

# HEY UNCLE SAM! MAYBE IT'S TIME TO STOP CONDONING CHILD ABDUCTIONS TO MEXICO

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## I. INTRODUCTION

Ana Belem was only going to Arizona for a few days, or at least that is what she told her husband, Carlos Bermudez.<sup>1</sup> She claimed that her cousin had an emergency and needed her assistance.<sup>2</sup> As the sole provider of the family, Bermudez was unable to take off work to care for their son in his wife's absence. Thus in June of 2008, Belem and their twelve months old son Sage left their North Carolina home.<sup>3</sup> Unbeknownst to Bermudez, the two were not coming back. There was no family crisis in Arizona; it was just a cover Belem used to give herself time to illegally relocate their son to Mexico, her native country.<sup>4</sup>

Unfortunately, Bermudez's story is not unique. He is only one of thousands of left-behind parents<sup>5</sup> worldwide whose child has been taken by the other parent and unlawfully retained in another country. In 2009 alone, the United States' Department of State responded to 1,135 new parental abduction cases, involving 1,621 children.<sup>6</sup>

When children are held in a country that is a signatory of the Hague Convention on the Civil Aspects of International Child Abduction (Convention), the left-behind parent, like Bermudez, is empowered to demand that the foreign country oversee the prompt return of the child.<sup>7</sup> When applied properly, the Convention is the most useful mechanism assisting left-behind parents as they maneuver through foreign courts.

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<sup>1</sup> *Broken Laws and Bereaved Lives, International Child Abduction Hearings: Hearings Before the Subcomm. on Afr., Global Health and Human Rights, H. Comm. on Foreign Affairs*, 112th Cong. (2011) [hereinafter *Hearings*] (testimony of Carlos Bermudez, father of child abducted to Mexico).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, FAMILY ABDUCTION: PREVENTION AND RESPONSE, at X (Patricia M. Hoff ed., 6th ed. 2009) (defining a left-behind parent as the parent from whom a child has been wrongfully taken, kept, or concealed).

<sup>6</sup> U.S. DEP'T OF STATE, 2010 REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 14 (Apr. 2010), [http://www.travel.state.gov/abduction/resources/congressreport/congressreport\\_4308.html](http://www.travel.state.gov/abduction/resources/congressreport/congressreport_4308.html) [hereinafter COMPLIANCE REPORT 2010].

<sup>7</sup> Amanda M. Waide, Note, *To Comply or Not to Comply? Brazil's Relationship with the Hague Convention on the Civil Aspects of International Child Abduction*, 39 GA. J. INT'L & COMP. L. 273, 273 (2010).

However, too often Convention partners fail to comply.<sup>8</sup> Mexico is one of a handful of countries that the State Department has repeatedly identified as either noncompliant or showing tendencies of noncompliance.<sup>9</sup>

Bermudez knows this reality too well. Since his son was kidnapped, Bermudez has participated in nine separate trials in Mexico, with several still ongoing.<sup>10</sup> Because the Mexican legal system allows a large number of appeals, the enforcement of any decision is often delayed.<sup>11</sup> For Bermudez, a family court judge has suspended any new proceedings, claiming he is waiting on documents from the first trial.<sup>12</sup>

Delays in proceedings are only one of the challenges faced by left-behind parents trying to secure the return of their children from Mexico.<sup>13</sup> The country has become one of the premier abduction destinations for American children. Of the 1,135 new outgoing cases in 2009, 309 of them, including 474 children, involved abductions to Mexico.<sup>14</sup> That is 417% more cases than the second most common abduction destination of children taken from the United States.<sup>15</sup>

Recently, the United States strengthened its stance on international child abduction.<sup>16</sup> In 2012, the Senate passed a resolution calling for the safe and immediate return of two abducted children, Noor and Ramsey Bower, from Egypt.<sup>17</sup> Just the year before, Congress introduced House Resolution 1940, which called for legislation that allows presidential action, including economic sanctions, against countries that condone child abduction, like Japan, India, and Egypt.<sup>18</sup> These countries are not Convention partners and

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<sup>8</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 18–25 (assessing Convention compliance with regards to Convention partners' central authority performance, judicial performance and law enforcement performance).

<sup>9</sup> *Id.*

<sup>10</sup> *Hearings, supra* note 1, at 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 11.

<sup>14</sup> *Id.* at 10, 14 (the term "outgoing cases" is being used according to the State Department's definition referring to "cases in which a parent wrongfully removed a child from the United States or wrongfully retained him or her in another country").

<sup>15</sup> *Id.* (Canada was recorded as having the second highest incidence of reported abductions of children taken from the United States with seventy-four new outgoing cases).

<sup>16</sup> DIPNOTE, *Conversations with America: International Parent Child Abductions*, U.S. DEP'T OF STATE OFFICIAL BLOG (Apr. 25, 2012), <http://blogs.state.gov/stories/2012/04/25/conversations-america-international-parental-child-abductions>.

<sup>17</sup> S. Res. 477, 112th Cong. (2012) (enacted).

<sup>18</sup> Bruce Gherbetti, *Delay in Signing Hague Child Abductions Treaty Could Provoke Sanctions*, JAPAN FILES (Sept. 4, 2012), <http://www.japantimes.co.jp/text/fl20120904hn.html>.

have not criminalized parental abductions.<sup>19</sup> Additionally, the Senate responded to the media attention that surrounded the David Goldman case in 2008, which involved an American father fighting for the return of his son from Brazil.<sup>20</sup> There, the Senate threatened Brazil with trade sanctions that would have subjected the country to a two billion dollar annual loss.<sup>21</sup>

These efforts to force Convention participation and compliance are commendable, but the reality of the matter is that the number of children abducted to Japan, India, and Brazil together make up only a fraction of the number of children abducted to Mexico.<sup>22</sup> In 2009, new outgoing cases from these three countries barely reached a quarter of the cases from Mexico.<sup>23</sup> And yet, Mexico has not seen a fraction of the pressure to comply with the Convention as these other countries have. Perhaps more baffling is that the United States, despite having the highest incidence of outgoing child abductions in the world, has taken comparatively fewer protective measures to prevent abductions than other countries, including Mexico.<sup>24</sup>

This Note sets out to explore factors that contribute to the difficulty in securing the prompt return of an abducted child from Mexico. The Note then critiques and proposes suggestions for the United States' current handling of the problem. Part II of this Note will discuss the background of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and Mexico's pattern of noncompliance. Part III will explore the United States' efforts to promote Convention accession and compliance. It will also discuss current restrictions and safeguards in place for children traveling into and out of the country. Part IV of this Note will examine tools the United States can effectively utilize to respond to Mexico's compliance deficiencies. Finally, this Note will conclude by suggesting that the government use a variety of methods to address Mexico's noncompliance, including preemptive measures.

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<sup>19</sup> *Id.*

<sup>20</sup> Waide, *supra* note 7, at 289–88.

<sup>21</sup> *Id.*; *see infra* Part III (describing Goldman's five year struggle to regain custody of his son).

<sup>22</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 2.

<sup>23</sup> *Id.*

<sup>24</sup> *See infra* Part III.B (comparing Mexico and the United States protective measures to prevent international child abduction); *see also Mexico Country Specific Information*, U.S. DEP'T OF STATE, [http://www.travel.state.gov/travel/cis\\_pa\\_tw/cis/cis\\_970.html](http://www.travel.state.gov/travel/cis_pa_tw/cis/cis_970.html) (last visited Nov. 4, 2013) (describing Mexico's entrance and exit requirements for minors traveling without both parents).

## II. THE HAGUE CONVENTION AND MEXICO'S HISTORY OF NONCOMPLIANCE

A. *The Hague Convention on Civil Aspects of International Child Abduction: Purpose and Background*

Prior to the 1980 Convention, it seemed nearly impossible to locate and secure the return of children abducted to foreign countries.<sup>25</sup> Moreover, the frequency of abductions continued to grow as the world saw increased international travel, bi-national marriages, and divorce rates.<sup>26</sup> In 1976, various country leaders acknowledged the need to collaboratively address the growing crisis.<sup>27</sup> Twenty-three countries participated in drafting the Hague Convention on Civil Aspects of International Child Abduction (Convention), and adopted it in 1980.<sup>28</sup> As of December 2012, sixty-nine countries have acceded to the convention.<sup>29</sup>

The Convention provides a uniform legal framework among countries with different legal systems to facilitate the prompt return of a child wrongfully retained in a foreign country.<sup>30</sup> Specifically, it “seeks to ‘restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court.’”<sup>31</sup> At its most basic form, the Hague Convention instructs courts to ask one simple question: what is the child’s country of habitual residency?<sup>32</sup> For instance, when a child is abducted from the United States to Mexico, the Mexican court must simply decide whether the child was living in the United States.<sup>33</sup> If he was, then he should be promptly returned to the U.S. for any further legal proceedings regarding custody.<sup>34</sup>

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<sup>25</sup> Donyale N. Leslie, Note, *A Difficult Situation Made Harder: A Parent’s Choice Between Civil Remedies and Criminal Charges in International Child Abduction*, 36 GA. J. INT’L & COMP. L. 381, 385 (2008).

<sup>26</sup> *Outline: Hague Child Abduction Convention* (2012), HAGUE CONFERENCE ON PRIVATE INT’L LAW (2012), [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=24](http://www.hcch.net/index_en.php?act=conventions.text&cid=24).

<sup>27</sup> Leslie, *supra* note 25, at 385.

<sup>28</sup> *Id.*

<sup>29</sup> *Hague Abduction Convention Country List*, U.S. DEP’T OF STATE BUREAU OF CONSULAR AFFAIRS, [http://travel.state.gov/abduction/resources/congressreport/congressreprot\\_1487.html](http://travel.state.gov/abduction/resources/congressreport/congressreprot_1487.html) (last visited Oct. 8, 2013).

<sup>30</sup> DIPNOTE BLOGGERS, *supra* note 16.

<sup>31</sup> Robert v. Tesson, 507 F.3d 981, 988 (6th Cir. 2007) (quoting *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996)).

<sup>32</sup> DIPNOTE BLOGGERS, *supra* note 16.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

The Convention drafters believed that the country of habitual residence, often where the child was born and possesses citizenship, has the most interest in resolving the conflict.<sup>35</sup> As a result, they designed the Convention in a way that allows the country of habitual residence to arbitrate the merits of the underlying custody dispute.<sup>36</sup> Thus, previous custody agreements are honored as the Convention prohibits foreign courts from deciding the merits of custody disputes.<sup>37</sup>

The Hague Convention does not explicitly define the circumstances that determine habitual residence.<sup>38</sup> Instead, “courts interpret the phrase according to its ordinary meaning and analyze habitual residence as a mixed question of fact and law, based on the circumstances of the particular case.”<sup>39</sup> Generally, when a child is born in the country where his parents have their habitual residence, then that country would be regarded as the child’s habitual residence.<sup>40</sup> Place of birth, however, is not dispositive.<sup>41</sup> Courts should consider the totality of the circumstances arising to and prevailing in the child’s living circumstances. This inquiry would include the history of the child’s residence, evidence of the parent’s mutual intent to fix the child’s location, and the settled nature of the family before the return request.<sup>42</sup>

Nonetheless, a country is not compelled to return a child to the country of habitual residence in every abduction case. The Convention establishes four discretionary exceptions that subordinate the obligation to return a child: (1) the proceedings to return the child commenced more than a year after the child was wrongfully removed; (2) the left-behind parent failed to exercise his custody rights at the time of removal or consented to the removal; (3) the

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<sup>35</sup> Waide, *supra* note 7, at 275.

<sup>36</sup> *Id.*

<sup>37</sup> Hague Convention on the Civil Aspects of International Child Abduction, opened for signature Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 19 I.L.M. 1501, art. 16 (1980) [hereinafter Hague Convention] (“The Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits or rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.”).

<sup>38</sup> *Id.*

<sup>39</sup> Hague Convention Chapter Advisory Comm., *The Hague Convention on International Child Abduction: A Child’s Return and the Presence of Domestic Violence* 8 (Sept. 2005) [hereinafter Advisory Comm. Report], <http://www.courts.wa.gov/content/manuals/domViol/appendixG.pdf>.

<sup>40</sup> Holder v. Holder, 392 F.3d 1009, 1020 (9th Cir. 2004).

<sup>41</sup> *Id.*

<sup>42</sup> Waide, *supra* note 7, at 276.

child will be at grave risk of physical or psychological harm if he were returned; and (4) the return of the child would violate the fundamental principles of human rights.<sup>43</sup> However, two factors limit the application of these Convention defenses.<sup>44</sup> First, the drafters of the Convention intended for courts to construe the defenses narrowly. Second, the Convention gives courts the discretion to return a child to the country of habitual residency if such action would promote the goals of the Convention.<sup>45</sup> This discretion exists even when the criteria of one of the exceptions is met.<sup>46</sup>

The first exemption in Article 12 of the Convention requires a showing that the child is settled into his new environment.<sup>47</sup> This is to say that even when an action is commenced more than a year after removal, the child should still be returned if he has not yet acclimated to the new country.<sup>48</sup> However, a determination of whether the child is acclimated is not appropriate if the action is filed within a year of the wrongful removal.<sup>49</sup>

Article 13 details the second discretionary exception,<sup>50</sup> and requires a party opposing a child's return to prove either of two things to successfully stop the action.<sup>51</sup> The party may first demonstrate that the left-behind parent "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."<sup>52</sup> This is to say that at the time of removal the left-behind parent was not exercising his parental rights. Courts construe "exercising custodial rights" broadly.<sup>53</sup> Generally, they infer that parents exercise custodial rights unless the opposing party demonstrates "clear and unequivocal abandonment of the child."<sup>54</sup> Once a showing of an exercise of custodial rights is established, the Convention dictates that the court should not deal with whether or not those rights were carried out well.<sup>55</sup>

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<sup>43</sup> Hague Convention, *supra* note 37, arts. 12–13, 20.

<sup>44</sup> Advisory Comm. Report, *supra* note 39, at 12.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Hague Convention, *supra* note 37, art. 12.

<sup>48</sup> Waide, *supra* note 7, at 276.

<sup>49</sup> *Id.*

<sup>50</sup> Hague Convention, *supra* note 37, art. 13.

<sup>51</sup> *Id.*

<sup>52</sup> Waide, *supra* note 7, at 277.

<sup>53</sup> Hague Convention, *supra* note 37, art. 13.

<sup>54</sup> *Id.*

<sup>55</sup> Advisory Comm. Report, *supra* note 39, at 18.

The third exception, also detailed in Article 13, prohibits the return of a child if “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.”<sup>56</sup> Courts’ treatment of this defense suggests that it is not intended to be a “vehicle to litigate” based on the child’s best interest or where the child might be happiest,<sup>57</sup> but instead, the defense is meant to determine only whether the child will suffer serious abuse if returned.<sup>58</sup> Abducting parents claiming domestic abuse often raise this exception.<sup>59</sup> However, many courts do not apply the grave risk defense absent evidence demonstrating that the violence would be aimed at the child.<sup>60</sup>

In addition, Article 13 enables the Court to consider the desires of children who are of an age and maturity level appropriate to take such view into consideration.<sup>61</sup> While the Convention does not indicate a specific age,<sup>62</sup> “the child must be capable of understanding the choice he or she is making” in order to invoke this defense.<sup>63</sup> Judges in the United States have often approached this exception in one of two ways.<sup>64</sup> Some judges hear a psychologist’s expert testimony on whether the child is of a sufficient age and maturity level to weigh in on his custody status.<sup>65</sup> Other courts appoint a guardian ad litem or even an attorney to represent the child.<sup>66</sup>

The final exception to returning a child to his country of habitual residence is found in Article 20 of the Hague Convention.<sup>67</sup> Under this Article, courts have discretion to refuse to return a child if such return “would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”<sup>68</sup> This

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<sup>56</sup> Hague Convention, *supra* note 37, art. 13.

<sup>57</sup> Advisory Comm. Report, *supra* note 39, at 18.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Waide, *supra* note 7, at 278.

<sup>61</sup> Hague Convention, *supra* note 37, art. 13.

<sup>62</sup> *Id.*

<sup>63</sup> Waide, *supra* note 7, at 278.

<sup>64</sup> Linda D. Elrod, “Please Let Me Stay”: *Hearing the Voice of the Child in Hague Abduction Cases*, 63 OKLA. L. REV. 663, 679–80 (2011).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*; see also Danaipour v. McLarey, 286 F.3d 1, 8 (1st Cir. 2002) (judge appointed a guardian ad litem for the children in the custody dispute); Kufner v. Kufner, 519 F.3d 33, 37 (1st Cir. 2008) (court appointed an attorney in dual role of guardian ad litem and attorney for children).

<sup>67</sup> Hague Convention, *supra* note 37, art. 20.

<sup>68</sup> *Id.*

defense has not been utilized in the United States to block the return of a child.<sup>69</sup>

### *B. Mexico's History of Noncompliance with the Hague Convention*

Every year, the Department of State's Office of Children's Issues conducts an analysis of signatories' compliance with the Convention.<sup>70</sup> The compliance reports identify areas of concern where a country's implementation of the Convention falls short of completing its obligations.<sup>71</sup> Relying in part on guidelines outlined in the Permanent Bureau of the Hague Conference on Private International Law's Guides to Good Practice, the Department considers three main compliance areas including: (1) central authority performance; (2) judicial performance; and, (3) law enforcement performance.<sup>72</sup> Considering these factors, the report categorizes countries of concern as either not compliant or as demonstrating patterns of noncompliance; the former category being the more serious of the two.<sup>73</sup> Since 1999, nearly every compliance report has identified Mexico as either not compliant or demonstrating patterns of noncompliance.<sup>74</sup>

#### *1. Mexican Central Authority Performance*

Historically, the United States' Central Authority (USCA), the organization that handles Convention cases in the United States, has found it difficult to communicate directly with the Mexican Central Authority (MCA).<sup>75</sup> In 2009, for instance, the USCA identified fifty-three unresolved cases that had been pending for eighteen months or longer following the application filing.<sup>76</sup> The USCA and the U.S. embassy repeatedly asked the

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<sup>69</sup> *Id.*

<sup>70</sup> *Compliance Reports*, U.S. DEP'T OF STATE, [http://www.travel.state.gov/abduction/resources/congressreport/congressreport\\_4308.html](http://www.travel.state.gov/abduction/resources/congressreport/congressreport_4308.html) (last visited Oct. 19, 2012).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> U.S. DEP'T OF STATE, 2012 REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL ABDUCTION (Apr. 2012), <http://www.travel.state.gov/pdf/2012HagueComplianceReport.pdf> [hereinafter COMPLIANCE REPORT 2012] (flagging Mexico as having enforcement problems, but not categorizing Mexico as either non-compliant or demonstrating patterns of non-compliance).

<sup>75</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 22 (when a country accedes to the Convention it must establish a central authority to handle Convention cases).

<sup>76</sup> *Id.*

MCA for status updates on these unresolved cases but received no response for at least nineteen of them.<sup>77</sup> Such difficulties have caused costly inconveniences for left-behind parents, as well as delays in processing return applications.<sup>78</sup> Moreover, any type of delay is detrimental to left-behind parents whose return applications, in accordance with Article 12 of the Convention, can be denied if the child is found to have settled into the new environment.<sup>79</sup>

The State Department attributes the MCA's performance deficiencies to inadequate staffing.<sup>80</sup> According to The Hague Permanent Bureau's *Guide to Good Practice*, central authority staff should be "sufficient in numbers to cope with the workload."<sup>81</sup> In the USCA's view, the MCA requires a larger allocation of resources and staff in order to comply with Convention requirements.<sup>82</sup>

Notwithstanding these insufficiencies, the MCA's performance has improved in the last couple of years.<sup>83</sup> As detailed in the 2011 compliance report, the frequency of exchange in information and meetings between the U.S. Embassy in Mexico City and the USCA has increased.<sup>84</sup> The MCA has also made efforts to improve the effectiveness of case management and to address judicial and law enforcement issues.<sup>85</sup> Despite these recent improvements, Mexico maintains an alarming number of cases that continue to be wrongfully delayed and unresolved.<sup>86</sup> In 2011, the State Department identified 117 outgoing cases that remained unresolved for more than eighteen months, eight-two of which were Mexican cases.<sup>87</sup>

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<sup>77</sup> *Id.* at 23.

<sup>78</sup> *Id.* at 22 (return applications are the Convention applications a left-behind parent files with the abducting country's central authority to request the return of the child).

<sup>79</sup> Advisory Comm. Report, *supra* note 39, at 12.

<sup>80</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 23.

<sup>81</sup> *Id.* (quoting the Hague Permanent Bureau's *Guide to Good Practice on Central Authority Performance*, § 2.4.1).

<sup>82</sup> *Id.*

<sup>83</sup> U.S. DEP'T OF STATE, 2011 REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 5 (Apr. 2011), <http://travel.state.gov/pdf/2011HagueComplianceReport.pdf> [hereinafter COMPLIANCE REPORT 2011].

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> COMPLIANCE REPORT 2012, *supra* note 74.

<sup>87</sup> *Id.*

## 2. *Judicial Performance*

Mexico continues to experience frequent judicial delays with respect to hearings. In several 2009 cases, sixteen to fifty-five months elapsed between the submission of a return application and the first court hearing.<sup>88</sup> The State Department identifies three causal factors for these judicial delays:

(1) lack of implementing legislation or procedures for Convention applications and many Mexican judges following inapposite procedures found in state civil codes in resolving such cases; (2) lack of understanding of the Convention by many Mexican judges . . . ; and, (3) [taking parents] (TPs) absconding with the children when summoned to a hearing . . . .<sup>89</sup>

Regarding the first causal factor, Mexican courts have traditionally shown a tendency to misapply Article 16 of the Convention by addressing the underlying custody issues of cases<sup>90</sup> and adjudicating cases based on custody merits.<sup>91</sup> Additionally, the application of the *amparo* process, a constitutionally based appeal in Mexico, continues to cause delays.<sup>92</sup> TPs may file an *amparo* appeal alleging that the Convention violates their rights under the Mexican Constitution.<sup>93</sup> In response, judges order an immediate stay of the Convention proceedings pending the adjudication of the underlying constitutional issue.<sup>94</sup> Mexican precedent instructs judges to promptly dismiss such an appeal, as both the Mexican Supreme Court and Mexican federal courts have held that the Convention does not violate the Constitution's due process requirements.<sup>95</sup> Although lower courts have

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<sup>88</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 22.

<sup>89</sup> *Id.* at 23 (defining a taking parent as the parent or person who abducted the child).

<sup>90</sup> U.S. DEP'T OF STATE, 2002-03 REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (Apr. 2003), <http://www.travel.state.gov/pdf/2002-2003ComplianceReport.pdf> [hereinafter COMPLIANCE REPORT 2002-03] (“[T]he only issues the court is supposed to examine are (a) whether the child was ‘habitually resident’ in another Hague state prior to the abduction or illegal retention; (b) whether the left-behind parent had some form of custodial rights at the time; and (c) whether those rights were being exercised.”).

<sup>91</sup> COMPLIANCE REPORT 2011, *supra* note 83, at 5.

<sup>92</sup> *Id.* (*amparo* appeals can be filed multiple times).

<sup>93</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 23.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

relied on these decisions,<sup>96</sup> *amparo* appeals still subject the Convention process to frequent delays.<sup>97</sup>

The second causal factor, a general lack of understanding of the Convention, seems fairly widespread throughout Mexican courts and agencies involved in the resolution process of Hague cases.<sup>98</sup> This unfamiliarity was evidenced in 2009, when courts submitted extensive requests for information, including letters from USCA to determine whether the facts of a particular case met the Convention's definition of international child abduction.<sup>99</sup>

The third causal factor, TPs fleeing with the children when summoned by court, occurs because neither the TP nor the children are secured following the court's notification.<sup>100</sup> Mexican judges can temporarily place children in a children's protection service shelter of the *Desarrollo Integral de la Familia*.<sup>101</sup> However, judges are reluctant to place children in these shelters absent evidence that the child is in danger under the TP's care.<sup>102</sup>

### 3. Law Enforcement Performance

Over the last decade Mexican law enforcement has been notoriously ineffective in its efforts to locate missing children.<sup>103</sup> As previously mentioned, fifty-four cases were left unresolved in 2009.<sup>104</sup> In thirty-eight of these cases, the USCA requested assistance from the MCA to locate the children with the help of Mexican law enforcement.<sup>105</sup> In many instances the left-behind parent provided a last known street address and telephone number of the abducting parent and child.<sup>106</sup> Still, Mexican authorities were unable to locate them.<sup>107</sup> The State Department attributes this problem to two main factors.<sup>108</sup> First, too few enforcement agencies are assigned to

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Compliance Reports, supra* note 70.

<sup>104</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 22.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

large territories and populations.<sup>109</sup> Second, international parental abductions seem to be lower priority than other more violent criminal activities.<sup>110</sup> Whatever the cause, delays in determining location are particularly detrimental to the return process because Mexico does not open a case until the location of the child is known.<sup>111</sup> “Since location starts a case, and a case must begin within a year to warrant automatic return, quickly locating a child in Mexico cannot be overemphasized.”<sup>112</sup>

With respect to recent improvements, the MCA has partnered with the *Agencia Federal de Investigacion* to more actively search for children.<sup>113</sup> The effort has resulted in successfully locating several children in longstanding cases.<sup>114</sup> Nevertheless, the majority of longstanding unresolved return applications remain pending because of law enforcement’s inability to locate abducted children.<sup>115</sup>

### C. Case Example: Didier Combe—Five Years Later and Still Waiting

Left-behind parents of children abducted to Mexico continue to experience unreasonable delays in court proceedings, inappropriate judicial implementation of Convention procedures, and too often, problems locating their children.<sup>116</sup> The case of Didier Combe, a man whose daughter is being wrongfully retained in Mexico, provides a great example of this trend of noncompliance.<sup>117</sup> In 2006 Combe, a U.S. citizen, was in the process of a divorce from Aline Rivas-Vera, a Mexican citizen.<sup>118</sup> During the proceedings the two shared custody of their two and a half year old daughter, Chloe.<sup>119</sup> On March 15, 2006, Rivas-Vera fled to Mexico with Chloe in

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Leslie, *supra* note 25, at 391.

<sup>112</sup> *Id.*

<sup>113</sup> COMPLIANCE REPORT 2011, *supra* note 83, at 5.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 5–6.

<sup>116</sup> *Id.* at 5.

<sup>117</sup> *An Update on Finding Chloe*, FIND CHLOE BLOG (Jan. 11, 2010, 12:19 PM), <http://chloecomberivas.blogspot.com/2010/01/update-on-finding-chloe.html> [hereinafter *Finding Chloe*].

<sup>118</sup> LIGHTING THEIR WAY HOME BLOG, <https://lightingtheirwayhome.wordpress.com/2012/01/05/chloe-combe-rivas-family-abduction-march-15-2006-updated-01-05-2012/> (last visited Oct. 2012).

<sup>119</sup> *Id.*

tow.<sup>120</sup> Shortly thereafter, a circuit court in Missouri granted Combe full legal and physical custody of Chloe.<sup>121</sup>

Since the abduction, a federal warrant has been issued for Vera's arrest.<sup>122</sup> Unfortunately, potential criminal sanctions are of little comfort to a man who has not seen his child in seven years. Combe filed a return application one month after the abduction and hired legal representation in Mexico City a few months later.<sup>123</sup> Over the next two years, he made several trips to Mexico City to meet with the MCA regarding efforts to have Chloe returned to the United States.<sup>124</sup> Although the Mexican government made numerous attempts to serve Rivas-Vera, law enforcement could not locate her for over a year because she went into hiding.<sup>125</sup> Once in front of a Mexican family judge, Rivas-Vera further prolonged the process by appealing three times.<sup>126</sup> Although the appeals were denied, they caused eight months of delays.<sup>127</sup>

Delays caused by difficulties in locating a child, appeals, and other issues can be particularly problematic. As noted above, Article 12 of the Hague Convention gives a judge the discretion to deny a return application, even when the court has determined the child was wrongfully removed, if the child has become settled in his new environment.<sup>128</sup> Long delays can contribute to a judge, unfamiliar with the proper application of the Convention, erroneously finding that a child has become settled and should not be returned. In Combe's case, on April 24, 2008, a judge determined that Chloe should stay in Mexico because she was accustomed to living there.<sup>129</sup>

This decision does not comport with a proper application of the Convention. Article 12 instructs that whether a child is settled in his environment should not be considered when the return application was filed within a year of the abduction.<sup>130</sup> Combe filed the application a month after his daughter was abducted,<sup>131</sup> thus the only question the judge should have

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Finding Chloe, supra* note 117.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Hague Convention, *supra* note 37, arts. 12–13.

<sup>129</sup> *Finding Chloe, supra* note 117.

<sup>130</sup> Hague Convention, *supra* note 37, art. 12.

<sup>131</sup> *Finding Chloe, supra* note 117.

determined was which country was Chloe's habitual residency at the time of the abduction.<sup>132</sup>

Combe appealed the decision to the Mexican Supreme Court.<sup>133</sup> In March 2009, a Mexican federal court overruled the family judge's decision and ordered that Chloe be returned to the United States as soon as possible.<sup>134</sup> Despite this ruling, which is consistent with the Convention articles, Chloe has not returned because she and Rivas-Vera are again in hiding<sup>135</sup> and law enforcement has been unable to locate them.<sup>136</sup>

### III. THE UNITED STATES' EFFORTS TO PROMOTE CONVENTION COMPLIANCE AND ACCESSION THROUGHOUT THE WORLD

#### A. *Recent Efforts to Enforce Convention Compliance*

The government has taken proactive steps towards encouraging compliance among the partners of the Convention.<sup>137</sup> Moreover, it has encouraged nonparties to become signatories of the Convention.<sup>138</sup> As Secretary of State, Hillary Clinton took a particular interest in children's issues.<sup>139</sup> In 2010, she created the position of Special Advisor to the Office of Children's Issues and appointed long-time children advocate and Ambassador Susan S. Jacobs.<sup>140</sup> Since being appointed, Special Advisor Jacobs has focused on raising awareness of the issues relating to international parental abduction in conjunction with continuing diplomatic efforts to improve Convention partners' performance.<sup>141</sup> A brief examination of these diplomatic and political efforts directed towards others countries, particularly Brazil, illustrate potential tactics that could effectively improve Mexican compliance.

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<sup>132</sup> DIPNOTE BLOGGERS, *supra* note 16.

<sup>133</sup> *Finding Chloe*, *supra* note 117.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> DIPNOTE BLOGGERS, *supra* note 16.

<sup>138</sup> H.R. 1326, 111th Cong. (2010) (agreed to) ("Calling on the Government of Japan to address the urgent problem of abduction to and retention of United States citizen children in Japan . . .").

<sup>139</sup> DIPNOTE BLOGGERS, *supra* note 16.

<sup>140</sup> *Secretary Clinton Designates Special Advisor for International Children's Issues*, U.S. DEP'T OF STATE OFFICE OF THE SPOKESPERSON (July 1, 2010), <http://www.state.gov/r/pa/prs/ps/2010/07/143892.htm>.

<sup>141</sup> DIPNOTE BLOGGERS, *supra* note 16.

*1. Pressure on Brazil*

Brazil acceded to the Convention in 2003,<sup>142</sup> and has since been identified by the State Department as not compliant.<sup>143</sup> In contrast to Mexico, judicial misapplication of the Convention is the principal causal factor of Brazil's noncompliance.<sup>144</sup> However, Brazilian judges share their Mexican counterparts' tendency to adjudicate Convention cases based on the underlying custody issue.<sup>145</sup> In making such merit based determinations, Brazilian courts have shown widespread favoritism towards Brazilian mothers.<sup>146</sup> Additionally, courts have demonstrated an alarming pattern of allowing children, who have not yet reached an age of maturity, to make statements about where they would prefer to live.<sup>147</sup> Finally, the Convention process in Brazil, like in Mexico, is sometimes disrupted by law enforcement deficiencies.<sup>148</sup> Further, the wrongful retention of children is not an offense under the Brazilian penal code.<sup>149</sup> As a result, law enforcement does not place a high priority on Convention cases.<sup>150</sup>

David Goldman, a U.S. citizen, brought international parental abductions before the public's eye<sup>151</sup> during his five-year struggle in Brazilian courts to be reunited with his son.<sup>152</sup> In June of 2004, his wife, Bruna, and son, Sean, departed for Brazil for what was supposed to be a two-week vacation to his wife's native country.<sup>153</sup> However, Goldman soon realized that his wife had no intention of returning.<sup>154</sup> He subsequently filed a timely return application for his son, but it was denied on the basis that the boy should stay in Brazil with his mother.<sup>155</sup>

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<sup>142</sup> *Hague Abduction Convention Country List*, *supra* note 29.

<sup>143</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 18.

<sup>144</sup> COMPLIANCE REPORT 2011, *supra* note 83, at 3.

<sup>145</sup> Waide, *supra* note 7, at 279.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 280.

<sup>148</sup> COMPLIANCE REPORT 2011, *supra* note 83, at 3.

<sup>149</sup> Waide, *supra* note 7, at 280.

<sup>150</sup> *Id.*

<sup>151</sup> Andrew Downie, *The Battle for Sean Goldman: The View from Brazil*, TIME WORLD, <http://www.time.com/time/world/article/0,8599,1948919,00.html>, (last visited Oct. 22, 2012).

<sup>152</sup> Waide, *supra* note 7, at 281.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 282.

Bruna remarried a prominent attorney in Brazil, and shortly thereafter died in childbirth.<sup>156</sup> Even after her death, Brazilian courts refused to return Sean to the United States.<sup>157</sup> Instead the court granted guardianship and custody to his stepfather.<sup>158</sup> After another negative ruling and appeal, a Brazilian federal court heard Goldman's case and determined that, under the Convention, his son should be returned to the United States.<sup>159</sup> However, the victory was short lived.<sup>160</sup> Following the federal court's ruling, a Supreme Court Justice issued a stay requiring Sean to remain with his Brazilian relatives until the Supreme Court could consider the case.<sup>161</sup>

Although Goldman's battle endured for nearly five years, he was lucky that it produced so much publicity. In response to the stay, U.S. Senator Frank Lautenberg placed a hold on a trade bill that would have subjected Brazil to a loss of around \$2.75 billion in benefits.<sup>162</sup> The bill was to "provide export tariff relief to 130 countries, of which Brazil would be the fifth largest recipient."<sup>163</sup> The hold "was designed to exert additional pressure on Brazilian authorities to abide by the court order."<sup>164</sup> The Senator's actions demonstrate that political pressure such as sanctions can induce Convention compliance. Shortly after the hold was placed in December of 2009, the stay on Sean was lifted.<sup>165</sup>

There have been other Congressional initiatives to pressure Brazil into compliance with its obligations under the Convention.<sup>166</sup> The Suspend Brazil GSP Act (Suspend Brazil Act), a U.S. House Resolution, was introduced in June of 2009, and called for the "suspen[sion of] the application of Generalized System of Preferences for Brazil until such time as Brazil complies with its obligations towards the United States under the

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<sup>156</sup> Downie, *supra* note 151.

<sup>157</sup> *Id.*

<sup>158</sup> Waide, *supra* note 7, at 284.

<sup>159</sup> *Id.* at 285.

<sup>160</sup> *Id.* at 288.

<sup>161</sup> Mariano Castillo & Adam Reiss, *Brazil High Court Lifts Stay, Allowing Boy to Return to U.S.*, CNN WORLD (Dec. 23, 2009), <http://www.cnn.com/2009/WORLD/americas/12/22/brazil.custody.battle/index.html>.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Waide, *supra* note 7, at 296.

<sup>166</sup> See Suspend Brazil GSP Act, H.R. 2702, 111th Cong. (2009) (referred to committee and died); International Child Abduction Prevention Act of 2009, H.R. 3240, 111th Cong. (2009) (referred to committee and died); International Child Abduction Prevention and Return Act of 2011, H.R. 1940, 112th Cong. (2011) (proposed).

Convention on the Civil Aspects of International Child Abduction.”<sup>167</sup> The bill was meant to “impress upon the judiciary, central authority, and law enforcement of Brazil the importance of abiding by their respective obligations” as imposed by the Convention.<sup>168</sup> If adopted, the Suspend Brazil Act would have cost Brazil about \$2 billion annually in trade benefits.<sup>169</sup> However, the bill eventually died in committee.<sup>170</sup> Perhaps it lost support when part of its purpose, to ensure the immediate return of Sean Goldman, was fulfilled that same year.<sup>171</sup> Nevertheless, the return of one child, when many other children are still wrongly retained,<sup>172</sup> seems to be only a small triumph in the big picture.

The International Child Abduction Prevention Act of 2009 (Abduction Prevention Act) was proposed almost concurrently with the Suspend Brazil Act.<sup>173</sup> The resolution sought to “ensure compliance with the 1980 Hague Convention on the Civil Aspects of International Child Abduction by countries with which the United States enjoys reciprocal obligations . . . .”<sup>174</sup> Unlike the Suspend Brazil Act, the Abduction Prevention Act was not directed specifically at Brazil. Instead, it was designed to affect any country that was not a Convention partner or demonstrated patterns of noncompliance.<sup>175</sup>

The Abduction Prevention Act was not enacted.<sup>176</sup> Had it been, the government would have gained much greater means of combating noncompliance. When countries consistently fall short of their Convention obligations, the Abduction Prevention Act would have authorized the President to use a variety of options to exert pressure to comply.<sup>177</sup> Such action could have included delays or cancellation of scientific or cultural exchanges, restrictions on visas issued to nationals of such country, limitations or suspensions of United States development or security

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<sup>167</sup> Suspend Brazil GSP Act, H.R. 2702, 111th Cong. (2009) (died in committee).

<sup>168</sup> *Id.* (in addition to encouraging compliance with the Hague, the bill was drafted in response to the custody difficulties facing David Goldman within the Brazilian courts in 2009).

<sup>169</sup> Waide, *supra* note 7, at 295.

<sup>170</sup> Suspend Brazil GSP Act, *supra* note 167.

<sup>171</sup> Waide, *supra* note 7, at 296.

<sup>172</sup> COMPLIANCE REPORT 2011, *supra* note 83, at 12–13.

<sup>173</sup> International Child Abduction Prevention Act of 2009, H.R. 3240, 111th Cong. (2009).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* § 204(a).

assistance, or ordering the heads of United States agencies not to issue licenses.<sup>178</sup> Furthermore, the Resolution would have established mechanisms to provide left-behind parents with more assistance and aggressive advocacy in foreign countries.<sup>179</sup>

2. *Pressure to Accede to the Convention—Japan, India, and Egypt*

The United States has also engaged in a considerable amount of diplomacy with non-partners of the Convention in hope of inducing accession.<sup>180</sup> These efforts are important because when a child is abducted to a country that is not a partner of the Hague Convention, the left-behind parent only has remedies under that country's laws.<sup>181</sup> In recent efforts, the Senate unanimously passed the International Parental Child Abduction Resolution (Parental Abduction Resolution) on December 4, 2012.<sup>182</sup> The Resolution condemns international parental abduction and calls on countries to join and fully comply with the Convention.<sup>183</sup> In doing so, it singles out Japan, India and Egypt for being non-Convention partners that are also among the top ten countries to which children abducted from the United States are taken.<sup>184</sup> While the Resolution does urge those Convention partners identified by the State Department as noncompliant or showing patterns of noncompliance to fulfill their commitments under the treaty, its two main focuses are: (1) to encourage non-partners of the Convention to accede and develop mechanisms for returning abducted children expediently; and (2) to increase the services and resources available to help left-behind parents secure the return of their child.<sup>185</sup> While these objectives are important, they should not subordinate specific efforts to enforce Convention compliance. Otherwise, the efforts to encourage a country to become a partner of a treaty would seem in vain if there is no continued pressure to comply with it.

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.* § 2(c)(4).

<sup>180</sup> DIPNOTE BLOGGERS, *supra* note 16.

<sup>181</sup> *Id.*

<sup>182</sup> Press Release, U.S. Senator Barbara Boxer, Boxer Praises Senate Passage of Resolution Condemning International Parental Child Abduction (Dec. 4, 2012), *available at* <http://boxer.senate.gov/en/press/releases/120412b.cfm>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

*B. Mexican Diplomacy Over the Past Decade*

Based on State Department compliance reports, between 1999 and the present, the United States government seems to have taken a diplomatic route to encourage Mexican compliance instead of exerting pressure through economic sanctions.<sup>186</sup> Throughout the new millennium, the USCA took action to address the MCA's lack of communication regarding status updates and general news on pending Hague cases.<sup>187</sup> The Office of Children's Issues and the USCA met with the MCA on separate occasions, and the USCA attended bi-national meetings with the Mexican Consulate to discuss communication problems.<sup>188</sup> Moreover, the 2011 compliance report marked considerable improvements in the MCA regarding consistent communications with the USCA.<sup>189</sup>

*C. Preventive Measures in General and Specific to Mexico*

Although Mexico has been noncompliant with regards to their application of the Convention, the country has passed several regulations that protect children from being wrongfully removed from Mexico.<sup>190</sup> These regulations generally take the form of travel requirements.<sup>191</sup> Mexican Immigration Authorities require the consent of both parents before any minor is allowed to enter or leave the county. This requirement applies to minors of any nationality. In order to comply with the requirement, a parent traveling alone with a minor must provide a written statement of consent from the absent

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<sup>186</sup> U.S. DEP'T OF STATE, 1999 REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 3 (1999), <http://travel.state.gov/pdf/1999ComplianceReport.pdf> [hereinafter COMPLIANCE REPORT 1999]; U.S. DEP'T OF STATE, 2001 REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 7 (Apr. 2011), <http://travel.state.gov/pdf/2001ComplianceReport.pdf> [hereinafter COMPLIANCE REPORT 2001]; COMPLIANCE REPORT 2002-03, *supra* note 90, at 8; U.S. DEP'T OF STATE, 2009 REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 25 (Apr. 2009) [hereinafter COMPLIANCE REPORT 2009], <http://travel.state.gov/pdf/2002-2003ComplianceReport.pdf>; COMPLIANCE REPORT 2011, *supra* note 83, at 5.

<sup>187</sup> COMPLIANCE REPORT 1999, *supra* note 186; COMPLIANCE REPORT 2001, *supra* note 186; COMPLIANCE REPORT 2002-03, *supra* note 90; COMPLIANCE REPORT 2009, *supra* note 186; COMPLIANCE REPORT 2011, *supra* note 83.

<sup>188</sup> COMPLIANCE REPORT 1999, *supra* note 186.

<sup>189</sup> COMPLIANCE REPORT 2011, *supra* note 83, at 5.

<sup>190</sup> *Mexico Country Specific Information*, *supra* note 24.

<sup>191</sup> *Id.*

parent.<sup>192</sup> Further, in order to even obtain a passport for a minor child, the Mexican Foreign Ministry officials require the signature of both parents.<sup>193</sup> This allows one parent to prevent the issuance of a valid passport by withholding consent.<sup>194</sup> In addition, traveling on a parent's passport is not allowed.<sup>195</sup> The effect of these procedures, when properly administered, is to prevent a minor from crossing the Mexican border without the explicit consent of both parents.

United States regulations regarding international travel of minors are relatively relaxed compared to Mexico's.<sup>196</sup> United States Customs does recommend that parents traveling with minors carry a notarized note of permission from the other parent in his or her absence.<sup>197</sup> Without the letter, the parent may be detained until the circumstances of the child traveling without both parents can be fully assessed,<sup>198</sup> however, a statement of permission is not required as it is in Mexico.<sup>199</sup>

It is both troubling and surprising that the United States experiences more cases of parental abductions than Mexico does, and yet implements fewer safeguards to prevent them.<sup>200</sup> The added cost to the country seems minimal when compared to the benefits derived. Implementing such a requirement would not be burdensome, as parents seeking to travel internationally with their children but without their spouse would have to exert the minimal time and money required to obtain a notarized consent form. The waiting time at customs for all travelers would likely increase slightly because officials would need to check that minors had all the required paper work, and in some instances, authorities might even have to check a database to confirm the validity of certain documents.<sup>201</sup> However, these small infringements

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Compare *id.*, with *Children—Child Traveling with One Parent or Someone Who Is Not a Parent or Legal Guardian or a Group*, U.S. CUSTOMS AND BORDER PROTECTION, [https://help.cbp.gov/app/answers/detail/a\\_id/268/~children---child-traveling-with-oneparent-or-someone-who-is-not-a-parent-or](https://help.cbp.gov/app/answers/detail/a_id/268/~children---child-traveling-with-oneparent-or-someone-who-is-not-a-parent-or) (last visited Sept. 15, 2012) [hereinafter *Child Traveling with One Parent U.S.*] (describing United States' travel restrictions for minors).

<sup>197</sup> *Child Traveling with One Parent U.S.*, *supra* note 196.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 22.

<sup>201</sup> See *infra* Part IV.C (suggesting a national custody order registry as an effective and necessary database to prevent abducting parents from illegally taking a child across the border).

seem insignificant if their application would prevent parents from illegally taking children out of the country.

#### IV. THE NEED FOR A BETTER RESPONSE TO ADDRESS MEXICO'S NONCOMPLIANCE

##### *A. The Convention Lacks a Mechanism to Address Compliance*

The Hague Convention offers an effective approach for countries to address international child abduction in a consistent and fair manner. However, its drafters failed to provide a mechanism within the Convention to ensure that other signatories fulfill their obligations, or for countries to use in order to enforce compliance among other contracting states.<sup>202</sup> Thus, countries rarely encounter ramifications when they fail to comply with their obligations. Professors Paul Beaumont and Peter McEleavy articulated this shortcoming best: when “faced with sustained noncompliance there is little Contracting States can do; certainly there is no mechanism proscribed within the text of the Convention . . . . Ultimately, in the absence of any sanction the operation of the Convention depends upon the goodwill of the signatory States.”<sup>203</sup>

##### *B. A More Aggressive Approach Should Include Potential Sanctions*

The United States should no longer rely on the good faith of Mexico to fulfill its obligations under the Convention. This is not to say that the State Department and USCA have not been proactive in strengthening the implementation of the Convention in Mexico and other noncompliant countries. Since 1999, both the USCA and representatives of the State Department have diligently met with the MCA to discuss deficiencies in Mexico's implementation of the Convention.<sup>204</sup> In addition to diplomatic efforts, the USCA publishes annual reports on the compliance of other

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<sup>202</sup> Caitlin M. Bannon, *The Hague Convention on Civil Aspects Of International Child Abduction: The Need for Mechanisms to Address Noncompliance*, 31 B.C. THIRD WORLD L.J. 129, 153 (2011). See generally Hague Convention, *supra* note 37 (not including an article addressing Convention enforcement or compliance).

<sup>203</sup> Bannon, *supra* note 202, at 153 (quoting Professors Paul Beaumont and Peter McEleavy).

<sup>204</sup> *Compliance Reports*, *supra* note 70 (providing a link to the text of every compliance report produced by the State Department since 1999); see also DIPNOTE BLOGGERS, *supra* note 30 (discussing the diplomatic efforts made by the Special Advisor for Office of International Children's).

parties to the Convention.<sup>205</sup> In an introductory letter published in the 2010 compliance report, Janice Jacobs, the Assistant Secretary of State for Consular Affairs, commented on the importance of these reports in the government's efforts to promote effective implementation of the Convention.<sup>206</sup> She wrote: "Compliance is an ongoing challenge for many countries. Consequently, continuing evaluation of treaty implementation in partner countries and in the United States is vital for its success."<sup>207</sup>

These diplomatic measures certainly play an important role in dealing with noncompliant partners. However, they simply fall short in their ability to effectuate a significant change in countries like Mexico, where the Convention obligations are not a priority.<sup>208</sup> Thus, the United States should take a more aggressive approach in dealing with noncompliance.

It is in this area that the United States legislators might draw inspiration from an examination of the Goldman case in Brazil. Congress failed to enact the Suspend Brazil Act and the Abduction Prevention Act.<sup>209</sup> Nevertheless, those two bills, as well as Senator Lautenberg's trade hold, demonstrate how Congress can encourage countries to meet their obligations under the Hague Convention.

For instance, the case of David Goldman should have been very simple. Many left-behind parents, particularly those whose children have been abducted to Mexico, encounter obstacles because the location of their children is unknown.<sup>210</sup> Goldman knew exactly where in Brazil his wife and son were located. His return application was filed with the Brazilian Central Authority within a month of his son's abduction, well within the one-year deadline. Further, Goldman and his wife were married in the United States, and their son was born and raised in the country; there was no question that the United States was Sean's habitual residency. Brazil's failure to promptly return Sean demonstrates how Brazilian judges "brazenly disregarded the

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<sup>205</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 10.

<sup>206</sup> *Id.* at 3.

<sup>207</sup> *Id.*

<sup>208</sup> Christopher H. Smith, Excerpt from International Child Abduction Hearing Before the Tom Lantos Human Rights Commission, CHRIS SMITH, 1 (Dec. 2, 2009), [http://chrissmith.house.gov/UploadedFiles/CHS\\_Testimony\\_on\\_Goldman\\_Hearing.pdf](http://chrissmith.house.gov/UploadedFiles/CHS_Testimony_on_Goldman_Hearing.pdf) ("[IPCA] trends show no sign of abatement or reversal until serious, aggressive, robust and sustained actions are implemented.").

<sup>209</sup> See discussion *supra* Part III.A.1 (discussing both bills in detail).

<sup>210</sup> See, e.g., GLOBALPOST, *Spanish woman battles to get kids back from ex in Mexico*, <http://www.globalpost.com/dispatch/news/agencia-efe/130408/Spanish-woman-battles-get-kids-back-ex-mexico1> (last visited Apr. 8, 2013).

Hague Convention.”<sup>211</sup> After five years of Hague Convention diplomacy, Brazil only returned Sean to the United States when Senator Lautenberg threatened to suspend \$2 billion in Brazilian trade benefits. This example illustrates how diplomacy can fall short of the effectiveness of monetary sanctions.

The political pressure that effectively combated Brazil’s judicial deficiencies might also prove successful against Mexico’s law enforcement problems. Brazil’s poor judicial performance seems to be a product of judges’ subordination of Convention Articles to Brazilian laws and cultural preferences. This was evident in the Goldman case when the Supreme Court judge issued a stay even after a lower court determined that the Convention required Sean be returned to the United States. Similarly, Mexico’s law enforcement issues are predominantly caused by the low priority that child abduction cases take in comparison to other responsibilities.<sup>212</sup> The important connection here is that both compliance issues stem from deliberate subordination of the country’s Convention obligations. The successful outcome in the Goldman case demonstrates that when compliance problems are a product of deliberate misbehaving or inaction, political pressure can effectively impress upon a country the importance of fulfilling its obligations under the Convention.

A bill similar to the Suspend Brazil Act or the International Abduction Prevention Act may be required to compel Mexico to take its law enforcement performance seriously. Considering the many trade agreements the United States shares with Mexico, something like the International Abduction Prevention Act would probably be most effective because it would empower the president to use an array of persuasive tools to force compliance.<sup>213</sup> This includes political approaches that would not affect trade agreements.<sup>214</sup> For instance, the President could restrict the number of visas issued to Mexican nationals when the State Department designates the country as a Country of Noncompliance.<sup>215</sup> To increase the incentive for Mexican officials to act promptly, the President could target specific visas of officials and their families, who are in a position to officiate change in the handling of Hague cases. Because Mexican officials and other powerful families often have residencies in the United States or send their children to

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<sup>211</sup> Waide, *supra* note 7, at 295 (quoting fathers’ rights attorney Jeffery Leving).

<sup>212</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 22.

<sup>213</sup> International Child Abduction Prevention Act of 2009, H.R. 3240, 11th Cong. (2009).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

educational institutions here, denying their visas might create a powerful incentive to address the Hague compliance concerns. Moreover, the Act would be beneficial for its ability to affect compliance in more than just Mexico. There are several countries that, like Mexico, have consistently been recognized as countries demonstrating patterns of noncompliance.<sup>216</sup> Legislation, like the International Abduction Prevention Act, should be implemented to allow the government with a tool to take action against these noncompliant countries.

In contrast to law enforcement performance, Mexico's judicial performance issues are often caused by unfamiliarity with the Convention. Political pressure would not remedy improper judicial handling of cases caused by judges' unfamiliarity with the Convention. Instead, a better solution would involve educating Mexico's judges on the proper application of the Convention in abduction disputes.<sup>217</sup>

### *C. More Progressive Preventive Measures*

In addition to political pressure and educational efforts, the United States should also implement more progressive prevention measures to reduce the occurrence of parental abductions. Implementing an improved system to stop children from crossing the border, beyond the United States' jurisdiction, will help ensure that children are not illegally isolated from one parent. The Child Passport Issuance Alert Program (CPIAP) is an excellent program already in place that promotes this goal.<sup>218</sup> The program alerts parents who have registered with CPIAP if the State Department receives an application for a passport in their child's name.<sup>219</sup> In this way, the procedure

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<sup>216</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 17 (identifying Brazil, Honduras and Mexico as countries not compliant and Bulgaria as demonstrating patterns of noncompliance); COMPLIANCE REPORT 2011, *supra* note 83, at 1–6 (identifying Bermuda, Brazil, Bulgaria, Burkina Faso, Honduras, Mexico, and the Bahamas as demonstrating patterns of noncompliance).

<sup>217</sup> COMPLIANCE REPORT 2010, *supra* note 6, at 22 (“The MCA and the state Supreme Courts of Nuevo León and Guanajuato collaborated with the U.S. Embassy to carry out two judicial seminars in late September, involving USCA and academic experts from Guadalajara and Mexico City.”).

<sup>218</sup> *Children's Passport Issuance Alert Program*, U.S. DEP'T OF STATE, [http://travel.state.gov/abduction/prevention/passportissuance/passportissuance\\_554.html](http://travel.state.gov/abduction/prevention/passportissuance/passportissuance_554.html) (last visited Jan. 8, 2013).

<sup>219</sup> *Id.*

warns parents of possible plans for international travel involving their child.<sup>220</sup>

However, additional restrictions on actual international travel involving children should also be strengthened. It seems rather ironic that Mexico, where Convention compliance is problematic, has implemented stricter procedures than the United States has to prevent the wrongful removal of children.<sup>221</sup> The most obvious example is that currently, a parent traveling out of the United States with a child is not required to carry evidence of permission to take the child abroad.<sup>222</sup> A better system would require these parents to carry a notarized letter of consent from the child's other parent, proving permission to travel. Such a procedure would not prevent abductions like Sean Goldman, where the abducting parent initially had permission to take the child abroad.<sup>223</sup> However, Didier Pier's ex-wife would not have been able to illegally take his daughter to Mexico had she been required to show a notarized letter of consent.<sup>224</sup>

In 2004, a bill was introduced to the House that called for the creation of a national registry of custody orders.<sup>225</sup> "A national registry of custody and visitation orders provides a single point of contact for courts and law enforcement to verify the validity of a custody order."<sup>226</sup> Such a registry, coupled with authority to take vulnerable children into temporary protective custody would strengthen the authority law enforcement has to prevent abductions.<sup>227</sup> Law enforcement efforts encounter challenges that make intervening in a family abduction situation more difficult. For instance, law enforcement officers often lack arrest warrants for the abducting parent or

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<sup>220</sup> *Id.*

<sup>221</sup> *Mexico Country Specific Information*, *supra* note 24.

<sup>222</sup> *See supra* Part III.C.

<sup>223</sup> *See supra* Part III.A.1.

<sup>224</sup> *Man Sues Airline in Parental Abduction*, BANDERAS NEWS, Jan. 2007, <http://www.banderasnews.com/0701/edat-mansuesairline.htm> (describing Didier's suit against Continental Airlines alleging that it negligently allowed his ex-wife to take their daughter to Mexico against his wishes by not following Mexican law requiring a single parent traveling with a minor to present a notarized letter from the absent parent authorizing travel into Mexico).

<sup>225</sup> *A Parent's Worst Nightmare: The Heartbreak of International Child Abductions*: Hearing before the Committee on International Relations, House of Representatives, 108th Cong. 2 (June 22, 2004), [http://commdocs.house.gov/committees/intlrel/hfa94505.000/hfa94505\\_0f.htm](http://commdocs.house.gov/committees/intlrel/hfa94505.000/hfa94505_0f.htm) (prepared statement of the Honorable Dennis Deconcini, Chairman of the Board, National Center for Missing & Exploited Children).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

even knowledge of who has true custody rights over the child.<sup>228</sup> One example of this difficulty is a particularly frustrating case described by former chairman of the National Center for Missing and Exploited Children during a legislative committee hearing in 2004.<sup>229</sup> That case involved a mother whose son was abducted despite police intervention. The child's school alerted the mother when her son's father arrived to pick him up. Since the father was not authorized to do so, the school also notified the police.<sup>230</sup> The father presented an outdated custody order to the police documenting that the parents shared joint custody. Although a current custody order granted the mother sole custody, she did not have a copy present to show the police.<sup>231</sup> As a result, the police allowed the father to take the child.<sup>232</sup> To the mother's despair, her son boarded a plane with his father that night, and traveled to a country that is not a signatory of the Convention.<sup>233</sup> Despite great efforts, as of 2004, the mother has had only two visits with her son over five years—both under the supervision of the abducting father.<sup>234</sup> A national registry of custody orders would have allowed the police officers to easily access the current custody order to discover that the father had no right to pick up the child.

Furthermore, the government should consider creating a “cannot travel” list linked to the national registry system that specifically targets traveling minors. A child's name would be added to the list and would only prevent international travel if a judge specifically added a provision in the custody agreement that prohibited the child from traveling abroad. By linking the cannot travel list to the national registry system, the minor's name would be automatically added to or removed from the list the moment a court registered a custody agreement into the registry system.

Since the United States shares a border with Mexico, enabling individuals to drive to the country, the United States should coordinate with Mexican border control and customs agents to yield the best results in the effort to reduce the occurrence of child abductions. Mexican law already places traveling restrictions on children traveling across its borders without both parents present. However, these laws, like the provisions of the Hague

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

Convention, are not effective if they are ignored. Coordination could provide the United States with some oversight ability to ensure that Mexican border patrols are requiring the proper documentation for children to enter the country. Moreover, any coordination efforts should include providing Mexican custom agents access to the “cannot travel list.” Thus, access into Mexico for a minor would require the child’s passport to be cross-referenced with the list. This level of coordination would mean that whether flying or driving, abducting parents would face the same obstacles if attempting to wrongfully transport their child to Mexico.

#### V. CONCLUSION

The United States cannot spend another decade hoping that gentle diplomacy will encourage Mexico to prioritize its Convention obligations. Instead, it should diversify its response to include diplomacy, educational initiatives, and political pressure through economic sanctions and other creative means. While these solutions are not perfect, the government should spend an equal amount of time strengthening preemptive measures to lower the overall occurrence of international parental abductions. As the country most heavily affected by this global phenomenon, the United States should lead Convention partners in creating a uniform approach to deal with noncompliant behavior.