opposed school closures. Democratic participation is further constricted in public school matters in Chicago, because unlike most other school districts around the country, where school board members are elected, the mayor of Chicago appoints all members to the Chicago Board of Education.¹⁷⁶ The right to participate in decision-making regarding school closings is an empty promise if the opinions of the community are ignored.

E. The closings cannot be justified due to a lack of financial resources

Article 2 of the ICESCR allows state parties to implement the right to education subject to “maximum available resources.”¹⁷⁷ However, the obligations contained in the ICCPR, CERD, CRC and other treaties are not subject to this limitation. In other words, regardless of their level of financial resources, governments can never discriminate against people within its jurisdiction and must treat them equally and protect their right to life. Thus, Chicago cannot offer a budget deficit as a reason for the discriminatory impact of its policies or for exposing children to an increased risk of violence. On the other hand, to the extent the City of Chicago may argue that the quality of education can suffer due to a lack of funding, that argument does not hold either. When examined carefully, given the various other funding options available for funding public schools and the potential lack of savings attributable to the school closings, budget constraints are not a legitimate excuse to erode the quality and accessibility of education for Chicago’s children (see Section 2.F (Factual Background on School Closings)).

¹⁷² Chicago Educational Task Force, *Draft – Preliminary Findings of the ILGA CEFTF*, (May, 2013), <http://www.isbe.state.il.us/CEF/pdf/ceftf-preliminary-findings-051713.pdf>.

¹⁷³ George N. Schmidt, *Kafka on Clark Street*, SUBSTANCE NEWS (June 4, 2013), <http://www.substancenews.net/articles.php?page=4318>.

¹⁷⁴ Becky Schlikerman and Tina Sfondeles, *Hearing Officers Oppose 10 Planned CPS Closures, Have Reservations About Others*, CHI. SUN-TIMES (May 7, 2013), <http://www.suntimes.com/news/education/19951788-418/hearing-officers-oppose-14-planned-cps-closures.html>.

¹⁷⁵ See, e.g., Stephanie Farmer, Isaura Pulido, Pamela J. Konkol, Kate Phillippo, David Stovall and Mike Klonsky, *CREATE Research Brief on School Closures*, CHICAGOLAND RESEARCHERS AND ADVOCS. FOR TRANSFORMATIVE EDUC. (Mar. 2013), <http://www.createchicago.org/2013/03/create-releases-research-brief-on.html>; Michael Tarm, Expert: *Chicago School Closings Will Endanger Kids*, AP (July 18, 2013), <http://abcnews.go.com/US/wireStory/expert-chicago-school-closings-endanger-kids-19693926>.

¹⁷⁶ Pauline Lipman and Eric Gutstein, *Should Chicago Have an Elected Representative School Board? A Look at the Evidence*, UNIVERSITY OF ILLINOIS AT CHICAGO (Feb. 2011), at 9, <http://www.uic.edu/educ/ceje/articles/Printed%20school%20board%20report.pdf>.

¹⁷⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

4. CONCLUSION

The school closures by the City of Chicago, the third largest city in the United States, are the largest in the United States' history. The closures displace nearly 30,000 students in 49 schools over the course of a few months. Although many schools are considered "underutilized" in Chicago, the schools targeted for closure are overwhelmingly located in minority communities. African American students are disproportionately impacted by the closings. While making up about 40% of all students in the public schools, over 80% of impacted students are African American. Accounting for about 12% of the displaced students, disabled children will be hastily transferred without any guarantee that their needs will be met in their new schools. The neighborhoods where many schools are set to close are plagued with gang violence. Displaced students forced to travel through new areas to get to school will face an increased risk of violence and death. The quality of education will suffer as students are packed into larger classes. Precisely those students who need the most resources devoted to their education will be deprived of it. Lack of funding is not an adequate justification for this massive wave of closures when funds that could be utilized for public schools are being spent on other projects. The Chicago Board of Education has largely ignored the findings of an independent panel urging that certain schools remain open as well as the widespread protests by parents, students, and community members against the school closings.

Education is the hallmark of the United States' democracy. It is a right guaranteed by the Illinois state constitution as well as UN treaties that apply to United States government and the City of Chicago. The school closings implicate the right to education as well as the right to equality and non-discrimination, the right of children to be free from violence, and the right to participation in public affairs. The Midwest Coalition for Human Rights on behalf of itself and the undersigned organizations and individuals requests the United Nations investigate these human rights violations and take measures to prevent them.

RESPECTFULLY SUBMITTED BY:

*Lead Coordinating Organization: **The Midwest Coalition for Human Rights***

The Midwest Coalition for Human Rights is a network of 56 organizations, service providers, and university Human Rights centers that work together to promote and protect human rights in the Midwest region of the United States. Coalition organizations research, advocate, educate, and take action as a strong regional voice on national and international human rights issues. The full member list of the coalition is available at <http://www.midwesthumanrights.org/members>.

*Legal counsel: **University of Chicago Law School's International Human Rights Clinic***

The International Human Rights Clinic works with non-governmental organizations to design and implement human rights cases and projects. Students learn human rights lawyering skills by working on these cases and projects, all of which are supervised by the director of the Clinic. The Clinic uses international human rights laws and norms to draw attention to human rights violations, develop practical solutions to those problems using interdisciplinary methodologies, and promote accountability on the part of state and non-state actors.

The following organizations:

Center for the Human Rights of Children, Loyola University, Chicago
Chicago Anti-Eviction Campaign
Chicago Grassroots Curriculum Taskforce
Chicago Teachers Union, Human Rights Committee
CReATE (Chicagoland Researchers and Advocates for Transformative Education)
Human Rights Committee of the Chicago Teachers Union
Jewish Council on Urban Affairs, Chicago
National Conference of Black Lawyers
National Lawyers Guild, Chicago chapter

The following parents, teachers, and community residents:

Marilyn Alam, Founder, Hyde Park Area Parents Group
Molly Armour, National Lawyers Guild, Chicago
William Ayers, Distinguished Professor, Dept. of Education, University of Illinois at Chicago (retired)
Barbara J. Baker, retired teacher
Timuel D. Black, Professor Emeritus, Chicago City Colleges
Ellyson Carter, Assistant Field Director, Action Now
Vickie Casanova, Trinity United Church of Christ, Chicago, Justice Watch Team
Lance Cohn, Chicago Teachers Union, Human Rights Committee
Willie JR Fleming, parent, Executive Director, Chicago Anti Eviction Campaign
Emily Fong, parent and HPCARES member
Stephanie Gadlin, Chicago Teachers Union
Marie Gasaway, grandparent, Action Now, Local School Council (LSC) member, Henson Elementary School
Susan Gzesh, Senior Lecturer, University of Chicago Human Rights Program
Lettrice Jamison, parent
Katelyn Johnson, Action Now, Executive Director
Michael Klonsky, Ph.D., DePaul University, Chicago
Valerie F. Leonard, expert, Community and Organizational Development
Sherise McDaniel, parent, George Manierre School
Joey Mogul, People's Law Office
Isabel Nuñez, CReATE
Windy M. Pearson
Jan Susler, People's Law Office
Flint Taylor, People's Law Office
Tammie F. Vinson, Chicago Teachers Union, teacher
Standish Willis, National Conference of Black Lawyers
Michelle Young, parent, Action Now, LSC member, May Elementary School

The names of additional signatories to the letter of allegation can be found at http://petitions.moveon.org/sign/united-nations-stop-human-2?source=c.url&r_by=8470674



**Convention on the
Rights of the Child**

Distr.
GENERAL

CRC/C/GC/10
25 April 2007

Original: ENGLISH

COMMITTEE ON THE RIGHTS OF THE CHILD
Forty-fourth session
Geneva, 15 January-2 February 2007

GENERAL COMMENT No. 10 (2007)

Children's rights in juvenile justice

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
I. INTRODUCTION	1 - 3	3
II. THE OBJECTIVES OF THE PRESENT GENERAL COMMENT	4	3
III. JUVENILE JUSTICE: THE LEADING PRINCIPLES OF A COMPREHENSIVE POLICY	5 - 14	4
IV. JUVENILE JUSTICE: THE CORE ELEMENTS OF A COMPREHENSIVE POLICY	15 - 89	7
A. Prevention of juvenile delinquency	16 - 21	7
B. Interventions/diversion	22 - 29	8
C. Age and children in conflict with the law	30 - 39	10
D. The guarantees for a fair trial	40 - 67	12
E. Measures	68 - 77	19
F. Deprivation of liberty, including pretrial detention and post-trial incarceration	78 - 89	21
V. THE ORGANIZATION OF JUVENILE JUSTICE	90 - 95	24
VI. AWARENESS-RAISING AND TRAINING	96 - 97	25
VII. DATA COLLECTION, EVALUATION AND RESEARCH	98 - 99	25

I. INTRODUCTION

1. In the reports they submit to the Committee on the Rights of the Child (hereafter: the Committee), States parties often pay quite detailed attention to the rights of children alleged as, accused of, or recognized as having infringed the penal law, also referred to as “children in conflict with the law”. In line with the Committee’s guidelines for periodic reporting, the implementation of articles 37 and 40 of the Convention on the Rights of the Child (hereafter: CRC) is the main focus of the information provided by the States parties. The Committee notes with appreciation the many efforts to establish an administration of juvenile justice in compliance with CRC. However, it is also clear that many States parties still have a long way to go in achieving full compliance with CRC, e.g. in the areas of procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort.

2. The Committee is equally concerned about the lack of information on the measures that States parties have taken to prevent children from coming into conflict with the law. This may be the result of a lack of a comprehensive policy for the field of juvenile justice. This may also explain why many States parties are providing only very limited statistical data on the treatment of children in conflict with the law.

3. The experience in reviewing the States parties’ performance in the field of juvenile justice is the reason for the present general comment, by which the Committee wants to provide the States parties with more elaborated guidance and recommendations for their efforts to establish an administration of juvenile justice in compliance with CRC. This juvenile justice, which should promote, inter alia, the use of alternative measures such as diversion and restorative justice, will provide States parties with possibilities to respond to children in conflict with the law in an effective manner serving not only the best interests of these children, but also the short- and long-term interest of the society at large.

II. THE OBJECTIVES OF THE PRESENT GENERAL COMMENT

4. At the outset, the Committee wishes to underscore that CRC requires States parties to develop and implement a comprehensive juvenile justice policy. This comprehensive approach should not be limited to the implementation of the specific provisions contained in articles 37 and 40 of CRC, but should also take into account the general principles enshrined in articles 2, 3, 6 and 12, and in all other relevant articles of CRC, such as articles 4 and 39. Therefore, the objectives of this general comment are:

- To encourage States parties to develop and implement a comprehensive juvenile justice policy to prevent and address juvenile delinquency based on and in compliance with CRC, and to seek in this regard advice and support from the Interagency Panel on Juvenile Justice, with representatives of the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Children’s Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC) and non-governmental organizations (NGO’s), established by ECOSOC resolution 1997/30;

- To provide States parties with guidance and recommendations for the content of this comprehensive juvenile justice policy, with special attention to prevention of juvenile delinquency, the introduction of alternative measures allowing for responses to juvenile delinquency without resorting to judicial procedures, and for the interpretation and implementation of all other provisions contained in articles 37 and 40 of CRC;
- To promote the integration, in a national and comprehensive juvenile justice policy, of other international standards, in particular, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the “Havana Rules”), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the “Riyadh Guidelines”).

III. JUVENILE JUSTICE: THE LEADING PRINCIPLES OF A COMPREHENSIVE POLICY

5. Before elaborating on the requirements of CRC in more detail, the Committee will first mention the leading principles of a comprehensive policy for juvenile justice. In the administration of juvenile justice, States parties have to apply systematically the general principles contained in articles 2, 3, 6 and 12 of CRC, as well as the fundamental principles of juvenile justice enshrined in articles 37 and 40.

Non-discrimination (art. 2)

6. States parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities and children who are repeatedly in conflict with the law (recidivists). In this regard, training of all professionals involved in the administration of juvenile justice is important (see paragraph 97 below), as well as the establishment of rules, regulations or protocols which enhance equal treatment of child offenders and provide redress, remedies and compensation.

7. Many children in conflict with the law are also victims of discrimination, e.g. when they try to get access to education or to the labour market. It is necessary that measures are taken to prevent such discrimination, inter alia, as by providing former child offenders with appropriate support and assistance in their efforts to reintegrate in society, and to conduct public campaigns emphasizing their right to assume a constructive role in society (art. 40 (1)).

8. It is quite common that criminal codes contain provisions criminalizing behavioural problems of children, such as vagrancy, truancy, runaways and other acts, which often are the result of psychological or socio-economic problems. It is particularly a matter of concern that girls and street children are often victims of this criminalization. These acts, also known as Status Offences, are not considered to be such if committed by adults. The Committee recommends that the States parties abolish the provisions on status offences in order to establish

an equal treatment under the law for children and adults. In this regard, the Committee also refers to article 56 of the Riyadh Guidelines which reads: “In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.”

9. In addition, behaviour such as vagrancy, roaming the streets or runaways should be dealt with through the implementation of child protective measures, including effective support for parents and/or other caregivers and measures which address the root causes of this behaviour.

Best interests of the child (art. 3)

10. In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.

The right to life, survival and development (art. 6)

11. This inherent right of every child should guide and inspire States parties in the development of effective national policies and programmes for the prevention of juvenile delinquency, because it goes without saying that delinquency has a very negative impact on the child’s development. Furthermore, this basic right should result in a policy of responding to juvenile delinquency in ways that support the child’s development. The death penalty and a life sentence without parole are explicitly prohibited under article 37 (a) of CRC (see paragraphs 75-77 below). The use of deprivation of liberty has very negative consequences for the child’s harmonious development and seriously hampers his/her reintegration in society. In this regard, article 37 (b) explicitly provides that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child’s right to development is fully respected and ensured (see paragraphs 78-88 below).¹

The right to be heard (art. 12)

12. The right of the child to express his/her views freely in all matters affecting the child should be fully respected and implemented throughout every stage of the process of juvenile

¹ Note that the rights of a child deprived of his/her liberty, as recognized in CRC, apply with respect to children in conflict with the law, and to children placed in institutions for the purposes of care, protection or treatment, including mental health, educational, drug treatment, child protection or immigration institutions.

justice (see paragraphs 43-45 below). The Committee notes that the voices of children involved in the juvenile justice system are increasingly becoming a powerful force for improvements and reform, and for the fulfilment of their rights.

Dignity (art. 40 (1))

13. CRC provides a set of fundamental principles for the treatment to be accorded to children in conflict with the law:

- *Treatment that is consistent with the child's sense of dignity and worth.* This principle reflects the fundamental human right enshrined in article 1 of UDHR, which stipulates that all human beings are born free and equal in dignity and rights. This inherent right to dignity and worth, to which the preamble of CRC makes explicit reference, has to be respected and protected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies and all the way to the implementation of all measures for dealing with the child;
- *Treatment that reinforces the child's respect for the human rights and freedoms of others.* This principle is in line with the consideration in the preamble that a child should be brought up in the spirit of the ideals proclaimed in the Charter of the United Nations. It also means that, within the juvenile justice system, the treatment and education of children shall be directed to the development of respect for human rights and freedoms (art. 29 (1) (b) of CRC and general comment No. 1 on the aims of education). It is obvious that this principle of juvenile justice requires a full respect for and implementation of the guarantees for a fair trial recognized in article 40 (2) (see paragraphs 40-67 below). If the key actors in juvenile justice, such as police officers, prosecutors, judges and probation officers, do not fully respect and protect these guarantees, how can they expect that with such poor examples the child will respect the human rights and fundamental freedom of others?;
- *Treatment that takes into account the child's age and promotes the child's reintegration and the child's assuming a constructive role in society.* This principle must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way to the implementation of all measures for dealing with the child. It requires that all professionals involved in the administration of juvenile justice be knowledgeable about child development, the dynamic and continuing growth of children, what is appropriate to their well-being, and the pervasive forms of violence against children;
- *Respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented.* Reports received by the Committee show that violence occurs in all phases of the juvenile justice process, from the first contact with the police, during pretrial detention and during the stay in treatment and other facilities for children sentenced to deprivation of liberty. The committee urges the States parties to take effective measures to prevent such violence and to make sure that the perpetrators are brought to justice and to give effective follow-up to the recommendations made in the report on the United Nations Study on Violence Against Children presented to the General Assembly in October 2006 (A/61/299).

14. The Committee acknowledges that the preservation of public safety is a legitimate aim of the justice system. However, it is of the opinion that this aim is best served by a full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in CRC.

IV. JUVENILE JUSTICE: THE CORE ELEMENTS OF A COMPREHENSIVE POLICY

15. A comprehensive policy for juvenile justice must deal with the following core elements: the prevention of juvenile delinquency; interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings; the minimum age of criminal responsibility and the upper age-limits for juvenile justice; the guarantees for a fair trial; and deprivation of liberty including pretrial detention and post-trial incarceration.

A. Prevention of juvenile delinquency

16. One of the most important goals of the implementation of CRC is to promote the full and harmonious development of the child's personality, talents and mental and physical abilities (preamble, and articles 6 and 29). The child should be prepared to live an individual and responsible life in a free society (preamble, and article 29), in which he/she can assume a constructive role with respect for human rights and fundamental freedoms (arts. 29 and 40). In this regard, parents have the responsibility to provide the child, in a manner consistent with his evolving capacities, with appropriate direction and guidance in the exercise of her/his rights as recognized in the Convention. In the light of these and other provisions of CRC, it is obviously not in the best interests of the child if he/she grows up in circumstances that may cause an increased or serious risk of becoming involved in criminal activities. Various measures should be taken for the full and equal implementation of the rights to an adequate standard of living (art. 27), to the highest attainable standard of health and access to health care (art. 24), to education (arts. 28 and 29), to protection from all forms of physical or mental violence, injury or abuse (art. 19), and from economic or sexual exploitation (arts. 32 and 34), and to other appropriate services for the care or protection of children.

17. As stated above, a juvenile justice policy without a set of measures aimed at preventing juvenile delinquency suffers from serious shortcomings. States parties should fully integrate into their comprehensive national policy for juvenile justice the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) adopted by the General Assembly in its resolution 45/112 of 14 December 1990.

18. The Committee fully supports the Riyadh Guidelines and agrees that emphasis should be placed on prevention policies that facilitate the successful socialization and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and the world of work, as well as through voluntary organizations. This means, inter alia that prevention programmes should focus on support for particularly vulnerable families, the involvement of schools in teaching basic values (including information about the rights and responsibilities of children and parents under the law), and extending special care and attention to young persons at risk. In this regard, particular attention should also be given to children who drop out of school or otherwise do not complete their education. The use of peer group support and a strong involvement of parents are recommended. The States parties should also develop

community-based services and programmes that respond to the special needs, problems, concerns and interests of children, in particular of children repeatedly in conflict with the law, and that provide appropriate counselling and guidance to their families.

19. Articles 18 and 27 of CRC confirm the importance of the responsibility of parents for the upbringing of their children, but at the same time CRC requires States parties to provide the necessary assistance to parents (or other caretakers), in the performance of their parental responsibilities. The measures of assistance should not only focus on the prevention of negative situations, but also and even more on the promotion of the social potential of parents. There is a wealth of information on home- and family-based prevention programmes, such as parent training, programmes to enhance parent-child interaction and home visitation programmes, which can start at a very young age of the child. In addition, early childhood education has shown to be correlated with a lower rate of future violence and crime. At the community level, positive results have been achieved with programmes such as Communities that Care (CTC), a risk-focused prevention strategy.

20. States parties should fully promote and support the involvement of children, in accordance with article 12 of CRC, and of parents, community leaders and other key actors (e.g. representatives of NGOs, probation services and social workers), in the development and implementation of prevention programmes. The quality of this involvement is a key factor in the success of these programmes.

21. The Committee recommends that States parties seek support and advice from the Interagency Panel on Juvenile Justice in their efforts to develop effective prevention programmes.

B. Interventions/diversion (see also section E below)

22. Two kinds of interventions can be used by the State authorities for dealing with children alleged as, accused of, or recognized as having infringed the penal law: measures without resorting to judicial proceedings and measures in the context of judicial proceedings. The Committee reminds States parties that utmost care must be taken to ensure that the child's human rights and legal safeguards are thereby fully respected and protected.

23. Children in conflict with the law, including child recidivists, have the right to be treated in ways that promote their reintegration and the child's assuming a constructive role in society (art. 40 (1) of CRC). The arrest, detention or imprisonment of a child may be used only as a measure of last resort (art. 37 (b)). It is, therefore, necessary - as part of a comprehensive policy for juvenile justice - to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed. These should include care, guidance and supervision, counselling, probation, foster care, educational and training programmes, and other alternatives to institutional care (art. 40 (4)).

Interventions without resorting to judicial proceedings

24. According to article 40 (3) of CRC, the States parties shall seek to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law

without resorting to judicial proceedings, whenever appropriate and desirable. Given the fact that the majority of child offenders commit only minor offences, a range of measures involving removal from criminal/juvenile justice processing and referral to alternative (social) services (i.e. diversion) should be a well-established practice that can and should be used in most cases.

25. In the opinion of the Committee, the obligation of States parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings applies, but is certainly not limited to children who commit minor offences, such as shoplifting or other property offences with limited damage, and first-time child offenders. Statistics in many States parties indicate that a large part, and often the majority, of offences committed by children fall into these categories. It is in line with the principles set out in article 40 (1) of CRC to deal with all such cases without resorting to criminal law procedures in court. In addition to avoiding stigmatization, this approach has good results for children and is in the interests of public safety, and has proven to be more cost-effective.

26. States parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system, and ensure that children's human rights and legal safeguards are thereby fully respected and protected (art. 40 (3) (b)).

27. It is left to the discretion of States parties to decide on the exact nature and content of the measures for dealing with children in conflict with the law without resorting to judicial proceedings, and to take the necessary legislative and other measures for their implementation. Nonetheless, on the basis of the information provided in the reports from some States parties, it is clear that a variety of community-based programmes have been developed, such as community service, supervision and guidance by for example social workers or probation officers, family conferencing and other forms of restorative justice including restitution to and compensation of victims. Other States parties should benefit from these experiences. As far as full respect for human rights and legal safeguards is concerned, the Committee refers to the relevant parts of article 40 of CRC and emphasizes the following:

- Diversion (i.e. measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings) should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding;
- The child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure. With a view to strengthening parental involvement, States parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years;

- The law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination;
- The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities, and on the possibility of review of the measure;
- The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as “criminal records” and a child who has been previously diverted must not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law.

Interventions in the context of judicial proceedings

28. When judicial proceedings are initiated by the competent authority (usually the prosecutor’s office), the principles of a fair and just trial must be applied (see section D below). At the same time, the juvenile justice system should provide for ample opportunities to deal with children in conflict with the law by using social and/or educational measures, and to strictly limit the use of deprivation of liberty, and in particular pretrial detention, as a measure of last resort. In the disposition phase of the proceedings, deprivation of liberty must be used only as a measure of last resort and for the shortest appropriate period of time (art. 37 (b)). This means that States parties should have in place a well-trained probation service to allow for the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day report centres, and the possibility of early release from detention.

29. The Committee reminds States parties that, pursuant to article 40 (1) of CRC, reintegration requires that no action may be taken that can hamper the child’s full participation in his/her community, such as stigmatization, social isolation, or negative publicity of the child. For a child in conflict with the law to be dealt with in a way that promotes reintegration requires that all actions should support the child becoming a full, constructive member of his/her society.

C. Age and children in conflict with the law

The minimum age of criminal responsibility

30. The reports submitted by States parties show the existence of a wide range of minimum ages of criminal responsibility. They range from a very low level of age 7 or 8 to the commendable high level of age 14 or 16. Quite a few States parties use two minimum ages of criminal responsibility. Children in conflict with the law who at the time of the commission of the crime are at or above the lower minimum age but below the higher minimum age are assumed to be criminally responsible only if they have the required maturity in that regard. The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of

serious crimes. The system of two minimum ages is often not only confusing, but leaves much to the discretion of the court/judge and may result in discriminatory practices. In the light of this wide range of minimum ages for criminal responsibility the Committee feels that there is a need to provide the States parties with clear guidance and recommendations regarding the minimum age of criminal responsibility.

31. Article 40 (3) of CRC requires States parties to seek to promote, inter alia, the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law, but does not mention a specific minimum age in this regard. The committee understands this provision as an obligation for States parties to set a minimum age of criminal responsibility (MACR). This minimum age means the following:

- Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below MACR the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interests;
- Children at or above the MACR at the time of the commission of an offence (or: infringement of the penal law) but younger than 18 years (see also paragraphs 35-38 below) can be formally charged and subject to penal law procedures. But these procedures, including the final outcome, must be in full compliance with the principles and provisions of CRC as elaborated in the present general comment.

32. Rule 4 of the Beijing Rules recommends that the beginning of MACR shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. In line with this rule the Committee has recommended States parties not to set a MACR at a too low level and to increase the existing low MACR to an internationally acceptable level. From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.

33. At the same time, the Committee urges States parties not to lower their MACR to the age of 12. A higher MACR, for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40 (3) (b) of CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected. In this regard, States parties should inform the Committee in their reports in specific detail how children below the MACR set in their laws are treated when they are recognized as having infringed the penal law, or are alleged as or accused of having done so, and what kinds of legal safeguards are in place to ensure that their treatment is as fair and just as that of children at or above MACR.

34. The Committee wishes to express its concern about the practice of allowing exceptions to a MACR which permit the use of a lower minimum age of criminal responsibility in cases where

the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. The Committee strongly recommends that States parties set a MACR that does not allow, by way of exception, the use of a lower age.

35. If there is no proof of age and it cannot be established that the child is at or above the MACR, the child shall not be held criminally responsible (see also paragraph 39 below).

The upper age-limit for juvenile justice

36. The Committee also wishes to draw the attention of States parties to the upper age-limit for the application of the rules of juvenile justice. These special rules - in terms both of special procedural rules and of rules for diversion and special measures - should apply, starting at the MACR set in the country, for all children who, at the time of their alleged commission of an offence (or act punishable under the criminal law), have not yet reached the age of 18 years.

37. The Committee wishes to remind States parties that they have recognized the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in accordance with the provisions of article 40 of CRC. This means that every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice.

38. The Committee, therefore, recommends that those States parties which limit the applicability of their juvenile justice rules to children under the age of 16 (or lower) years, or which allow by way of exception that 16 or 17-year-old children are treated as adult criminals, change their laws with a view to achieving a non-discriminatory full application of their juvenile justice rules to all persons under the age of 18 years. The Committee notes with appreciation that some States parties allow for the application of the rules and regulations of juvenile justice to persons aged 18 and older, usually till the age of 21, either as a general rule or by way of exception.

39. Finally, the Committee wishes to emphasize the fact that it is crucial for the full implementation of article 7 of CRC requiring, *inter alia*, that every child shall be registered immediately after birth to set age-limits one way or another, which is the case for all States parties. A child without a provable date of birth is extremely vulnerable to all kinds of abuse and injustice regarding the family, work, education and labour, particularly within the juvenile justice system. Every child must be provided with a birth certificate free of charge whenever he/she needs it to prove his/her age. If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt.

D. The guarantees for a fair trial

40. Article 40 (2) of CRC contains an important list of rights and guarantees that are all meant to ensure that every child alleged as or accused of having infringed the penal law receives fair treatment and trial. Most of these guarantees can also be found in article 14 of the International Covenant on Civil and Political Rights (ICCPR), which the Human Rights Committee elaborated and commented on in its general comment No. 13 (1984) (Administration of justice) which is

currently in the process of being reviewed. However, the implementation of these guarantees for children does have some specific aspects which will be presented in this section. Before doing so, the Committee wishes to emphasize that a key condition for a proper and effective implementation of these rights or guarantees is the quality of the persons involved in the administration of juvenile justice. The training of professionals, such as police officers, prosecutors, legal and other representatives of the child, judges, probation officers, social workers and others is crucial and should take place in a systematic and ongoing manner. These professionals should be well informed about the child's, and particularly about the adolescent's physical, psychological, mental and social development, as well as about the special needs of the most vulnerable children, such as children with disabilities, displaced children, street children, refugee and asylum-seeking children, and children belonging to racial, ethnic, religious, linguistic or other minorities (see paragraphs 6-9 above). Since girls in the juvenile justice system may be easily overlooked because they represent only a small group, special attention must be paid to the particular needs of the girl child, e.g. in relation to prior abuse and special health needs. Professionals and staff should act under all circumstances in a manner consistent with the child's dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others, and which promotes the child's reintegration and his/her assuming a constructive role in society (art. 40 (1)). All the guarantees recognized in article 40 (2), which will be dealt with hereafter, are minimum standards, meaning that States parties can and should try to establish and observe higher standards, e.g. in the areas of legal assistance and the involvement of the child and her/his parents in the judicial process.

No retroactive juvenile justice (art. 40 (2) (a))

41. Article 40 (2) (a) of CRC affirms that the rule that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed is also applicable to children (see also article 15 of ICCPR). It means that no child can be charged with or sentenced under the penal law for acts or omissions which at the time they were committed were not prohibited under national or international law. In the light of the fact that many States parties have recently strengthened and/or expanded their criminal law provisions to prevent and combat terrorism, the Committee recommends that States parties ensure that these changes do not result in retroactive or unintended punishment of children. The Committee also wishes to remind States parties that the rule that no heavier penalty shall be imposed than the one that was applicable at the time when the criminal offence was committed, as expressed in article 15 of ICCPR, is in the light of article 41 of CRC, applicable to children in the States parties to ICCPR. No child shall be punished with a heavier penalty than the one applicable at the time of his/her infringement of the penal law. But if a change of law after the act provides for a lighter penalty, the child should benefit from this change.

The presumption of innocence (art. 40 (2) (b) (i))

42. The presumption of innocence is fundamental to the protection of the human rights of children in conflict with the law. It means that the burden of proof of the charge(s) brought against the child is on the prosecution. The child alleged as or accused of having infringed the penal law has the benefit of doubt and is only guilty as charged if these charges have been proven beyond reasonable doubt. The child has the right to be treated in accordance with this presumption and it is the duty of all public authorities or others involved to refrain from

prejudging the outcome of the trial. States parties should provide information about child development to ensure that this presumption of innocence is respected in practice. Due to the lack of understanding of the process, immaturity, fear or other reasons, the child may behave in a suspicious manner, but the authorities must not assume that the child is guilty without proof of guilt beyond any reasonable doubt.

The right to be heard (art. 12)

43. Article 12 (2) of CRC requires that a child be provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law.

44. It is obvious that for a child alleged as, accused of, or recognized as having infringed the penal law, the right to be heard is fundamental for a fair trial. It is equally obvious that the child has the right to be heard directly and not only through a representative or an appropriate body if it is in her/his best interests. This right must be fully observed at all stages of the process, starting with pretrial stage when the child has the right to remain silent, as well as the right to be heard by the police, the prosecutor and the investigating judge. But it also applies to the stages of adjudication and of implementation of the imposed measures. In other words, the child must be given the opportunity to express his/her views freely, and those views should be given due weight in accordance with the age and maturity of the child (art. 12 (1)), throughout the juvenile justice process. This means that the child, in order to effectively participate in the proceedings, must be informed not only of the charges (see paragraphs 47-48 below), but also of the juvenile justice process as such and of the possible measures.

45. The child should be given the opportunity to express his/her views concerning the (alternative) measures that may be imposed, and the specific wishes or preferences he/she may have in this regard should be given due weight. Alleging that the child is criminally responsible implies that he/she should be competent and able to effectively participate in the decisions regarding the most appropriate response to allegations of his/her infringement of the penal law (see paragraph 46 below). It goes without saying that the judges involved are responsible for taking the decisions. But to treat the child as a passive object does not recognize his/her rights nor does it contribute to an effective response to his/her behaviour. This also applies to the implementation of the measure(s) imposed. Research shows that an active engagement of the child in this implementation will, in most cases, contribute to a positive result.

The right to effective participation in the proceedings (art 40 (2) (b) (iv))

46. A fair trial requires that the child alleged as or accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely. Taking into account the child's age and maturity may also require modified courtroom procedures and practices.

Prompt and direct information of the charge(s) (art. 40 (2) (b) (ii))

47. Every child alleged as or accused of having infringed the penal law has the right to be informed promptly and directly of the charges brought against him/her. Prompt and direct means as soon as possible, and that is when the prosecutor or the judge initially takes procedural steps against the child. But also when the authorities decide to deal with the case without resorting to judicial proceedings, the child must be informed of the charge(s) that may justify this approach. This is part of the requirement of article 40 (3) (b) of CRC that legal safeguards should be fully respected. The child should be informed in a language he/she understands. This may require a presentation of the information in a foreign language but also a “translation” of the formal legal jargon often used in criminal/juvenile charges into a language that the child can understand.

48. Providing the child with an official document is not enough and an oral explanation may often be necessary. The authorities should not leave this to the parents or legal guardians or the child’s legal or other assistance. It is the responsibility of the authorities (e.g. police, prosecutor, judge) to make sure that the child understands each charge brought against him/her. The Committee is of the opinion that the provision of this information to the parents or legal guardians should not be an alternative to communicating this information to the child. It is most appropriate if both the child and the parents or legal guardians receive the information in such a way that they can understand the charge(s) and the possible consequences.

Legal or other appropriate assistance (art. 40 (2) (b) (ii))

49. The child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence. CRC does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of States parties to determine how this assistance is provided but it should be free of charge. The Committee recommends the State parties provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals. Other appropriate assistance is possible (e.g. social worker), but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law.

50. As required by article 14 (3) (b) of ICCPR, the child and his/her assistant must have adequate time and facilities for the preparation of his/her defence. Communications between the child and his/her assistance, either in writing or orally, should take place under such conditions that the confidentiality of such communications is fully respected in accordance with the guarantee provided for in article 40 (2) (b) (vii) of CRC, and the right of the child to be protected against interference with his/her privacy and correspondence (art. 16 of CRC). A number of States parties have made reservations regarding this guarantee (art. 40 (2) (b) (ii) of CRC), apparently assuming that it requires exclusively the provision of legal assistance and therefore by a lawyer. That is not the case and such reservations can and should be withdrawn.

Decisions without delay and with involvement of parents (art. 40 (2) (b) (iii))

51. Internationally there is a consensus that for children in conflict with the law the time between the commission of the offence and the final response to this act should be as short as

possible. The longer this period, the more likely it is that the response loses its desired positive, pedagogical impact, and the more the child will be stigmatized. In this regard, the Committee also refers to article 37 (d) of CRC, where the child deprived of liberty has the right to a prompt decision on his/her action to challenge the legality of the deprivation of his/her liberty. The term “prompt” is even stronger - and justifiably so given the seriousness of deprivation of liberty - than the term “without delay” (art. 40 (2) (b) (iii) of CRC), which is stronger than the term “without undue delay” of article 14 (3) (c) of ICCPR.

52. The Committee recommends that the States parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body. These time limits should be much shorter than those set for adults. But at the same time, decisions without delay should be the result of a process in which the human rights of the child and legal safeguards are fully respected. In this decision-making process without delay, the legal or other appropriate assistance must be present. This presence should not be limited to the trial before the court or other judicial body, but also applies to all other stages of the process, beginning with the interviewing (interrogation) of the child by the police.

53. Parents or legal guardians should also be present at the proceedings because they can provide general psychological and emotional assistance to the child. The presence of parents does not mean that parents can act in defence of the child or be involved in the decision-making process. However, the judge or competent authority may decide, at the request of the child or of his/her legal or other appropriate assistance or because it is not in the best interests of the child (art. 3 of CRC), to limit, restrict or exclude the presence of the parents from the proceedings.

54. The Committee recommends that States parties explicitly provide by law for the maximum possible involvement of parents or legal guardians in the proceedings against the child. This involvement shall in general contribute to an effective response to the child’s infringement of the penal law. To promote parental involvement, parents must be notified of the apprehension of their child as soon as possible.

55. At the same time, the Committee regrets the trend in some countries to introduce the punishment of parents for the offences committed by their children. Civil liability for the damage caused by the child’s act can, in some limited cases, be appropriate, in particular for the younger children (e.g. below 16 years of age). But criminalizing parents of children in conflict with the law will most likely not contribute to their becoming active partners in the social reintegration of their child.

Freedom from compulsory self-incrimination (art. 40 (2) (b) (iii))

56. In line with article 14 (3) (g) of ICCPR, CRC requires that a child be not compelled to give testimony or to confess or acknowledge guilt. This means in the first place - and self-evidently - that torture, cruel, inhuman or degrading treatment in order to extract an admission or a confession constitutes a grave violation of the rights of the child (art. 37 (a) of CRC) and is wholly unacceptable. No such admission or confession can be admissible as evidence (article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

57. There are many other less violent ways to coerce or to lead the child to a confession or a self-incriminatory testimony. The term “compelled” should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights. The age of the child, the child’s development, the length of the interrogation, the child’s lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead him/her to a confession that is not true. That may become even more likely if rewards are promised such as: “You can go home as soon as you have given us the true story”, or lighter sanctions or release are promised.

58. The child being questioned must have access to a legal or other appropriate representative, and must be able to request the presence of his/her parent(s) during questioning. There must be independent scrutiny of the methods of interrogation to ensure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable. The court or other judicial body, when considering the voluntary nature and reliability of an admission or confession by a child, must take into account the age of the child, the length of custody and interrogation, and the presence of legal or other counsel, parent(s), or independent representatives of the child. Police officers and other investigating authorities should be well trained to avoid interrogation techniques and practices that result in coerced or unreliable confessions or testimonies.

Presence and examination of witnesses (art. 40 (2) (b) (iv))

59. The guarantee in article 40 (2) (b) (iv) of CRC underscores that the principle of equality of arms (i.e. under conditions of equality or parity between defence and prosecution) should be observed in the administration of juvenile justice. The term “to examine or to have examined” refers to the fact that there are distinctions in the legal systems, particularly between the accusatorial and inquisitorial trials. In the latter, the defendant is often allowed to examine witnesses although he/she rarely uses this right, leaving examination of the witnesses to the lawyer or, in the case of children, to another appropriate body. However, it remains important that the lawyer or other representative informs the child of the possibility to examine witnesses and to allow him/her to express his/her views in that regard, views which should be given due weight in accordance with the age and maturity of the child (art. 12).

The right to appeal (art. 40 (2) (b) (v))

60. The child has the right to appeal against the decision by which he is found guilty of the charge(s) brought against him/her and against the measures imposed as a consequence of this guilty verdict. This appeal should be decided by a higher, competent, independent and impartial authority or judicial body, in other words, a body that meets the same standards and requirements as the one that dealt with the case in the first instance. This guarantee is similar to the one expressed in article 14 (5) of ICCPR. This right of appeal is not limited to the most serious offences.

61. This seems to be the reason why quite a few States parties have made reservations regarding this provision in order to limit this right of appeal by the child to the more serious offences and/or imprisonment sentences. The Committee reminds States parties to the ICCPR

that a similar provision is made in article 14 (5) of the Covenant. In the light of article 41 of CRC, it means that this article should provide every adjudicated child with the right to appeal. The Committee recommends that the States parties withdraw their reservations to the provision in article 40 (2) (b) (v).

Free assistance of an interpreter (art. 40 (2) (vi))

62. If a child cannot understand or speak the language used by the juvenile justice system, he/she has the right to get free assistance of an interpreter. This assistance should not be limited to the court trial but should also be available at all stages of the juvenile justice process. It is also important that the interpreter has been trained to work with children, because the use and understanding of their mother tongue might be different from that of adults. Lack of knowledge and/or experience in that regard may impede the child's full understanding of the questions raised, and interfere with the right to a fair trial and to effective participation. The condition starting with "if", "if the child cannot understand or speak the language used", means that a child of a foreign or ethnic origin for example, who - besides his/her mother tongue - understands and speaks the official language, does not have to be provided with the free assistance of an interpreter.

63. The Committee also wishes to draw the attention of States parties to children with speech impairment or other disabilities. In line with the spirit of article 40 (2) (vi), and in accordance with the special protection measures provided to children with disabilities in article 23, the Committee recommends that States parties ensure that children with speech impairment or other disabilities are provided with adequate and effective assistance by well-trained professionals, e.g. in sign language, in case they are subject to the juvenile justice process (see also in this regard general comment No. 9 (The rights of children with disabilities) of the Committee on the Rights of the Child).

Full respect of privacy (arts. 16 and 40 (2) (b) (vii))

64. The right of a child to have his/her privacy fully respected during all stages of the proceedings reflects the right to protection of privacy enshrined in article 16 of CRC. "All stages of the proceedings" includes from the initial contact with law enforcement (e.g. a request for information and identification) up until the final decision by a competent authority, or release from supervision, custody or deprivation of liberty. In this particular context, it is meant to avoid harm caused by undue publicity or by the process of labelling. No information shall be published that may lead to the identification of a child offender because of its effect of stigmatization, and possible impact on his/her ability to have access to education, work, housing or to be safe. It means that a public authority should be very reluctant with press releases related to offences allegedly committed by children and limit them to very exceptional cases. They must take measures to guarantee that children are not identifiable via these press releases. Journalists who violate the right to privacy of a child in conflict with the law should be sanctioned with disciplinary and when necessary (e.g. in case of recidivism) with penal law sanctions.

65. In order to protect the privacy of the child, most States parties have as a rule - sometimes with the possibility of exceptions - that the court or other hearings of a child accused of an

infringement of the penal law should take place behind closed doors. This rule allows for the presence of experts or other professionals with a special permission of the court. Public hearings in juvenile justice should only be possible in well-defined cases and at the written decision of the court. Such a decision should be open for appeal by the child.

66. The Committee recommends that all States parties introduce the rule that court and other hearings of a child in conflict with the law be conducted behind closed doors. Exceptions to this rule should be very limited and clearly stated in the law. The verdict/sentence should be pronounced in public at a court session in such a way that the identity of the child is not revealed. The right to privacy (art. 16) requires all professionals involved in the implementation of the measures taken by the court or another competent authority to keep all information that may result in the identification of the child confidential in all their external contacts. Furthermore, the right to privacy also means that the records of child offenders should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case. With a view to avoiding stigmatization and/or prejudgements, records of child offenders should not be used in adult proceedings in subsequent cases involving the same offender (see the Beijing Rules, rules 21.1 and 21.2), or to enhance such future sentencing.

67. The Committee also recommends that the States parties introduce rules which would allow for an automatic removal from the criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain limited, serious offences where removal is possible at the request of the child, if necessary under certain conditions (e.g. not having committed an offence within two years after the last conviction).

E. Measures (see also chapter IV, section B, above)

Pretrial alternatives

68. The decision to initiate a formal criminal law procedure does not necessarily mean that this procedure must be completed with a formal court sentence for a child. In line with the observations made above in section B, the Committee wishes to emphasize that the competent authorities - in most States the office of the public prosecutor - should continuously explore the possibilities of alternatives to a court conviction. In other words, efforts to achieve an appropriate conclusion of the case by offering measures like the ones mentioned above in section B should continue. The nature and duration of these measures offered by the prosecution may be more demanding, and legal or other appropriate assistance for the child is then necessary. The performance of such a measure should be presented to the child as a way to suspend the formal criminal/juvenile law procedure, which will be terminated if the measure has been carried out in a satisfactory manner.

69. In this process of offering alternatives to a court conviction at the level of the prosecutor, the child's human rights and legal safeguards should be fully respected. In this regard, the Committee refers to the recommendations set out in paragraph 27 above, which equally apply here.

Dispositions by the juvenile court/judge

70. After a fair and just trial in full compliance with article 40 of CRC (see chapter IV, section D, above), a decision is made regarding the measures which should be imposed on the child found guilty of the alleged offence(s). The laws must provide the court/judge, or other competent, independent and impartial authority or judicial body, with a wide variety of possible alternatives to institutional care and deprivation of liberty, which are listed in a non-exhaustive manner in article 40 (4) of CRC, to assure that deprivation of liberty be used only as a measure of last resort and for the shortest possible period of time (art. 37 (b) of CRC).

71. The Committee wishes to emphasize that the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40 (1) of CRC (see paragraphs 5-14 above). The Committee reiterates that corporal punishment as a sanction is a violation of these principles as well as of article 37 which prohibits all forms of cruel, inhuman and degrading treatment or punishment (see also the Committee's general comment No. 8 (2006) (The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment)). In cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration.

72. The Committee notes that if a penal disposition is linked to the age of a child, and there is conflicting, inconclusive or uncertain evidence of the child's age, he/she shall have the right to the rule of the benefit of the doubt (see also paragraphs 35 and 39 above).

73. As far as alternatives to deprivation of liberty/institutional care are concerned, there is a wide range of experience with the use and implementation of such measures. States parties should benefit from this experience, and develop and implement these alternatives by adjusting them to their own culture and tradition. It goes without saying that measures amounting to forced labour or to torture or inhuman and degrading treatment must be explicitly prohibited, and those responsible for such illegal practices should be brought to justice.

74. After these general remarks, the Committee wishes to draw attention to the measures prohibited under article 37 (a) of CRC, and to deprivation of liberty.

Prohibition of the death penalty

75. Article 37 (a) of CRC reaffirms the internationally accepted standard (see for example article 6 (5) of ICCPR) that the death penalty cannot be imposed for a crime committed by a person who at that time was under 18 years of age. Although the text is clear, there are States parties that assume that the rule only prohibits the execution of persons below the age of 18 years. However, under this rule the explicit and decisive criteria is the age at the time of the

commission of the offence. It means that a death penalty may not be imposed for a crime committed by a person under 18 regardless of his/her age at the time of the trial or sentencing or of the execution of the sanction.

76. The Committee recommends the few States parties that have not done so yet to abolish the death penalty for all offences committed by persons below the age of 18 years and to suspend the execution of all death sentences for those persons till the necessary legislative measures abolishing the death penalty for children have been fully enacted. The imposed death penalty should be changed to a sanction that is in full conformity with CRC.

No life imprisonment without parole

77. No child who was under the age of 18 at the time he or she committed an offence should be sentenced to life without the possibility of release or parole. For all sentences imposed upon children the possibility of release should be realistic and regularly considered. In this regard, the Committee refers to article 25 of CRC providing the right to periodic review for all children placed for the purpose of care, protection or treatment. The Committee reminds the States parties which do sentence children to life imprisonment with the possibility of release or parole that this sanction must fully comply with and strive for the realization of the aims of juvenile justice enshrined in article 40 (1) of CRC. This means inter alia that the child sentenced to this imprisonment should receive education, treatment, and care aiming at his/her release, reintegration and ability to assume a constructive role in society. This also requires a regular review of the child's development and progress in order to decide on his/her possible release. Given the likelihood that a life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release, the Committee strongly recommends the States parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18.

F. Deprivation of liberty, including pretrial detention and post-trial incarceration

78. Article 37 of CRC contains the leading principles for the use of deprivation of liberty, the procedural rights of every child deprived of liberty, and provisions concerning the treatment of and conditions for children deprived of their liberty.

Basic principles

79. The leading principles for the use of deprivation of liberty are: (a) the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily.

80. The Committee notes with concern that, in many countries, children languish in pretrial detention for months or even years, which constitutes a grave violation of article 37 (b) of CRC. An effective package of alternatives must be available (see chapter IV, section B, above), for the States parties to realize their obligation under article 37 (b) of CRC to use deprivation of liberty only as a measure of last resort. The use of these alternatives must be carefully structured to reduce the use of pretrial detention as well, rather than "widening the net" of sanctioned children. In addition, the States parties should take adequate legislative and other measures to reduce the

use of pretrial detention. Use of pretrial detention as a punishment violates the presumption of innocence. The law should clearly state the conditions that are required to determine whether to place or keep a child in pretrial detention, in particular to ensure his/her appearance at the court proceedings, and whether he/she is an immediate danger to himself/herself or others. The duration of pretrial detention should be limited by law and be subject to regular review.

81. The Committee recommends that the State parties ensure that a child can be released from pretrial detention as soon as possible, and if necessary under certain conditions. Decisions regarding pretrial detention, including its duration, should be made by a competent, independent and impartial authority or a judicial body, and the child should be provided with legal or other appropriate assistance.

Procedural rights (art. 37 (d))

82. Every child deprived of his/her liberty has the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his/her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

83. Every child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours. The Committee also recommends that the States parties ensure by strict legal provisions that the legality of a pretrial detention is reviewed regularly, preferably every two weeks. In case a conditional release of the child, e.g. by applying alternative measures, is not possible, the child should be formally charged with the alleged offences and be brought before a court or other competent, independent and impartial authority or judicial body, not later than 30 days after his/her pretrial detention takes effect. The Committee, conscious of the practice of adjourning court hearings, often more than once, urges the States parties to introduce the legal provisions necessary to ensure that the court/juvenile judge or other competent body makes a final decision on the charges not later than six months after they have been presented.

84. The right to challenge the legality of the deprivation of liberty includes not only the right to appeal, but also the right to access the court, or other competent, independent and impartial authority or judicial body, in cases where the deprivation of liberty is an administrative decision (e.g. the police, the prosecutor and other competent authority). The right to a prompt decision means that a decision must be rendered as soon as possible, e.g. within or not later than two weeks after the challenge is made.

Treatment and conditions (art. 37 (c))

85. Every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37 (c) of CRC, “unless it is considered in the child’s best interests not to do so”, should be interpreted narrowly; the child’s

best interests does not mean for the convenience of the States parties. States parties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices.

86. This rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns 18. Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of the younger children in the facility.

87. Every child deprived of liberty has the right to maintain contact with his/her family through correspondence and visits. In order to facilitate visits, the child should be placed in a facility that is as close as possible to the place of residence of his/her family. Exceptional circumstances that may limit this contact should be clearly described in the law and not be left to the discretion of the competent authorities.

88. The Committee draws the attention of States parties to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the General Assembly in its resolution 45/113 of 14 December 1990. The Committee urges the States parties to fully implement these rules, while also taking into account as far as relevant the Standard Minimum Rules for the Treatment of Prisoners (see also rule 9 of the Beijing Rules). In this regard, the Committee recommends that the States parties incorporate these rules into their national laws and regulations, and make them available, in the national or regional language, to all professionals, NGOs and volunteers involved in the administration of juvenile justice.

89. The Committee wishes to emphasize that, inter alia, the following principles and rules need to be observed in all cases of deprivation of liberty:

- Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities;
- Every child of compulsory school age has the right to education suited to his/her needs and abilities, and designed to prepare him/her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him/her for future employment;
- Every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided, where possible, by health facilities and services of the community;
- The staff of the facility should promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends and other persons or representatives of reputable outside organizations, and the opportunity to visit his/her home and family;

- Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately;
- Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned;
- Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay; children need to know about and have easy access to these mechanisms;
- Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting.

V. THE ORGANIZATION OF JUVENILE JUSTICE

90. In order to ensure the full implementation of the principles and rights elaborated in the previous paragraphs, it is necessary to establish an effective organization for the administration of juvenile justice, and a comprehensive juvenile justice system. As stated in article 40 (3) of CRC, States parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the penal law.

91. What the basic provisions of these laws and procedures are required to be, has been presented in the present general comment. More and other provisions are left to the discretion of States parties. This also applies to the form of these laws and procedures. They can be laid down in special chapters of the general criminal and procedural law, or be brought together in a separate act or law on juvenile justice.

92. A comprehensive juvenile justice system further requires the establishment of specialized units within the police, the judiciary, the court system, the prosecutor's office, as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child.

93. The Committee recommends that the States parties establish juvenile courts either as separate units or as part of existing regional/district courts. Where that is not immediately feasible for practical reasons, the States parties should ensure the appointment of specialized judges or magistrates for dealing with cases of juvenile justice.

94. In addition, specialized services such as probation, counselling or supervision should be established together with specialized facilities including for example day treatment centres and, where necessary, facilities for residential care and treatment of child offenders. In this juvenile justice system, an effective coordination of the activities of all these specialized units, services and facilities should be promoted in an ongoing manner.

95. It is clear from many States parties' reports that non-governmental organizations can and do play an important role not only in the prevention of juvenile delinquency as such, but also in the administration of juvenile justice. The Committee therefore recommends that States parties seek the active involvement of these organizations in the development and implementation of their comprehensive juvenile justice policy and provide them with the necessary resources for this involvement.

VI. AWARENESS-RAISING AND TRAINING

96. Children who commit offences are often subject to negative publicity in the media, which contributes to a discriminatory and negative stereotyping of these children and often of children in general. This negative presentation or criminalization of child offenders is often based on misrepresentation and/or misunderstanding of the causes of juvenile delinquency, and results regularly in a call for a tougher approach (e.g. zero-tolerance, three strikes and you are out, mandatory sentences, trial in adult courts and other primarily punitive measures). To create a positive environment for a better understanding of the root causes of juvenile delinquency and a rights-based approach to this social problem, the States parties should conduct, promote and/or support educational and other campaigns to raise awareness of the need and the obligation to deal with children alleged of violating the penal law in accordance with the spirit and the letter of CRC. In this regard, the States parties should seek the active and positive involvement of members of parliament, NGOs and the media, and support their efforts in the improvement of the understanding of a rights-based approach to children who have been or are in conflict with the penal law. It is crucial for children, in particular those who have experience with the juvenile justice system, to be involved in these awareness-raising efforts.

97. It is essential for the quality of the administration of juvenile justice that all the professionals involved, inter alia, in law enforcement and the judiciary receive appropriate training on the content and meaning of the provisions of CRC in general, particularly those directly relevant to their daily practice. This training should be organized in a systematic and ongoing manner and should not be limited to information on the relevant national and international legal provisions. It should include information on, inter alia, the social and other causes of juvenile delinquency, psychological and other aspects of the development of children, with special attention to girls and children belonging to minorities or indigenous peoples, the culture and the trends in the world of young people, the dynamics of group activities, and the available measures dealing with children in conflict with the penal law, in particular measures without resorting to judicial proceedings (see chapter IV, section B, above).

VII. DATA COLLECTION, EVALUATION AND RESEARCH

98. The Committee is deeply concerned about the lack of even basic and disaggregated data on, inter alia, the number and nature of offences committed by children, the use and the average duration of pretrial detention, the number of children dealt with by resorting to measures other

than judicial proceedings (diversion), the number of convicted children and the nature of the sanctions imposed on them. The Committee urges the States parties to systematically collect disaggregated data relevant to the information on the practice of the administration of juvenile justice, and necessary for the development, implementation and evaluation of policies and programmes aiming at the prevention and effective responses to juvenile delinquency in full accordance with the principles and provisions of CRC.

99. The Committee recommends that States parties conduct regular evaluations of their practice of juvenile justice, in particular of the effectiveness of the measures taken, including those concerning discrimination, reintegration and recidivism, preferably carried out by independent academic institutions. Research, as for example on the disparities in the administration of juvenile justice which may amount to discrimination, and developments in the field of juvenile delinquency, such as effective diversion programmes or newly emerging juvenile delinquency activities, will indicate critical points of success and concern. It is important that children are involved in this evaluation and research, in particular those who have been in contact with parts of the juvenile justice system. The privacy of these children and the confidentiality of their cooperation should be fully respected and protected. In this regard, the Committee refers the States parties to the existing international guidelines on the involvement of children in research.
