



INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

5. Report on the merits

Article 51 of the American Convention on Human Rights provides that: 1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration. 2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined. 3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

REPORT Nº 71/00*

CASE 11.676

"X" and "Z"

ARGENTINA

October 3, 2000

I. SUMMARY

1. On February 21, 1996, Mrs. "X" (hereinafter "the petitioner" or "the mother") filed a petition with the Inter-American Commission on Human Rights (hereinafter "the Commission", "the Inter-American Commission" or "the IACHR") alleging violation of the right to due process (Article 8(1)). In a communication of August 20, 1996, the petitioner also alleged violation of the right to protection of the family (Article 17), the rights of the child (Article 19), and the right to judicial protection (Article 25) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") on the part of the Argentine Republic (hereinafter "the State," "the Argentine State" or "Argentina"). The alleged violations purportedly occurred in connection with a dispute between the petitioner and Mr. "Y" (hereinafter "the father") concerning the return to Spain of child "Z" (hereinafter "the child"), born of the union of "X" and "Z". According to the petition, the violations committed were detrimental to both child and mother.

2. The petitioner's main complaint is that Argentine authorities violated the rights to due process (Article 8(1)) and effective recourse (Article 25) when, within the space of 24 hours, they executed the court ruling ordering the return of child "Z" to the latter's habitual residence in Spain, in the care and custody of the father, before the court ruling ordering her return had become final. The petitioner further alleges that the ruling of the court of second instance, which in this case was the National Civil Appeals Chamber, Court "H" (hereinafter "the Civil Appeals Court"), was arbitrary when it ordered that the child be handed over to her father and taken to Spain (hereinafter "Spain"). She based her assertion on the claim that the father's request had not been filed within the deadline stipulated in The Hague Convention and that the child's removal to Argentina with her mother had not been unlawful. The State alleges that it acted in compliance with The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter "The Hague Convention"), adopted at the Fourteenth Session of The Hague Conference on Private International Law, October 25, 1980. The Convention became Argentine domestic law 23,857 on October 31, 1990, and was ratified before the organs and agencies therein stipulated.

3. After examining the admissibility of the case, the Commission concluded that it met the formal requirements for admissibility stipulated in Articles 46 and 47 of the Convention. However, when examining the merits of the case, the Commission concluded that

the facts alleged by the petitioner did not constitute violations of Articles 8, 17, 19 and 25 of the Convention.

II. PROCEEDINGS WITH THE COMMISSION

4. The Commission acknowledged receipt of the petition on March 8, 1996. It acknowledged receipt of the additional material sent on two occasions, on April 16 and July 11, 1996. On March 28, 1996, information was requested from the State and two 30-day extensions were granted: one on June 26 and the other on July 26, 1996. The State's response was received on July 30, 1996. The petitioner presented her observations on August 23, 1996. On September 11, 1996, the parties were informed that a number had been assigned to the case. Thereafter, the State was given extensions for purposes of its reply. On October 14, 1997, another communication was received from the petitioner and then forwarded to the State on November 7, 1997. On December 10, 1997, information was received from the State.

5. The Commission held a hearing with the parties during its 100th regular session, on October 6, 1998. On March 1, 1999, the State presented its observations to the Commission. On March 30, the petitioner presented additional information, which was forwarded to the State that same day, which was given 30 days to present its observations. On May 10, 1999, the State requested an extension on that deadline. The Commission then granted it a 30-day extension. The State presented its reports on June 2, 1999, and the Commission forwarded them to the petitioner on June 16, 1999, who was given 30 days in which to reply. The petitioner presented her observations on July 7, 1999, which were then forwarded to the State on July 9, 1999. The State was given 30 days in which to present its report. The Commission received the State's observations on August 19, 1999, and sent them to the petitioner on August 11, 1999. On January 4, 2000, the Commission requested additional information from the petitioner, which she supplied on February 8, 2000. The State furnished copies of the court rulings on April 26, 2000.

III. THE PARTIES' POSITIONS

A. The petitioner's position

6. As the petition states, Mrs. "X" married Mr. "Y", a Danish citizen, in Denmark. Child "Z" was the product of that union. The family home became Madrid, Spain. Over time the marriage between "X" and "Y" broke down and the couple filed for divorce in the Spanish courts. When the court-ordered separation came through on April 23, 1991, Madrid's 27th Lower Court (hereinafter "the Madrid Lower Court") awarded the mother temporary custody and the father visiting rights. When the couple quarreled, the mother decided to move to Argentina with her daughter. That decision was not reported to the Madrid Lower Court that had handled the divorce and had decided the question of the child's custody.

7. A year later, the father went to the Madrid Lower Court to ask that the mother's custody of the child be revoked on the grounds that she had violated his visiting rights. The Madrid Lower Court awarded temporary custody of the child to the father and, based on The Hague Convention, Spain sent Argentina a diplomatic letter rogatory to determine the whereabouts of the child. The petitioner concedes that the proceedings for divorce, child custody and visiting rights in the Spanish courts are not the subject of this case, which strictly concerns what transpired within Argentine jurisdictional bodies.

8. The petitioner points out that the proceedings conducted with Argentine authorities were the following: on May 6, 1993, a hearing was held in which the Advisor on Minors Affairs of the Ministry of Foreign Relations, Trade and Worship told the mother that the child could not be removed from Argentine jurisdiction without authorization. On May 21, 1993, Domestic Court No. 5 in the city of Rosario, Province of Santa Fe, Argentina awarded custody of the child to the mother, as did the National Civil Court of First Instance of the Federal Capital, which gave the mother provisional custody until the question of whether the child should be sent to Spain was settled. On several occasions, courts declared that they did not have jurisdiction over the case. They ruled that because The Hague Convention was the controlling law, the case belonged in the federal courts. Then, on September 28, 1993, the National Civil Court of First Instance of the Federal Capital handed down its ruling, which was to refuse to allow the child's return to her father.

9. When the father appealed the ruling, the case went to the Civil Appeals Court, where new expert opinions, hearings with the parties, evaluations of the child and interviews with the parties were ordered. On March 2, 1995, the Civil Appeals Court decided to overturn the lower-court's decision and ordered the child immediately handed over to her father and returned to Spain. The Advisor on Minors Affairs executed the ruling that very day, before it became final and *res judicata*. To carry out the ruling, the Civil Appeals Court ordered the mother to hand over the child's clothes at a tearoom near the court district. The child's effects were handed over to the father, who had a special visit with the child. That day the two left for Spain. The petitioner considers that the Advisor on Minors Affairs usurped the functions of the court because the Civil Appeals Court had not instructed said Advisor to execute the ruling. According to the ruling, the Advisor for Minors Affairs was merely informed of the ruling.

10. On March 3, 1995, the Advisor on Minors Affairs informed the Civil Appeals Court of the execution of the court's ruling the previous day. That same day, the petitioner filed an extraordinary appeal to challenge the ruling. In her appeal, she petitioned for suspension of the ruling's execution until the Supreme Court of Justice (hereinafter "the Supreme Court") ruled on the appeal, as the case came under federal jurisdiction because it involved the interpretation and application of international treaties ratified by Argentina. That same day, on March 3, 1995, the Civil Appeals Court dismissed the request to suspend execution of the ruling handed down and executed the previous day.

11. On March 7, 1995, the Spanish central authority was sent a copy of the Appeals Court ruling reversing the lower-court decision and thus ordering the child's return to her father. On March 8, 1995, the central Spanish authority reported that the child was with her father in Spain.

12. On April 11, 1995, the Civil Appeals Court handed down its ruling that allowed the petitioner to file an extraordinary appeal and send the case to the Supreme Court. On April 17, 1995, the petitioner filed a motion with the Civil Appeals Court seeking the child's return. She argued that the decision allowing her to file extraordinary appeal had the effect of suspending execution of the appeals court ruling. The petitioner's position is that the decision to allow the extraordinary appeal to go forward implied an acknowledgment of the fact that an injustice had been committed when the child was ordered returned to her father and when the judgment was allowed to be carried out before it became final and *res judicata*, which caused an irreparable harm.

13. On April 28, 1995, the Civil Appeals Court denied the petitioner's request on the grounds that it was not a question of "suspending execution of a ruling, but of undoing a situation resulting from a ruling carried out outside the procedural framework for execution" and sent the request to the Supreme Court. In the opinion of the petitioner, the Civil Appeals Court acknowledged that whereas the ruling was executed within the court system, it was not done according to judicial procedure; "it was executed by an advisor rather than a judge." There was a dissenting opinion in the appellate court's decision, which was in favor of "acceding to the request and, therefore, asking the Spanish authorities to return the child to Argentina, through a letter rogatory processed through diplomatic channels."

14. In addition to the extraordinary appeal, the petitioner also filed a petition of *amparo* directly with the Supreme Court. That petition, as the petitioner claims, was part of the extraordinary appeal. To show the injustice of the decision, the petitioner cites the jurisprudence in the *Osswald* case, which finds that rulings involving application and interpretation of international treaties cannot be executed through the courts, because such matters are eminently federal jurisdiction and therefore require the Supreme Court's intervention before they can become *res judicata*.

15. On August 29, 1995, the Supreme Court denied the extraordinary appeal on the grounds that no federal issue was at stake that would necessitate its intervention. The petitioner also used the arguments of the dissenting judges, who found that interpretation of a treaty is an eminently federal matter even though two of the requirements under The Hague Convention to effect the child's return were not satisfied: first, it was not illegal for the mother to bring the child to Argentina; second, the father had let more than a year pass from the time mother and daughter left for Argentina before claiming his custody, which is a violation of Article 12 of The Hague Convention. She therefore considered that the Civil Appeals Court's ruling was arbitrary.

16. The petitioner reports that she also brought a criminal complaint against the three members of the Civil Appeals Court, the Advisor on Minors Affairs and the officials from the Ministry of Foreign Affairs and Worship of Argentina who had intervened in the instant case, charging them with breach of the duties of a public official and, in the case of the Advisor on Minors Affairs, usurping judicial functions. The Fifth Chamber of the Criminal Appellate Court dismissed this complaint on the grounds that the issue of whether the ruling of the Civil Appeals Court was final when carried out was debatable and while the advisor on minors affairs may have overreached his functions, the matter was one for the administrative law courts, not the criminal courts. With this ruling, this internal remedy was exhausted. The petitioner also pointed out that she subsequently traveled to Spain to get the custody arrangement modified and secure a more liberal visiting arrangement.

17. The petitioner alleges that the violations of Articles 8 and 25 of the Convention were the material support of the violation of the rights of the child (Article 19) and of the mother (Article 17(4)). She is of the view that the rights of the child were irreparably damaged because she was separated from her natural mother in charge of raising and educating her. The mother's rights were also injured in that the child was removed from her custody not because she was derelict in her parental duties, but as some kind of undetermined procedural penalty and for having left Spanish territory without the express authorization of the judge who handled the divorce and child-custody proceedings.

B. The State

18. The State alleges that child "Z" was born in Denmark in 1987, acquired Spanish citizenship and lived in Spain with her mother, who had dual Spanish/Argentine citizenship, and her father, a Danish citizen. The parents separated in Spain and settled the issues of custody, visiting, and the child's residence with the natural Spanish court competent in such matters. The State pointed out that while separation was being processed, the father had liberal visiting rights, which were given to him by the Spanish courts, which later awarded him custody of the child after determining that he would be able to care for her properly.

19. The State argues that the mother, in flagrant violation of the decision of the Spanish courts, unlawfully moved the child to Argentina, without the knowledge of or authorization from the Madrid Civil Court that had heard the separation proceedings. The mother argued that Argentina's judicial authorities had legitimized the unlawful removal of the child by requesting the Spanish authorities to give her custody of the child, in a clear evasion of the original and natural jurisdiction of the Spanish courts that had ordered that the child not be taken out of the country. The State considers that situations of this type come under The Hague Convention, which is the international community's response to the juridical insecurity that forum shopping would create, in a fraudulent evasion of the law and the jurisdiction of the State in which the child had its immediate habitual residence before it was removed or retained.

20. On February 3, 1993, the Argentine State received a request from Spain, based on Article 8 of The Hague Convention, to find and return the child. This request was accompanied by the following court documents: a) a police order dated May 17, 1991, prohibiting the removal of the child from Spanish territory; b) proceedings of June 1, 1991, to determine the visiting arrangement and requiring both parents to turn over their passports to prevent them from leaving Spanish territory; c) an arrest warrant issued by Madrid's Examining Court Nº 23, ordering temporary detention pending trial, without bond, of the child's mother; d) a June 3, 1992 decision of Madrid's Lower Court Nº 27 giving the father custody of the child and maintaining the system of shared *patria potestad*; e) the June 8, 1992, ruling of the same court ordering the conjugal separation of the spouses, keeping intact the measures ordered under the previous ruling. Based on these documents, the Convention's central authority in Argentina filed with the judicial authority, which in turn instituted proceedings.

21. The State alleges that the parents presented their arguments before the Argentine judicial authorities, whose sole function was to discern whether The Hague Convention should be invoked; it did not enter into the merits of the child's custody, as prescribed in Article 16 of that instrument. On September 28, 1993, the court of first instance decided to refuse to order the child's return to her father. On October 26, 1993, Spain's central authority requested that the decision be appealed. On March 2, 1995, the Civil Appeals Court overturned the decision of the court of first instance and ordered that the child be returned to her father.

22. As for compliance with the requirements stipulated in The Hague Convention, the State asserts that the Civil Appeals Court confirmed that the requirements had been met. First, invoking The Hague Convention the father filed his claim in Spain in late 1991, i.e., within six months of the date of his daughter's removal; on June 3, 1992, Madrid's Court of First Instance Nº 27 gave the father custody of the child. The State argues that under Article 12 of The Hague Convention, if the proceedings begin before one year from the time of removal or retention, return shall be immediate; after a year, the return may hinge upon evidence that the child has adapted to his/her new milieu.

23. Second, the State notes that the judicial authorities confirmed that the child had been removed unlawfully and that none of the few exceptions provided for in the Convention applied. It therefore decided to order that she be immediately returned to her habitual residence in Spain. The State argues that under The Hague Convention, the principle of the child's higher interest is served by returning her immediately to her place of habitual residence. To illustrate, the State cited paragraphs from the official report on The Hague Convention, prepared by Eliza Pérez Vera.^[1]

24. The State alleges that the child was taken to the country of habitual residence and its natural judges on March 3, 1995. Thereafter, the child "was not taken away and returned, and there is no dispute over jurisdiction since she returned to her natural jurisdiction, which was Spain." The State argued that on March 8, the Central Authority in Spain (in application of The Hague Convention) reported that the child was in Spain, with her father, and considered the case closed. The requirement stipulated in Article 46(1) of the Convention might therefore be considered fulfilled.

25. The State reports that in June 1995, the mother appeared before the competent Spanish judge and requested the visiting arrangement and custody change, since custody went to the merits and was therefore completely extraneous to the proceeding conducted in Argentina. The fact that the child is living with her father in Spain cannot be blamed on the Argentine State since it confined itself to returning the child to her residence and to the jurisdiction of the natural courts in her case, in response to the mother's wrongful removal of the child and in compliance with an international treaty.

26. The State alleges that the procedure followed in the Argentine courts is an autonomous measure stemming from the text of the Convention, and can in some ways be likened to a precautionary measure to be carried out in a foreign jurisdiction. As to the immediacy with which the Civil Appeals Court ordered the ruling carried out, the State alleges that the principle of The Hague Convention is to return wrongfully removed or retained minors immediately, following more expeditious procedures. It also pointed out that there is international jurisprudence in which lower-court rulings have been executed while appeals were in process, in order to be in compliance with the objectives of The Hague Convention.

27. Concerning the action taken by the Advisor on Minors Affairs, the State explains that the appeals court expressly requested the advisor's cooperation, as the ruling clearly shows, and that nothing illegal was done. The State also notes that the Supreme Court dismissed the appeals filed by the petitioner concerning immediate execution of the ruling. The complaints filed by the mother in criminal court for alleged irregularities on the part of the civil appeals court, the advisor on minors affairs and Argentina's Ministry of Foreign Affairs and Worship were examined and dismissed.

28. The State alleges that under Article 17(4) of the Convention, both parents have equal rights and a proper balance of responsibilities. Article 18 of the Convention on the Rights of the Child requires States to guarantee that both parents have mutual obligations in raising the child; Article 11 urges the States to combat unlawful removals and retention of children abroad, to which end they will work toward agreements. The State argues that it is fully respectful of the jurisdictions of other countries and of the international agreements it has signed. As of mid 1998, 45 minors wrongfully removed or retained from their habitual place of residence had been returned under The Hague Convention.

IV. ANALYSIS ON ADMISSIBILITY

A. Competence of the Commission *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione loci*

29. The Commission is competent *ratione materiae* and *ratione personae* by virtue of the passive and active legitimation, *ratione loci* and *ratione temporis* to take up the present case because the alleged violations of Convention Articles 8, 17, 19 and 25 are attributed to agents of the Argentine State, a party to the American Convention. The alleged victims are natural persons, Mrs. "X", acting on her own behalf and on behalf of her daughter, child "Z". The alleged violations were purportedly committed within Argentine territory, subsequent to its ratification of the Convention.^[2]

B. Other admissibility requirements of the petition

a. Exhaustion of local remedies

30. For the Commission to admit a petition, Article 46(1)(a) of the Convention stipulates that the remedies under domestic law shall have been exhausted, in accordance with generally recognized principles of international law. The Commission considers that the only domestic remedies that must be exhausted under Article 46(1)(a) of the Convention are those related to the alleged violations of the Convention. At the same time, those remedies must be adequate; in other words, they must be able to provide an effective and sufficient remedy for the violations. All internal legal systems have multiple remedies, but not all remedies apply in all circumstances. Therefore, those remedies that, although remedies in theory, offer no chance of remedying the alleged violations need not be exhausted.^[3]

31. First, in the instant case the petitioner alleges that with the ruling handed down by the Supreme Court, the proceedings in the civil courts were exhausted; she also asserts that the petition filed with the criminal court had exhausted that avenue as well. The State merely notes that the domestic remedies were exhausted once the child was returned to the jurisdiction of the Spanish courts; in other words, with execution of the Civil Appeals Court ruling. The Commission considers that the parties have built their arguments around the proceedings in the civil courts, for application of The Hague Convention. This, therefore, is at the very center of the instant case. With regard to the complaints that the petitioner filed in criminal court, the IACHR notes that they referred to the possibly criminal conduct on the part of public officials of the Ministry of Foreign Affairs, Trade and Worship, the Advisor on Minors Affairs and three judges on the Civil Appeals Court bench. As to this trial, although the petitioner states that "the remedy was exhausted", she provided nothing that would allow this Commission to infer or deduce that the petition is in anyway related to that criminal court case. The Commission considers that even if the outcome in the criminal case had been favorable to the petitioner, it would have not constituted a remedy for the alleged violations having to do with her daughter's return to Spain. For this reason, the Commission concludes that the proceedings in the civil courts were the proper remedies for a final resolution of the situation denounced.

32. Second, while the parties agree that the domestic remedies before the civil courts have been exhausted, the petitioner and the State each cite different court actions, taken at different times, to show that this requirement was met. The State alleges that on March 3, 1995, Spain's Central Authority reported that the child was in the country, living with her father, and that it considered the case closed. Whereas the State argues that this decision fulfilled the requirement under Article 46(1)(a) of the Convention, the petitioner argues, *inter alia*, that the right to due process (Article 8(1)) was violated when court actions resulted in the execution of a judgment before it became *res judicata*. To have the child returned to Argentina, the petitioner filed a motion for the child's return with the Civil Appeals Court and a remedy of *amparo* that she regarded as over and above the extraordinary appeal. The Civil Appeals Court decided to refer her requests to the Supreme Court, which handed down a final ruling.

33. In the Commission's view, the petition raises certain questions related to the Argentine civil courts' interpretation and application of The Hague Convention that were decisive in determining where the child would live, and issues about the application of procedural rules and procedural aspects of domestic law concerning execution of judgments and the effects that the filing of an extraordinary remedy of appeal have.

34. The Commission is of the view that in principle, execution of a judgment does not necessary mean that the judicial remedies have been exhausted, since any appeal filed by the parties might still be pending.^[4] In the instant case, while the ruling of the Civil Appeals Court had been executed with the child's return to her father and to the jurisdiction of the

Spanish courts, the procedure before the Argentine courts was not exhausted until the Supreme Court handed down its ruling of August 25, 1995 and denied the extraordinary appeal filed by the petitioner. Given the particulars of the instant case, the Commission concluded that the Supreme Court's ruling on August 25, 1995, denying the extraordinary appeal exhausted the domestic remedies and with that the requirement under Article 46(1)(a) of the Convention was fulfilled.

b. Deadline for filing a petition with the Commission

35. One of the requirements that Article 46(1)(b) of the Convention establishes for a petitioner's admissibility is that it has been presented within six months of the date on which the petitioner was notified of the final decision. Inasmuch as the State has not alleged failure to comply with this requirement, it can be considered that the State has tacitly waived its right to challenge on grounds of a failure to meet this requirement.^[5] That having been said, the Commission notes that the Supreme Court handed down the final decision on August 25, 1995, and that the mother's attorney was notified on August 29, 1995. It further notes that the petition was filed with the Commission on February 21, 1996, within the six-month time frame. The Commission therefore concludes that this requirement has been satisfied.

c. Duplication of proceedings and *res judicata*

36. As for the requirement set forth in Article 46(1)(c) of the Convention, which is that the petition is not pending with any other international organization for settlement, the Commission has received no information that would indicate that this circumstance obtains. Hence, the Commission considers that this requirement has been met. The Commission finds that the requirement established in Article 47(d) has also been met, which is that the petition is not substantially the same as one already examined by the Commission; nor has the Commission received any information indicating that the case was settled by some other international organization.

d. Characterization of the facts alleged

37. Article 47(b) of the Convention provides that the Commission shall consider inadmissible any petition or communication if "the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention." The Commission considers that the facts that the petitioner alleges could characterize violations of Articles 8, 17, 19 and 25 of the American Convention. The Commission therefore concludes that the petition is admissible under the terms established in Article 47(b).

V. ANALYSIS ON THE MERITS

38. In the case under study, The Hague Convention was the legal basis of the dispute between the parties litigated in the domestic courts. That Convention was ratified by Argentina and is part of its domestic legal system. The Convention contains provisions establishing rights and obligations for the signatory States and rights for the interested person vis-à-vis the State. In the instant case, as the State has pointed out and the petitioner acknowledged, it was not the function of Argentina's judicial authorities to decide which of the two parents should have custody of the child "Z." Instead, their function was merely to determine the rights established under The Hague Convention, i.e., to determine whether conditions were present to order the child's return to Spain, pursuant to Article 16 and in application of that instrument's principal objective.^[6] Therefore, the central issue for the Commission to decide is whether the Argentine authorities violated the American Convention by taking action and ruling on Spain's request seeking the return of child "Z" under the terms of The Hague Convention.

39. In principle, according to the "fourth instance formula," the Commission cannot review judgments handed down by domestic courts within their competence and with due judicial guarantees, unless a possible violation of the American Convention has been committed.^[7] The Commission will now examine whether the facts alleged by the petitioner constitute violations of Articles 8 and 25 of the Convention, and then its Articles 17 and 19.

- i. Right to due process (Article 8(1)) and the right to judicial protection (Article 25)

Right to due process (Article 8(1)).

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

Right to effective remedies (Article 25)

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

40. Under these Articles, every person has the right to have the basic rules of procedure observed not just in terms of access to the courts, but also in terms of effective enforcement of the judicial authorities' decisions. In this connection, this Commission has observed that the right to judicial protection recognized in the Convention covers the right to fair, impartial and prompt proceedings that offer the possibility but never a guarantee of a favorable outcome. In the instant case, the Commission will begin by examining the petitioner's allegations regarding the conduct of the Advisor on Minors Affairs when it executed a ruling without having jurisdictional authorities; the Commission will then look at the execution of the Civil Appeals Court ruling before the ruling became *res judicata* and the effects of the filing of the extraordinary appeal; and then the Supreme Court's decision denying the extraordinary appeal filed by the petitioner.

41. Concerning the petitioner's allegations relative to the execution of the Civil Appeals Court decision by the Advisor on Minors Issues, who did not have the jurisdictional authorities to do so, the State explained that the Civil Appeals Court had expressly requested that the Advisor cooperate when the time came to execute the decision, which was nothing illegal. This is clear from the March 2, 1995 ruling, an excerpt of which appears below:

Inasmuch as the father is in the country, the proper course of action is to effect the return immediately. The Argentine authorities that, if necessary, might have to issue the documents necessary for the child to leave the country, are to be so notified. Let notification be made today to the parties, to the Advisor on Minors Affairs and the Ministry of Foreign Affairs, International Trade and Worship so that they might arrange the measures necessary to fully comply with this ruling, with authorization to treat as juridical days and hours those days and hours which otherwise would not be so counted (emphasis added by the State).

42. From the text cited above, the Commission notes that the Civil Appeals Court expressly requested the cooperation of the parents, as parties involved in the proceeding, of the Advisor on Minors Affairs and of the Ministry of Foreign Affairs, International Trade and Worship, so that together they might arrange "the measures necessary to fully comply with this ruling" and to that end authorized non-working hours and days to be used. The Advisor on Minors Issues, then, was in compliance with the order issued by the court competent to determine the rights of the parties in this case, and ordered that the decision be carried out immediately. The Commission finds no reason to question the impartiality of the Appeals Court in ordering notification of the parties, the Advisor on Minors Affairs and the Ministry of Foreign Affairs, International Trade and Worship so that they might arrange the measures necessary to execute the ruling immediately.

43. The Commission notes that to accomplish its objectives, The Hague Convention develops a procedure tending to guarantee the minor's return (Preamble, Articles 1 and 2). To that end, contracting States are to take all appropriate measures to secure within their territories the implementation of the objects of the Convention, using the most expeditious procedures available (Article 2). Here, The Hague Convention is the product of the interdisciplinary work done in civil international law and procedural international law that not only harmonize and unify private law, but also influence domestic procedural laws in order to facilitate international judicial assistance and ensure the human right to access the courts. The Commission considers that Argentina's Central Authority acted within the framework of the obligations and authorities established to achieve The Hague Convention's objectives, as set forth in Article 7.^[8] As said, the Commission must confine itself to examining whether the judicial authorities acted in conformity with the American Convention, without entering into the question of whether The Hague Convention was properly interpreted or applied. Consequently, the Commission considers that the allegation made in this part of the petition does not constitute a violation of Article 8(1) of the Convention.

44. Secondly, the Commission will analyze whether immediate execution of the ruling ordering the return of child "Z", delivered in accordance with The Hague Convention at a time when an extraordinary appeal was pending with the Supreme Court, constitutes a violation of Articles 8(1) and 25 of the Convention. The petitioner alleges that execution of the Civil Appeals Court decision before it became final and *res judicata* was a violation of her right to due process. It was detrimental to her right to an effective recourse because the domestic remedies had not been exhausted, specifically the extraordinary appeal she had filed. For its part, the State alleged that the procedure followed in the Argentine courts was an autonomous measure arising out of the text of The Hague Convention. It added that under Article 11 of The Hague Convention, the child's return is to be executed within six weeks of commencement of the proceedings,^[9] which can be likened to a precautionary measure that must be executed in a foreign jurisdiction, where the most expeditious proceedings are required. It noted that this position is supported by international jurisprudence that allows children to be returned under lower-court rulings while an appeal is still pending.^[10] The State also notes that the Argentine judicial authorities gave the petitioner a hearing and her arguments were duly rejected. Specifically, it notes that the extraordinary appeal the petitioner filed to challenge that decision was declared inadmissible by the Supreme Court.

45. The Commission considers that the issue to be decided has nothing to do with the principle of *res judicata* or with the fact that the decision ordering the child's return had not become final: the fact that the petitioner was able to file an extraordinary appeal with the Supreme Court to challenge the Civil Appeals Court ruling is uncontested. Moreover, rulings that have not become final can still be executed under the procedural laws of the State.^[11] The question of whether or not the court ruling is final, therefore, is not relevant in the instant case. Instead, the issue to be decided is whether a court ruling can be executed while an appeal provided for by law is pending.

46. Whether a court ruling pending on appeal can be executed depends on the effect of the remedy. It is a matter of determining whether or not the remedy presented by the petitioner has the effect of suspending the ruling being appealed. The issue before the domestic courts is the effect of an extraordinary appeal filed with the Supreme Court. The State's procedural laws include special regulations governing the extraordinary appeal filed with the Supreme Court.^[12] The petitioner has argued that execution is suspended not just when the extraordinary appeal is allowed but also when the appeal is filed. The issue is a difficult one since, as the State points out, the executed court ruling can be likened to a precautionary measure. The Commission notes that under Argentine procedural law, special rules govern the effect of appeals with regard to precautionary measures.^[13]

47. The Commission notes that varying interpretations have been given of this issue. In the instant case, on the very day that the petitioner filed the extraordinary appeal and requested that execution of the judgment be suspended, the appeal was denied by the Civil Appeals Court. In other words, the Civil Appeals Court was of the view that execution of the ruling was not suspended merely because an extraordinary appeal was filed. Execution is suspended only when the extraordinary appeal is allowed.^[14] The petitioner, on the other hand, argued that the jurisprudence of the Supreme Court now recognizes the suspensive effect that follows from the filing of an extraordinary appeal against a ruling ordering a minor's return under The Hague Convention.^[15] Furthermore, the local courts themselves, specifically the Criminal Court that dismissed the criminal complaint brought by the petitioner in connection

with these facts, ruled that there is some debate surrounding the scope of the procedural laws on this subject. It described the issue as "debatable." The Commission reiterates that it has limited competence to examine whether a State's actions are in keeping with the law; it is up to the national authorities to interpret the law. The Commission, therefore, cannot say what the proper interpretation is of domestic procedural laws on the effects that the ordering and filing of a federal extraordinary appeal have on the execution of a ruling ordering the return of minors under The Hague Convention. The Commission only has competence to analyze whether those laws are in themselves incompatible with the Convention or whether their application in a specific case has violated some right protected under the Convention.

48. The State has the authority to design a procedural system of civil remedies, so it is only obligated to ensure a process with the guarantees required under Article 8(1) of the Convention. While appeals may in some cases be remedies against violations of fundamental rights recognized in the American Convention, they may also be effective for purposes of Article 25 of the Convention.

49. The fact that an order to return a minor was executed in accordance with The Hague Convention, before the extraordinary appeal filed by the interested party was decided, cannot be regarded *per se* as incompatible with either Article 8(1) or Article 25 of the Convention. The determination as to whether execution of a ruling can become a violation of the Convention depends on the circumstances of each concrete case. The Commission will examine whether execution of the lower court ruling in the instant case adversely affected the right to due process and the right to effective judicial protection. Accordingly, it will be especially attentive to the particulars of the judicial proceeding being examined.^[16]

50. In the instant case, under The Hague Convention Spanish authorities filed a request with Argentine authorities to secure a minor's return. The issue, therefore, was not the custody of child "Z", but rather her return to her habitual place of residence while the custody arrangement was being settled. The object of the Hague Convention, *inter alia*, is to avoid an evasion of the law that might adversely affect the minor's interests, when one of his/her parents wrongfully remove the child from the country of the child's habitual residence and, by taking the child to another country, tries to shop the forum in which the issue of custody will be decided. One element typical of such situations is that the person who retains or removes the child claims that his/her action is considered lawful by the competent authorities of the State of refuge; one measure to deter this practice, therefore, is to deprive his/her actions of any practical consequence. Here, the principal objective of the Hague Convention is to restore the *status quo* by securing the immediate return of the wrongfully removed or retained minor in any contracting State.

51. It is reasonable to understand that one possible way to avoid unnecessary delays in processing the minor's return is to authorize execution of the order, even when appeals are pending. Hence, it cannot be said that immediate execution is incompatible with the object or purpose of the judicial proceeding in particular. On the contrary, it might well be regarded as one possible way to fully comply with the obligations expressly set forth in The Hague Convention. The petitioner does not allege that The Hague Convention itself is incompatible with the American Convention.

52. Having shed light on the relationship between the effects of the appeal and the characteristics of the process, the Commission will now examine whether in this case, immediate execution of the ruling might have adversely affected the petitioner's rights. Having examined the background information in the case file, the Commission notes that on March 3, 1995, the Advisor on Minors Affairs informed the Civil Appeals Court that:

Having learned of the final ruling that Your Honor handed down yesterday, which supports the child's reunion with her father, as requested in Spain's letter rogatory and as this Office urged, the child is already in her father's custody, to facilitate her transfer to the requesting State; no measure need be executed to carry out the ruling since execution has been effected now that she has been turned over to her father's custody (...).

53. The case files also show that on March 8, 1995, the Advisor for Minors Affairs informed the Civil Appeals Court of the following:

I am forwarding to Your Honor for the case file the final report prepared by the technical team of this Office of the Advisor on Minors Affairs that assisted in this

case (...) particularly to help the child take leave of her mother and provide the basics that the child should take with her. (...) Finally, I would add that I have been informed that the child and her father left for Spain that same day, Friday the third at 8:00 p.m., and that everything went smoothly. The next day she arrived safely in her country of destination. All this after I personally witnessed the child's mother delivering to the father's attorney, at 5:50 p.m., (...) a small suitcase containing the child's personal effects.

54. The IACHR notes that no court held that execution of the ruling in the instant case was contrary to local procedural law. In effect, the day after the ruling was executed, the mother filed an extraordinary appeal with the Civil Appeals Court, which allowed it and referred it to the Supreme Court. The petitioner also filed a motion with the Civil Appeals Court and a remedy of *amparo*—the latter was part of the extraordinary appeal—. The purpose of the motion and the remedy was to secure the return of her daughter from Spain to Argentina. The motion to secure her daughter's return was denied by the Civil Appeals Court on April 28, 1995, based on the fact that the ruling had been executed outside the framework of judicial procedure and that what the petitioner was seeking was to restore the *status quo* as it was prior to execution of the ruling.

55. The criminal complaint that the petitioner brought was dismissed by the Fifth Court of the Criminal Appeals Court on the grounds that the question of whether the ruling of the Civil Appeals Court was final at the time it was carried out was debatable and that if the Advisor on Minors Affairs had overstepped his authority, the matter was one for the administrative law court, not criminal court.

56. The Commission considers that in the instant case, immediate execution of the ruling ordering the child's return did not breach the petitioner's right to due process of law, since she challenged that ruling by filing other judicial remedies based on her interpretation of The Hague Convention and procedural law. The courts analyzed and dismissed those appeals. And even though the appeals were filed after the Civil Appeals Court decision had been executed, the petitioner was able to challenge the way in which the ruling had been executed, i.e., the very same question she is putting to the Commission for consideration. The petitioner has not alleged—nor is there anything in the case file to indicate—that the immediate execution of the ruling ordering the child's return affected the admissibility of the appeals, narrowed the issues that could be appealed, or curtailed access to higher courts or her chances of having a hearing, with the necessary guarantees, for the determination of her civil rights. The Commission concludes, then, that this part of the petition does not constitute a violation of Article 8(1) of the Convention.

57. The Commission considers that execution of the ruling ordering the child's return did not affect the petitioner's right to effective remedies, since had the remedies been decided in the mother's favor, the child might have been returned to her custody until the competent Spanish authorities reached a final decision on the matter. Nor is there any apparent reason why the mother could not have filed a complaint alleging the illegality of the immediate execution of the ruling before she handed the child over to the father for her return to Spain, if she had planned to file an extraordinary appeal with the Supreme Court to challenge that ruling, based on the argument that the filing of that appeal had the effect of suspending execution, as she argued in the petition she filed with the Commission. The Commission observes that as the procedural deadline for filing an appeal with the Court is the maximum time period,^[17] there was no procedural rule that would have prevented her from filing before the deadline expired and argue then and there to have the execution of the ruling suspended. The mother raised the issue of immediate execution of the ruling when it had already been executed, and filed a motion for review that the Civil Appeals Court rejected. The Commission notes that there is nothing in Argentine procedural law to prevent the petitioner from introducing her argument concerning the suspensive effects of a pending extraordinary appeal, before execution of the ruling materialized.^[18] The allegation made in the petition on this point, therefore, is not a violation of Article 25 of the Convention.

58. Thirdly, the Commission will examine the petitioner's allegations to the effect that with the Supreme Court's denial of the extraordinary appeal, two requirements of The Hague Convention for effecting the child's return were not observed, in violation of Articles 8(1) and 25 of the Convention. It is not up to the Commission to analyze what error the local courts may or may not have committed, acting within their competence, in interpreting The Hague Convention, unless some violation of the Convention was committed.

59. The petitioner further alleges that the ruling handed down by the Civil Appeals Court did not take into account the fact that the child's removal from Spain to Argentina had not been wrongful. Here the State argued that by petitioning the Argentine courts for custody of the child, the mother wanted the Argentine authorities to sanction the wrongful removal of the child. It was an obvious attempt to evade the original and natural jurisdiction of the Spanish authorities, which had prohibited the child's removal from the country. The Commission considers that the Civil Appeals Court decision is neither unfounded nor patently arbitrary. The Civil Appeals Court, among other issues, considered the fact that a certificate had been presented, filed under the terms of Article 15 of The Hague Convention, attesting to the child's unlawful removal and the violation of the court order that prohibited her removal from Spain, which was considered to be one of the factual premises stipulated in Article 3 to consider a removal as wrongful, and a violation of the father's right under Article 5,^[19] in the terms of Article 4 of The Hague Convention.^[20] The Commission, therefore, considers that the allegations that the petitioner makes on this point do not constitute a violation of Article 8(1) of the Convention.

60. The petitioner alleges that the father waited more than a year from the time of the child's removal before filing a claim, which is contrary to the provisions of Article 12 of The Hague Convention. The Argentine State alleged that the sense of Article 12 of that Convention is that if the proceedings commence before the expiration of the period of one year from the date of the wrongful removal, then the child is to be returned immediately, while if more than a year has elapsed, the return may hinge on whether it is shown that the child is now settled in its new environment. The Commission notes that the Civil Appeals Court's finding was that the time period stipulated in Article 12 had been exceeded. It proceeded to analyze and weigh the evidence in the case to determine whether any of the hypothetical impediments posited in Article 13 of The Hague Convention were present.^[21] The Commission also notes that to arrive at its findings, the Civil Appeals Court considered the evaluations done by a psychologist and a court-appointed social worker assigned to the case. They interviewed the two parents and the child. It also considered the statements made by the child concerning supposedly negative comments made by the mother. The Commission cannot review the decisions of the Argentine authorities that interpret and apply The Hague Convention, designed precisely to help settle problems such as the one raised in the present petition. The Commission is of the view that the protection that the Convention affords includes the right to fair, impartial and rapid proceedings that offer the possibility but never a guarantee of a favorable outcome.^[22] The Commission, then, does not find that the facts alleged by the petitioner on this point constitute violations of Articles 8(1) and 25 of the Convention.

ii. Right to family protection (Article 17) and the rights of the child (Article 19).

61. Article 17(1) and (4) reads as follows:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

(...)

4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balance of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests. (Emphasis added by the Commission)

62. Article 19 of the Convention provides the following:

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

63. The petitioner alleges that the violations of Articles 8(1) and 25 of the Convention were the material root of the breach of the rights of the child under Article 19 and the rights of the mother under Article 17(4) of the Convention. There are, then, no freestanding arguments or issues upon which to base the alleged violation of these rights. Therefore, a separate analysis of the possible violation of Articles 19 and 17(4) of the Convention is unnecessary. The Commission, then, has concluded that the court rulings

analyzed have not violated Articles 8(1) and 25 of the Convention. Therefore, the petitioner's allegations cannot be characterized as violations of either of these rights.

VI. CONCLUSIONS

64. After examining the admissibility of the case, the Commission concludes that it meets the requirements stipulated in Articles 46 and 47 of the American Convention. Nevertheless, the Commission also concludes that the facts alleged by the petitioner do not constitute violations of Articles 8, 17, 19 and 25 of the Convention.

65. Based on the foregoing arguments of fact and of law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare that the facts alleged in this petition do not constitute violations of Articles 8, 17, 19 and 25 of the Convention.

2. To transmit this report to the parties, make it public and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 3rd day of the month of October, 2000 (Signed): Chairman; Hélio Bicudo, First Vice-Chairman; Claudio Grossman, Commissioners: Marta Altolaguirre, Robert K. Goldman, Peter Laurie, and Julio Prado Vallejo.

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* The second Vice-Chairman of the Commission, Mr. Juan E. Méndez, an Argentine national, did not participate in the discussion and decision of this Report, in keeping with Article 19(2)(a) of the Commission's Regulations.

[1] The following excerpts are cited by the State: (...) two elements are invariably present in all cases examined (...). 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 has 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 document on custody exists in no way affects the sociological realities of the problem. 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, this 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 favorable to his own claims (...) 16. The Convention's objects, which appear in Article 1, can be summarized as follows: since one factor characteristic of the situation 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 rules 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. (...) 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.' 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 abduction 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 recognized as individuals with their own rights and needs."

[2] The instrument of ratification was deposited with the General Secretariat of the Organization of American States on September 5, 1984.

[3] Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Preliminary Objections, judgment of June 26, 1987, paragraphs 63, 64 and 88. Also, the former European Commission on Human Rights has stated the following: *The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach.* (cf. Eur. Court H.R., *De Jong, Baljet and Van den Brink judgment* of 22 May 1984, Series A no. 77, p. 18, para. 36, and Nos. 14116/88 and 14117/88, *Sargin and Yagci v. Turkey*, Dec. 11.05.89, D.R. 61 p. 250, 262).

[4] Procedural doctrine and law in most countries of the hemisphere generally make a distinction between devolutive effects (which do nothing to prevent execution of the decision or stay the main proceeding) and suspensive effects (which paralyze execution of the court ruling until such time as the appeal has been decided) of the appeals and remedies brought against court decisions.

[5] See, *inter alia*, IACHR, Report N° 22/00, Case 11,732, Argentina. Decision of March 7, 2000, paragraph 32.

[6] Article 16 reads as follows: "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 the Convention is not lodged within a reasonable time following receipt of the notice."

[7] Annual Report 1988-1989. Resolution N° 15/89, Case 10.208 (Dominican Republic), April 14, 1989, and Annual Report 1996, Case 11.673, *Santiago Marzioni* (Argentina), page 86, para. 50.

[8] Article 7 states the following: "Central Authorities shall co-operate with each other and promote co-operation amongst the 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: (...) c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues; (...) 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; (...) h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child."

[9] Article 11 provides the following: "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.

[10] The State cited the Report of the Second Special Commission meeting to review the operation of The Hague Convention on the Civil Aspects of International Child Abduction (18-21 January 1993) prepared by the Permanent Office (paragraph 26): "One way to avoid delay in frivolous appeals was to enforce the order for return of the child or children while the appeal is pending. This had been done in some cases in France, where there did not appear to be a strong legal ground for the appeal, the Central Authority having the power to enforce the decision pending the appeal. In the Netherlands the order must be enforced, even if there is an appeal. Austria, Germany and Luxembourg also have the possibility for enforcement of a return pending an appeal".

[11] See the Civil and Commercial Procedural Code of the Nation: Article 243: "The remedy of appeal allowed will be open to new evidence or closed to new evidence; in either case, allowing an appeal may or may not have the effect of suspending execution of the lower-court decision. An appeal against a final judgment, whether in regular or summary proceedings, will be open to new evidence. In other cases, the appeal will be closed to new evidence. It will always have a suspensive effect, unless the law stipulates that it will not. Appeals allowed where new evidence may be introduced will also have a deferred effect, when the law so stipulates."

[12] Article 258 of the Civil and Commercial Procedural Code stipulates that: "If the ruling of the appeals court or tribunal upholds the lower-court ruling, when the appeal is allowed the respondent may request its execution, pledging to return what he receives if the Supreme Court overturns the lower court ruling (...)".

[13] Article 198 of the Civil and Commercial Procedural Code stipulates that in the case of precautionary measures: "the remedy of appeal, if admitted, will have a devolutive effect."

[14] Dissenting vote of Dr. Claudio Marcelo Kiper in the Civil Appeals Court ruling of April 28, 1995: "(...) it is important to note that the effects of just filing the kind of appeal in question is an abstract issue, since at folio 731 of the principal proceedings the decision on the issue was negative, as most Argentine doctrine recognizes. (...). The issue to be resolved is whether the fact that the federal remedy has been permitted a posteriori and before substantiation, implies a change in the effects that the decision of the majority on this bench has had thus far. The extraordinary remedy permitted suspends execution of a ruling (Colombo, "Código Procesal", II, page 521; Palacio, L., "Derecho Procesal Civil", V, pág. 302.)

(...) This raises the sensitive question of whether a suspensive effect should be ordered in relation to a ruling that has already been carried out (...). (Emphasis by the Commission).

[15] Corte Suprema de Justicia de la Nación. *Caso Wilner, Eduardo Mario c/ Osswald, María Gabriela*, judgment of 14/6/1995.

[16] European Court of Human Rights, *Delcourt Case*, January 17, 1970. A.11, p.15; *Pakelli Case*, April 25, 1983, A.64, p. 14; *Pretto et al*, December 8, 1983, A.71, p. 12; *Granger Case*, March 28, 1990, A.174, pp. 17-19.

[17] Article 257 of the Civil and Commercial Procedural Code stipulates that the appeal can be filed "within a period of ten days."

[18] See: *Corte Suprema de Justicia de la Nación. Caso Wilner, Eduardo Mario c/ Osswald, María Gabriela*, Judgment of 14/6/1995.

[19] Article 5 provides the following: "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." (emphasis added)

[20] In its ruling the Civil Appeals Court stated the following: "the stormy relationship between the parties following their separation in Spain, after the mother was granted temporary custody on April 23, 1991, caused the magistrate to order, on April 30, 1991, that the child was not to leave the country without the court's express authorization. Later, as the litigation continued, a hearing was held on July 1, 1991. There, once the visiting arrangement was settled, the Spanish court demanded that both parents turn over their respective passports, so that "they might not attempt to take the child out of Spanish territory" (see fs. 24). It was around that time, probably on July 8, 1991, that the child was taken out of the country (see fs. 535.), proof of the wrongful act of which Article 3 of The Hague Convention speaks, committed by the mother. She disregarded not only the respondent's right but also her daughter's right -as defined in Article 5- all under the terms of Article 4 of the applicable law, especially since the father was entitled to spend summer vacations with the child."

[21] Article 12 stipulates the following: "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 reads as follows: "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."

[22] Inter-American Commission on Human Rights, Annual Report 1996, Case 11.673, *Santiago Marzoni* (Argentina), page 89.