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LE CARACTERE OBLIGATOIRE OU NON OBLIGATOIRE DE LA CONVENTION PREUVES

établi par le Bureau Permanent

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THE MANDATORY / NON-MANDATORY CHARACTER OF THE EVIDENCE CONVENTION

drawn up by the Permanent Bureau

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à l'intention de la Commission spéciale de février 2009 sur le fonctionnement pratique des Conventions de La Haye Apostille, Notification, Preuves et Accès à la Justice

Preliminary Document No 10 of December 2008
for the attention of the Special Commission of February 2009 on the practical operation of the Hague Apostille, Service, Evidence and Access to Justice Conventions

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INTRODUCTION

1. The question whether the Hague Evidence Convention is mandatory or non-mandatory is a point of difference between States Parties. In the 2008 Questionnaire,[1] the Permanent Bureau asked States Parties to express their view on this question.[2] Of the twenty-eight responding States and REIOs, six States Parties[3] and the European Community[4] expressed the view that the Convention is mandatory in character, while seven States Parties[5] expressed the view that the Convention is non-mandatory in character; four States Parties[6] did not express a view. This difference of opinion has a lengthy history, and raises important questions of principle. In the Questionnaire, the Permanent Bureau invited States Parties to give reasons why they have taken the position they assert. Very few States Parties, however, have accepted this invitation. Noting the importance and history of this issue, the Permanent Bureau has therefore prepared this document which includes an explanation and analysis of the question, together with a summary of arguments in favour and against the question whether the Convention is mandatory or non-mandatory. While the Permanent Bureau does not take a view on this question, it is hoped that this traversal of the relevant issues will facilitate discussions at the Special Commission.

2. The Permanent Bureau also avails itself of the opportunity to reflect upon the related question whether, if the Convention is non-mandatory, States Parties should adopt a policy of ''first resort'' towards the Convention.

A Defining the Problem

1 Asking the Relevant Question

3. The question at stake is the following: must a State Party have recourse to the Convention on each occasion that it intends to take evidence that is located in another State Party?

4. As the responses to the Questionnaire demonstrate, opinion is divided on this question. In general, (mainly European) States Parties from a civil law background consider that evidence located abroad ought only to be taken pursuant to the methods set out in the Convention.[7] On the other hand, most common law States Parties consider that a State is not required to have recourse to the Convention and may permissibly take evidence in another State Party by other means.

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[1] Questionnaire of May 2008 relating to the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters*, Prel. Doc. No 1 of May 2008. The replies of responding States are available, together with a synopsis of replies, and an analysis thereof, at < www.hcch.net >. The Questionnaire included questions to both States Parties and States non-Parties. As per 15 December 2008, the Permanent Bureau had received responses from 46 States and 1 Regional Economic Integration Organisation (REIO).

[2] Naturally, this question was only addressed to States Parties.

[3] Argentina, Israel, Monaco, Switzerland, Ukraine, Turkey.

[4] The following EC States supported this position: Czech Republic, Estonia, France, Germany, Latvia, Luxembourg, Poland, Romania, Slovakia, Spain, Sweden.

[5] Denmark, Greece, China (Hong Kong Special Administrative Region), Lithuania, Mexico, Singapore, South Africa.

[6] Finland, Italy, Norway, United Kingdom.

[7] Although it should be noted that one distinguished European scholar has suggested that "The Hague Evidence Convention is not mandatory […] in the opinion of most signatories": R. Stürner, "Some European Remarks on a New Joint Project of the American Law Institute and UNIDROIT" (2000) 34 *International Law* 1071, 1073.

5. In addressing this question, the relevant literature employs a range of terminology; in particular the expressions "exclusive" or "non-exclusive",[8] and "mandatory" or "non-mandatory" are used.[9] In this document, the question whether a State Party may take evidence in the territory of another State Party only pursuant to the Convention will be examined under the heading of ***whether or not*** the Convention is of ***mandatory character***.[10]

2 The (non-)issue of Exclusivity

6. It is relevant to note at the outset that issues similar to those addressed in this document arise in respect of the Hague Service Convention.[11] However, a number of important differences exist between the two Conventions. Most importantly, the Hague Service Convention is described as having a "non-mandatory" but "exclusive" character. Article 1 of the Service Convention states that it "shall apply in all cases … where there is occasion to transmit a … document for service abroad". The language "where there is occasion to transmit" is understood as meaning that the Service Convention is non-mandatory in the sense that it is a matter for the *lex fori* to determine whether a document must be transmitted for service abroad.[12] The use of the word "shall" is understood as meaning that the Service Convention is exclusive, in the sense that once the law of the forum has determined that a document must be transmitted abroad for service, the channels of transmission expressly available or otherwise permissible under the Hague Service Convention are the *only* channels that may be used.[13]

7. Unlike the Hague Service Convention, it serves no purpose to discuss whether the Evidence Convention has the additional quality of being exclusive. While the twin concepts of mandatory and exclusive serve clear and distinct purposes when describing the Service Convention, this is not the case for the Evidence Convention. For the Service Convention, the question whether a document must be transmitted abroad is a matter of law (specifically the *lex fori*). Accordingly, under the Service Convention, two distinct legal questions arise: whether to transmit a document abroad; and, if so, whether the procedures of the Service Convention must be followed. For the Evidence Convention, the question whether evidence is located abroad is a question not of law but of circumstance (the evidence is located abroad). Accordingly, under the Evidence Convention, only one question arises: whether evidence abroad must be taken pursuant to the Convention. As explained above, this single question will be referred to as the question of whether the convention is mandatory.

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[8] See, *e.g.*, L. Teitz, *Transnational Litigation*, (1996) p. 185; G. Bermann, *Transnational Litigation* (2003) p. 311; A. Heck, "US Misinterpretation of the Hague Evidence Convention" (1985-86),24 *Colum J Transnat'l L* 231, 253; *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 US 522, 533, 548 (1987) (hereafter referred to as the "*Aérospatiale*" case).

[9] S. Swanson, "Comity, International Dispute Resolution Agreements, and the Supreme Court" (1989-90) 21 *Law & Pol'y Int'l Bus* 333, 346; see also Permanent Bureau of the Hague Conference on Private International Law, *Practical Handbook on the Operation of the Hague Service Convention* (2006), para. 15 *et seq*. (hereafter referred to as "Service Convention Handbook").

[10] This approach is consistent with the terminology used in the Service Convention Handbook, *ibid*. It is also the terminology used in the 2008 Evidence Questionnaire.

[11] See Service Convention Handbook, *ibid*, paras 15-48.

[12] *Ibid*, paras 24-41.

[13] *Ibid*, paras 44-45. Note that this conclusion is not as strict as may first appear, as the Hague Service Convention allows for derogatory channels arising from additional agreements between States (Art. 11), other Conventions (Art. 25), and unilateral derogation (Art. 19): see *ibid*, paras 236-242.

B Consideration of this question by previous Special Commissions

8. The question whether the Evidence Convention is mandatory or non-mandatory was first considered by the 1985 Special Commission. In the report on the work of that Special Commission, the Permanent Bureau noted that:[14]

> "This was a new issue, which had not yet arisen during the 1978 meeting. The United States Experts explained that … there had been a legal issue in United States courts concerning whether the Convention is the exclusive[15] method for taking evidence located in other States Parties to the Hague Evidence Convention. Many United States courts have ruled that the treaty, even though non-exclusive, should be applied on the basis of international comity. Other courts have ruled that the treaty has not supplanted the United States Federal rules of Civil Procedure where the court has personal jurisdiction over the party who had been requested to provide the evidence. On the other hand, the Experts of the Federal Republic of Germany pointed out that in the view of their country the Convention is exclusive, where the courts of a Contracting State order witnesses or documents to be produced in another Contracting State, because at that point that country's sovereignty may be at stake. Where the court of a Contracting State orders witnesses or documents to be produced in its own country, the Convention, though not exclusive, should be first applied, before recourse may be had to that court's own, non-treaty rules for the taking of evidence abroad. Opinions differed among the delegates and no consensus could be reached at this juncture.".

9. The 1985 Special Commission reached agreement on the following conclusion:[16]

> "3. The question of exclusivity of the Convention remains in issue. Under the interpretation of certain States, the Convention is not by its terms an exclusive channel for obtaining evidence located abroad. However certain States consider the taking of evidence in their territory to be a judicial act which, in the absence of permission, will violate their sovereignty, and consequently the operation of the Convention on their territory will take on an exclusive character.".

10. The matter was next addressed at the 1989 Special Commission, where experts discussed the decision of the United States Supreme Court in *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa,*[17] where the Court unanimously held that the Evidence Convention is non-mandatory. The Court also held, by a 5-4 majority, that there should be no rule of "first resort" to the Convention.[18] The Report on the Special Commission noted that: [19]

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[14] Permanent Bureau, *Report on the Work of the Special Commission of May 1985 on the Operation of the Convention* at p. 42(I), available at the Hague Conference's website: < www.hcch.net >.
[15] Here the terminology "exclusive" is used to express the concept referred to in this document as "mandatory": see note 10 above, and accompanying text.
[16] Report on the 1985 Special Commission, note 14 *supra*.
[17] 482 US 522, 535, 548 (1987)
[18] *Ibid*, 542.
[19] Permanent Bureau, *Report on the Work of the Special Commission of April 1989 on the Operation of the Convention* at para. 30, available at the Hague Conference's website: < www.hcch.net >.

> "The views expressed on this point were varied; some delegations taking the view that the Convention occupied the field and therefore excluded application of domestic procedural rules whenever the evidence was physically located or the witness was physically residing abroad, others taking the view that the Convention offered facilities which were parallel and complementary to procedures offered by domestic rules in each contracting State.".

11. The 1989 Special Commission also adopted the following Conclusions:[20]

> "(b) The Special Commission took note of the fact that opinions remain divided as to whether or not the Convention is of exclusive application.
>
> (c) However, having regard to the object of the Convention, the Commission thought that in all Contracting States, whatever their views as to its exclusive application, priority should be given to the procedures offered by the Convention when evidence located abroad is being sought.".

12. The second of these Conclusions, it will be observed, stands in opposition to the position taken by majority of the Supreme Court of the United States of America in the "*Aérospatiale"* case.

13. The matter was also discussed at the 2003 Special Commission, which adopted the following Conclusion and Recommendation:[21]

> "37. The SC noted that there were still differing views among States Party as to the obligatory and/or exclusive character of the Convention.".

14. Finally, it is relevant to note that the 2003 Special Commission also considered the question of whether the Hague Service Convention was mandatory or non-mandatory. That question had also been a matter of contention amongst States Parties to the Service Convention. The Special Commission adopted the following Conclusion and Recommendation in respect of the Service Convention:[22]

> "73. Recalling the conclusions and recommendations of 1989, the SC confirmed the prevailing view that the Convention was of a non-mandatory, but exclusive character as described in more detail in the provisional version of the Practical Handbook, without prejudice to international law on the interpretation of treaties.".

15. This Conclusion and Recommendation has brought considerable clarity to a once-disputed legal issue in respect of the Hague Service Convention. It is the hope of the Permanent Bureau that the 2009 Special Commission will take similar steps to bring clarity to the interpretation of the Hague Evidence Convention. With that goal in mind, the Permanent Bureau now sets out the principal arguments for and against the question whether the Convention is mandatory or non-mandatory.

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[20] *Ibid*, para. 34.
[21] Conclusions and Recommendations of the Special Commission of October-November 2003, available on the Hague Conference's website at < www.hcch.net > The expression "obligatory" was used to refer to the expression "mandatory".
[22] *Ibid*.

C Arguments in Favour and Against

1 The Words of the Convention

16. This first section considers the textual indications within the Convention that support or contradict the proposition that the Convention is mandatory.

a) Permissive Language: "may" not "shall"

17. The key provision of the Convention that empowers a court of a State Party to send a Letter of Request provides that such a request "may" be made.[23] This is language that is permissive rather than mandatory. Similarly, the articles of Chapter II that make provision for evidence to be taken by diplomatic officers, consular agents and commissioners are introduced by the word "may".[24]

18. The permissive language of the Convention was the principal basis upon which the United States Supreme Court held in the "*Aérospatiale*" case[25] that the Convention is non-mandatory. The nub of the argument is that the Convention states that a judicial authority "may" take evidence by the procedures set out therein; it does not say that they "must" or "shall" do so.[26]

19. The permissive wording of Articles 1, 15, 16 and 17 may be contrasted with the mandatory language that is used elsewhere in the Convention. The Convention requires, for instance, that a State Party "shall" designate a central authority,[27] that a Letter of Request "shall" specify certain matters,[28] and "shall" conform to certain language requirements.[29] The text of the Convention, it may be argued, was carefully chosen to employ permissive language when setting out the methods of evidence-taking available, but using mandatory language to set out the steps that must be followed once one such method is selected.

20. In support of this view, it might also be observed that, whether or not the language of the Convention was deliberately drafted with permissive language, it appears to be an inescapable fact that, under common law systems, a grant of power that is introduced by the word "may" is generally understood to refer to a grant of a discretionary power.[30]

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[23] Art. 1.
[24] Arts 15-17.
[25] 482 US 522, 535 (1987).
[26] See A. Lowenfeld, *International Litigation and the Quest for Reasonableness* (1996) 189-90, who considered that the argument that the Convention was mandatory was doomed before the US Supreme Court: "I always thought that the parties and *amici* (as well as various lobbyists) damaged their cause by overplaying it. 'Must' was clearly wrong".
[27] Art. 4.
[28] Art. 2.
[29] Art. 3.
[30] **Australia**: s 33(2A) *Acts Interpretation Act* 1901 (Cth): "Where an Act … provides that a person, court or body may do a particular act or thing, and the word 'may' is used, the act or thing may be done at the discretion of the person, court or body." **Canada**: *Dagg v. Canada* (1997) 148 DLR (4th) 385 at [108]: "Generally speaking, the use of the word 'may', especially when it is used, as in this case, in contradistinction to the word 'shall', indicates that an administrative decision maker has the discretion, and not the duty, to exercise a statutory power". **United Kingdom**: *Pelling v. Families Need Fathers Ltd* [2001] EWCA Civ 1280 at [23]: "In its ordinary and natural meaning the word 'may' is apt to confer a discretion or power. ... The use of 'may' in subsection (6) is in striking contrast to the mandatory force of 'shall' in other parts of the same section". **United States**: *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 346 (2005): "The word 'may' customarily connotes discretion. … That connotation is particularly apt where, as here, 'may' is used in contraposition to the word 'shall'". See also, *e.g.*, *US v. Rodgers*, 103 S Ct 2132 (1983); *Thompson v. Clifford*, 408 F 2d 154 (CA DC, 1968).

It might be argued, therefore, that absent clear evidence to the contrary in the preparatory documents, it is likely that States Parties from a common law background understood themselves to be consenting to be bound by a non-mandatory Convention.

21. On the other hand, it has been argued that the permissive language of the Convention should not be understood as an indication that the Convention was intended to be non-mandatory, and that the word "may" was chosen in recognition of the fact that the Convention contains a number of methods by which evidence may be taken abroad, between which a court is permitted to choose. [31] Understood in this sense, the word "may" is neutral as to the mandatory or non-mandatory character of the Convention. It has also been argued that to focus upon the permissive language of the Convention involves an overly technical interpretation that is not appropriate when interpreting instruments drafted by civil law States.[32]

22. Finally, others have argued that the Convention was simply "poorly worded" in this regard.[33]

b) Article 23 of the Convention

23. In the "*Aérospatiale*" case, the Supreme Court of the United States of America found its conclusion that the Convention is non-mandatory to be further "bolstered" by a consideration of the effect of Article 23.[34] The argument stated that it was unlikely that the United States (or any other common law States that allows pre-trial discovery) would have agreed to a provision that would have had the effect of granting States Parties the power to deny requests for pre-trial discovery without an explicit acknowledgement that this would be a consequence of becoming party to the Convention.[35]

24. Critics of the decision have taken a variety of different views of the merit of this argument, with some finding that, of all arguments in favour of the Convention being non-mandatory, this is the "only convincing one",[36] while others have found it "unpersuasive", [37] and even "rather tortious".[38]

25. It may be that the arguments based upon Article 23 have now lost some of their force due to the interpretation of this Article that has been taken by successive Special Commissions. The 1985 Special Commission reached the following conclusions:

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[31] See G. Bermann, "The Hague Evidence Convention in the Supreme Court: A Critique of the *Aérospatiale* decision" (1989) p. 63 *Tul L Rev* 525, 531; Heck, note 8 *supra*, p. 267; Swanson, note 9 *supra*, p. 361.
[32] P. Borchers, "The Incredible Shrinking Hague Evidence Convention" (2003) 38 *Tex Int'l LJ* 73, 82.
[33] J. Nafziger, "Another Look at the Hague Evidence Convention after *Aérospatiale*" (2003) 38 *Tex Int'l LJ* 103, 105.
[34] 482 US 522, 536-7 (1987).
[35] *Ibid.* The Court said: "Article 23 expressly authorizes a contracting state to declare that it will not execute any letter of request in aid of pre-trial discovery. Surely, if the Convention had been intended to replace completely the broad discovery powers that common law courts previously exercised over foreign litigants subject to their jurisdiction, it would have been most anomalous for the common-law contracting parties to agree to Article 23, which enables a contracting party to revoke its consent to the treaty's procedures for pre-trial discovery. In the absence of explicit textual support, we are unable to accept the hypothesis that the common-law contracting states adjured recourse to all pre-existing pretrial discovery procedures at the same time that they accepted the possibility that a contracting party could unilaterally abrogate even the Convention's procedures."
[36] Bermann, note 31 *supra*, p. 532.
[37] Swanson, note 9 *supra*, p. 361. A similar view appears to have been taken by J. Dwyer and L. Yurow, "Taking Evidence and Breaking Treaties: Aerospatiale and the Need for Common Sense" (1988) 21 *Geo Wash J Int'l L & Econ* 439, p. 466-7.
[38] D. McClean, *Co-operation in Civil and Criminal Matters* (2002), p. 140.

> "1. The discussions have clearly shown the necessity for a substantial number of States of a reservation in order to avoid abuses which can arise in connection with pre-trial discovery of documents. However, the adoption of an unqualified reservation as permitted by Article 23 would seem excessive and detrimental to the proper operation of the Convention.
>
> 2. The tendency which has appeared since 1978 and which has led a number of States to limit their reservations has gained ground, and the majority of States are now prepared to frame – or, to the extent that they have not yet done so, to limit – their reservations along the lines of the reservation formulated by the United Kingdom or the reservation contained in the Protocol[39] drawn under the auspices of the Organisation of American States."[40].

26. Similarly, the 1989 Special Commission adopted the following Conclusion:

> "(d) With a view to facilitating the resort to the Convention as a matter of priority, the Commission encouraged any States which have made or contemplate making the reservation under Article 23 to limit the scope of such reservation.".

27. This issue was considered in substantially greater depth by the 2003 Special Commission, which adopted several Conclusions and Recommendations on the question.[41] Of particular relevance are the following Conclusions and Recommendations:

> "29. The SC recognised that the terms of Article 23, which permits a Contracting State to 'declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents', are a continued source of misunderstandings. Having regard to the history of the provision, the SC agreed that Article 23 was intended to permit States to ensure that a request for the production of documents must be *sufficiently substantiated* so as to avoid requests whereby one party merely seeks to find out what documents may generally be in the possession of the other party to the proceeding. […]
>
> 31. The SC noted that in some instances where States have made a general, non-particularised declaration under Article 23, they may have mistakenly believed that they are only objecting to evidence requests submitted prior to the *opening of a proceeding in the State of origin*. In fact, "pre-trial discovery" means evidence requests submitted after the filing of a claim but before the final hearing on the merits.
>
> 32. Compounding the misunderstandings that may have prompted Contracting States to make a general declaration under Article 23 denying the "pre-trial discovery of documents", the SC noted that in some cases the judicial authorities of a State of origin have concluded that no requests for the production of documents were permitted under the Convention in a State having made such a general declaration. This may result in the State of origin applying its own domestic law for the taking of evidence against foreign parties.".

28. The evolution of the interpretation of Article 23 – especially the conclusion by the Special Commission that Article 23 should be interpreted only so as to prevent vague and unsubstantiated requests – reduces the force of the argument that the Convention would represent a significant interference with the practice of some common law States.

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[39] Additional Protocol of 8 May 1979 to the Inter-American Convention on Letters Rogatory of 30 January 1975, the English text is available on the website of the Organisation of American States (OAS) at the following address < www.oas.org/DIL/CIDIP-II-protocol_lettersrogatory.htm > and is also reproduced in 18 *International Legal Materials 1979* at p. 1238.

[40] Report on the 1989 Special Commission, note 19 *supra*.

[41] Conclusions and Recommendations Nos 29-35 of the 2003 Special Commission, note 21 *supra*.

29. Finally, it has also been argued that the inclusion of Article 23 represented a negotiated agreement between common law States and civil law States, and that "the United States was unlikely to get a treaty without such a provision".[42] With respect, this argument cannot be supported: it is wrong as a matter of record that the United States accepted Article 23 in order to cause the Convention to be more palatable to civil law States. Rather, Article 23 was proposed by the United Kingdom – a common law State that viewed[43] the Convention as non-mandatory – and was *opposed* by each of France, Germany and Switzerland.[44]

c) Article 27 of the Convention

30. The Supreme Court also accepted the further argument that Article 27 of the Convention supports the view that the Convention is non-mandatory on the grounds that the expression "Contracting State" in the chapeau of Article 27 "comprehends both the requesting state and the executing state".[45] Understood in this way, Article 27 authorises any State to permit its courts to collect evidence abroad according to methods other than those provided for in the Convention.

31. This interpretation of Article 27 has been strongly criticised.[46] The preparatory documents of the Convention make it clear that the expression "Contracting States" in the chapeau of this Article ought to be understood as a reference to receiving States only. This is made clear in the Explanatory Report, which, in describing the operation of this provision, states that "[t]he only conditions are that the *State of execution* will permit [the alternate method], and the resulting record will be admissible in the trial of the action"[47].

32. It has also been suggested that Article 27 supports the proposition that the Convention is mandatory. The argument is that the negative wording of Article 27 indicates that discovery by procedures not set forth in the Convention may occur only upon the consent of the state in which the evidence or witness is located.[48] However, it may be argued that this argument is not supported by the Explanatory Report, which states that the Article is:

> "[…] designed to preserve existing internal law and practice in a Contracting State which provides broader, more generous and less restrictive rules of international cooperation in the taking of evidence for the benefit of foreign courts and litigants.".[49]

33. According to the view expressed in the Explanatory Report, therefore, the goal of Article 27 was to "preserve" the laws of States that permit evidence to be taken *within* their own territory. It does not address the laws of States that permit evidence to be taken *elsewhere*, outside of their own territory.

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[42] Swanson, note 9 *supra,* p. 361.
[43] In 1986 the Government of the United Kingdom filed an *amicus* brief in the *Aérospatiale* litigation in which it supported the view that the Convention was non-mandatory: reproduced at 25 *International Legal Materials,* 1557, esp at 1559-60.
[44] See Hague Conference on Private International Law, *Actes et documents de la Onzième session*, Tome IV, at p. 177.
[45] 482 US 522, 537 note 24 (1987).
[46] 482 US 522, 551 note 2 (1987) (Blackmun J in dissent); Bermann, note 31 *supra*, p. 532; Dwyer and Yurow, note 37 *supra*, p. 467; D. McClean, *Co-operation in Civil and Criminal Matters* (2002) p. 137.
[47] Ph.W. Amram, "Explanatory Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters" in *Actes et documents de la Onzième session*, Tome IV, at p. 215 [emphasis added].
[48] *Amicus* brief submitted by France in the *Aérospatiale* litigation: 25 *International Legal Materials*, pp. 1519, 1525.
[49] Explanatory Report, note 47 *supra*, p. 215.

34. It might also be argued that Article 27 is in truth neutral on the question whether the Convention is mandatory. For to ask the question whether that Article permits the taking of evidence abroad in certain circumstances is to presuppose that the Convention applies. The question whether the Convention is mandatory or non-mandatory has logical priority.

d) The Preamble

35. It has been argued that the preamble to the Convention suggests that the States signatory contemplated a permissive rather than mandatory instrument. The Preamble says:

> "Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose, [and]
>
> Desiring to improve mutual co-operation in civil or commercial matters […]."

36. In this regard, the Supreme Court of the United States of America observed, "the Preamble does not speak in mandatory terms which would purport to describe the procedure for all permissible transnational discovery and exclude all other existing practices".[50]

37. It may be argued, however, that the Preamble sheds very little light on the question whether the Convention is mandatory. The Preamble is not couched in mandatory terms, nor are its terms permissive. Rather, the Preamble constitutes a general and neutral statement of intent that is expressed in very broad terms. One suspects that the preamble could sit equally comfortably above either an expressly mandatory or an expressly non-mandatory Convention.

2 The Explanatory Report

38. The Explanatory Report on the Convention sets out the "basic principle" of the Convention, which was to create a system for the collection of evidence abroad which was both "tolerable in the State of execution", and "utilisable in the forum of the State of origin where the action is pending".[51]

39. It should be noted immediately that this "basic principle", which was said to have "animated all the discussion", is equally neutral on the question whether the Convention is mandatory or non-mandatory; it describes the desired characteristics of any method of evidence collection to be implemented by the Convention, but it is silent on the question whether any other method may be employed. Whilst it may be argued that, for States that consider the taking of evidence within their territory by methods outside the Convention to be a violation of sovereignty, any non-mandatory Convention would be intolerable, it could equally be argued that, for States that take a different view of sovereignty, a non-mandatory Convention would not only be "tolerable", but also perhaps desirable.

40. However, in addition to setting out the above-mentioned "basic principle", the Explanatory Report sets out a number of further goals of the Convention, which were explained as follows:

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[50] 482 US 522, 534 (1987).
[51] Ph.W. Amram, *Explanatory Report*, note 47 *supra*.

> "In broad outline, the convention seeks to –
>
> (a) improve the existing system of Letters of Request; and
> (b) enlarge the devices for the taking of evidence by increasing the powers of consuls and by introducing, on a limited basis, the concept of the commissioner; and at the same time
> (c) preserve all existing more favourable and less restrictive practices resulting from internal law, internal rules of procedure and bilateral or multilateral conventions."[52].

41. The words "enlarge" and, in particular, "preserve" might be understood to tend against the conclusion that the Convention is mandatory. "Enlarging" the devices for taking evidence suggests that, if anything, the Convention sought to *increase* the possible methods of taking evidence, rather than reducing them only to those contemplated by the Convention. Similarly, the non-mandatory nature of the Convention might appear to be positively affirmed by noting the purpose of the Convention to "preserve all existing more favourable and less restrictive practices resulting from internal law" and "internal rules of procedure".

3 History of the Convention

42. A full analysis of the preparatory and subsequent material suggests that the question whether the Convention is mandatory or non-mandatory was *not actively considered at the time of negotiation, nor for some time thereafter.* The matter was not expressly discussed by either the Special Commission that considered the Draft Convention,[53] or the Special Commission of 1978. This view is confirmed by the *Report on the Work of the Special Commission of May 1985*, which records that the question whether the Convention is mandatory "was a new issue, which had not yet arisen during the 1978 meeting".[54] It may be, therefore, that some States Parties became party to the Convention on the assumption that the Convention is non-mandatory, while others assumed the contrary.[55]

43. This view also finds support in the research and recollection of one scholar and former employee of the United States Department of Justice who reported that:

> "Based on this writer's review of the documents and memoranda on file in the Departments of State and Justice on the negotiation of the Evidence Convention, the instructions given to the American delegation to the Eleventh Session of the Hague Conference and based on this writer's personal notes on, and recollection of, departmental meetings prior to and following the adoption of the Evidence Convention, the question of what impact the Convention would have on outgoing request from the United States … was never raised or discussed."[56].

4 The Convention as a Negotiated Agreement

44. An argument advanced in favour of the Convention being mandatory is that, if the Convention was negotiated as non-mandatory, it would have constituted such a poor bargain for civil law States that it is impossible that they could have accepted it. It has been suggested that, without the *quid pro quo* that the Convention is mandatory, civil

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[52] *Ibid*.
[53] *Ibid*.
[54] Report on the 1985 Special Commission, note 14 *supra*.
[55] Professor Bermann has noted that the German Courts have repeatedly assumed that the Convention is mandatory: Bermann, note 31 *supra*, p. 533 note 28.
[56] B. Ristau, *International Judicial Assistance; (Civil and Commercia),* (Vol. 1, 2000 revision) §5-2-7, p. 307 note 11.

law States would have consented neither to making the substantial changes to their existing practice required by the Convention, nor to permitting the gathering of evidence in a manner hitherto regarded as an infringement of sovereignty.[57]

45. On the other hand, one might argue that it is incorrect to suggest that civil law countries gained no benefit from the Convention. While most common law States did in fact permit evidence to be taken within their territory, [58] they were not obliged to do so, and could have prevented evidence from being taken at their discretion. Similarly, prior to becoming party to the Convention, common law States were under no obligation to execute letters of request. All States Parties to the Convention – both common law and civil law – gained from the Convention a *right* to have letters of request executed by other States Parties.

D Comity and the Principle of First Resort

46. Having traversed the arguments in favour and against the question whether the Convention is mandatory or non-mandatory in character, the Permanent Bureau now offers some observations in support of the view that, should the Convention be non-mandatory in character, the Convention should nevertheless be used as a "first resort". According to this approach, even in those States where the Convention is considered to be non-mandatory, a presumption should exist that evidence should be taken abroad using the procedures set out in the Evidence Convention; other methods of taking evidence should only be used if the presumption is displaced. This view is consistent with the position taken by the 1989 Special Commission.[59]

47. The "first resort" principle rests upon the fact that the Convention was created because many States Parties consider that the taking of evidence by other means constitutes a violation of their sovereignty. The Convention therefore represents a negotiated bargain whereby States Parties have, in a spirit of co-operation, consented to other States Parties performing acts which, but for the convention, would otherwise violate their sovereignty. The same spirit of co-operation requires that States Parties respect one another's sovereignty by attempting to use the procedures provided for in the Convention wherever possible. These considerations of mutual regard are sometimes referred to as considerations of "comity", and have an entrenched role in international legal relations. As Professor Bermann has noted:

> "Relying on comity to develop strong presumptions in international legal practice is … an established practice, whether in choice of forum, choice of law, sovereign immunity, or other matters."[60].

48. In this regard, the Permanent Bureau is pleased to note that all States that responded to the 2008 Questionnaire with the view that the Convention is non-mandatory also advised that their courts take issues of comity into account when determining whether or not to make use of the procedures of the Convention. In the

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[57] See, *e.g.*, Dwyer and Yurow, note 37, p. 466.
[58] **United Kingdom:** *Foreign Tribunals Evidence Act* 1856; **United States of America:** USC § 1782, which had its origin in 1855. Note also the broad interpretation given to this provision in *Intel Corp v. Advanced Micro Devices Inc*, 542 US 241 (2004), effectively permitting US-style discovery in foreign proceedings.
[59] Report on the 1989 Special Commission, note 19 *supra*. This view is also analogous to the view taken by the 2003 Special Commission (Conclusion and Recommendation No 73) that the Service Convention is non-mandatory (but exclusive), and to the practice of many States according to which domestic methods of substituted service are utilised when a Letter of Request for service is returned unexecuted.
[60] Bermann, note 31 *supra*, p. 536.

Permanent Bureau's view, it would be desirable if this uniform use of comity principles could develop into a "first resort" principle. The Permanent Bureau notes, however, that some individual courts have taken the view that a presumption should exist against the use of the Evidence Convention, and in favour of domestic law.[61] It is respectfully submitted that this view should be rejected.

49. A rule of first resort would not impose any new burdens upon the taking of evidence between States Parties that do not consider the taking of evidence within their territory to be a violation of sovereignty. In practice, the question whether to use the procedures of the Evidence Convention or to use other procedures outside the Convention will usually turn on two considerations only: a consideration of whether the State in which the evidence is to be taken views the taking of evidence as a violation of its sovereignty; and a comparison of the speed and practicality of the procedures. In the case where the foreign State does not see a threat to its sovereignty, it is likely that the question whether to use the procedures of the Convention will be reduced to a simple assessment of practical considerations. If the non-Convention procedure is the more practical, then the court would ordinarily determine that this other procedure should be used.

50. It is also to be remembered that Article 27 *b)* provides that the Convention does not prevent States Parties from "permitting, by internal law or practice, an act provided for in this Convention to be performed upon less restrictive conditions". It is likely that most States that do not consider the taking of evidence for foreign proceedings to be a violation of their sovereignty could be said to have a practice that permits the taking of evidence by means outside the Convention. On this view of Article 27 *b)*, it could be argued that the Convention permits the taking of evidence by procedures outside the Convention in the territory of States that do not consider such actions to violate their sovereignty. A "first resort" approach would therefore not impede the use of other procedures.

51. Finally, the Permanent Bureau also notes that in some States where the Evidence Convention is considered to be non-mandatory, a rule is applied that the Convention should always be used where the State in which the evidence is to be taken regards the taking of evidence by other means to be a violation of its sovereignty. This position might be termed "strict comity".

52. For example, the relevant Rules of Court for Singapore and China (Hong Kong Special Administrative Region) regulating the power to issue a letter of request or to take evidence on commission are relevantly identical,[62] and are based upon an earlier version of the Rules of the English Supreme Court circulated as a model for Commonwealth countries to adopt.[63] These rules explicitly state that the power to order that a person be examined in another State may only be exercised "if the government of that country

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[61] See, *e.g.*, *Valois of America Inc v. Risdon Corp*, 193 FRD 344. 346 (D Conn, 1997); *Bodner v. Paribas*, 202 *FRD* 370, 372-3 (EDNY, 2000).

[62] **China (Hong Kong SAR):** Rules of the High Court, Order 39 rr 1-2. For further commentary, see: Sweet & Maxwell Asia, *Hong Kong Civil Procedure*, Westlaw citation HKCP RHC O.39. **Singapore:** Rules of Court, Order 39 rr 1-2.

[63] D. McClean and C. McLachlan, *The Hague Convention on the Taking of Evidence Abroad: Explanatory Documentation Prepared for Commonwealth Jurisdictions* (1985), 27, 29.

allows".[64] The relevant rules in the United Kingdom have since been amended,[65] however it appears that the strict comity rule has been maintained. As is noted in the *White Book* (the standard work on civil procedure):

> "a letter of request would certainly be needed when it is necessary to obtain the evidence of witnesses under compulsion or when the government of a country might not readily consent to a special examiner taking evidence in its country.".[66]

53. It may be concluded that the observance of comity, and a "first resort" rule, has the effect that the debate whether the Convention is mandatory or non-mandatory loses much of its significance. Comity, when observed, has the consequence that the sovereignty of States will rarely be violated; for in most circumstances where the taking of evidence would cause such a violation, the State seeking to take the evidence will be guided by comity to the procedures of the Convention. Moreover, where a position of "strict comity" is observed, the issue disappears altogether, as the sovereignty of all States Parties will always be respected.

E. Conclusion

54. In this document, the Permanent Bureau has endeavoured to set out the arguments in favour and against the question whether the Evidence Convention is mandatory or non-mandatory. While the Permanent Bureau does not take a view on this question, it does consider that it would be of great benefit to all States Parties and eventually to the Convention itself for the question to be resolved. The Permanent Bureau is convinced that the Evidence Convention continues to have an important role to play in transnational litigation, and affirms its commitment to the spirit of the view taken by the 1989 Special Commission that the Convention should be used as often as possible. Noting that a similar question was resolved in respect of the Service Convention at the 2003 Special Commission, the Permanent Bureau is confident that a similar resolution in respect of the Evidence Convention may be found at the 2009 Special Commission. It is hoped, therefore, that this document will lead to fruitful discussion.

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[64] **China (Hong Kong SAR):** Rules of the High Court, Order 39 r 2(1)(b). **Singapore:** Rules of Court, Order 39 r 2(1)(b).

[65] The relevant provisions are now found in Rule 34.13 of the *Civil Procedure Rules* 1998. For further commentary, see *The White Book from Sweet and Maxwell*, Westlaw citation UK CP 34.13.

[66] *White Book*, *ibid*.