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Addressing the Problem of Implementing the Hague Abduction Convention on the Civil Aspects of International Child Abduction Between the U.S. and Mexico

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**ADDRESSING THE PROBLEM OF
IMPLEMENTING THE HAGUE
ABDUCTION CONVENTION ON THE
CIVIL ASPECTS OF INTERNATIONAL
CHILD ABDUCTION BETWEEN THE U.S.
AND MEXICO**

Breanna Atwood

I. INTRODUCTION

In August 2007, seventeen-month-old¹ Andrew was abducted to Mexico from his hometown of Milwaukee, Wisconsin.² At the time of his abduction, Andrew's parents were involved in divorce proceedings and had a temporary custody agreement granting

¹ Sources differ as to whether Andrew was seventeen or nineteen months old at the time of his abduction. Compare Trevor Richardson, *My Journey Continues* (Mar. 1, 2008), http://mexicoabduction.blogspot.com/2008_03_01_archive.html (Trevor's blog stating that Andrew was seventeen months old at the time of his abduction), with Trevor Richardson, *Bring Andrew Home-Int'l Child Abduction to Mexico*, YOUTUBE (Sep. 7, 2010) [hereinafter *Bring Andrew Home*], https://www.youtube.com/watch?v=Bl_SJ1CVOdM (A news segment posted on Trevor's YouTube channel stating that Andrew was nineteen months old).

² *Felony Warrant For Mother Who Abducted Her Child, Andrew Richardson, In The Summer Of 2007*, MISSING & UNIDENTIFIED PEOPLE: LETS FIND THEM (Nov. 27, 2012), <http://letsfindthem.wordpress.com/2012/11/27/unsolved-felony-warrant-for-mother-who-abduction-her-child-andrew-richardson-in-the-summer-of-2007/>.

Andrew's father, Trevor, visitation.³ When Trevor arrived at Andrew's daycare to pick him up, he was informed that his son had not shown up for a week.⁴ Andrew was soon found in Querétaro, Mexico, living with his mother, Mariana,⁵ a Mexican national.⁶ Mariana was charged in the U.S. with two felonies for abduction,⁷ and Trevor was granted sole legal custody of Andrew.⁸ Upon arriving in Mexico, however, Mariana had told authorities that she fled the U.S. because Trevor was abusive to her and Andrew.⁹ Although the U.S. determined these allegations were false,¹⁰ Trevor remains unable to secure the return of his son to the U.S. in accordance with his custody rights.¹¹

Sadly, Andrew and Trevor's story is not uncommon. Each year, more than one thousand international parental child abductions from the U.S. to other countries are reported.¹² Since 2006, Congress has reported that this number has "increased substantially,"¹³ since advancements in international transportation and communication have resulted in an increase in travel and immigration.¹⁴ In fact, it is estimated that more than 11,000 American children¹⁵ currently live

³ Trevor Richardson, *History*, BRING ANDREW HOME, http://www.bringandrewhome.com/andrew_feb_7_002.htm (last visited Jan. 25, 2014).

⁴ *Id.*

⁵ *Id.*

⁶ *Bring Andrew Home*, *supra* note 1.

⁷ *Id.*

⁸ *My Journey Continues*, *supra* note 1.

⁹ *Bring Andrew Home*, *supra* note 1.

¹⁰ *Id.*

¹¹ *My Journey Continues*, *supra* note 1.

¹² H.R. 3212, 113th Cong. (1st Sess. 2013), *available at* <http://beta.congress.gov/bill/113th/house-bill/3212/text>.

¹³ H.R. 1951, 113th Cong. (1st Sess. 2013), *available at* <http://beta.congress.gov/bill/113th/house-bill/1951/text>; *see also* H.R. 3240, 111th Cong. (1st Sess. 2009), *available at* <http://thomas.loc.gov/cgi-bin/query/F?c111:1:./temp/~c111TqDdHb:e1569>: (stating that the number of international parental child abductions increased by sixty percent from 2006 to 2008, and by forty percent in 2008 alone).

¹⁴ Priscilla Steward, *Access Rights: A Necessary Corollary to Custody Rights Under the Hague Convention on the Civil Aspects of Int'l Child Abduction*, 21 FORDHAM INT'L L.J. 308, 315 (1997).

abroad as a result of international parental child abduction.¹⁶ Statistically, only half of these children will be returned to the U.S.¹⁷

International parental child abduction frequently causes severe psychological and emotional damage to both the child and left-behind parent.¹⁸ Often, the child is taken from a stable, healthy environment, and relocated to an unfamiliar environment in which he or she must meet new people, learn a new language, and understand and assimilate into a different culture.¹⁹ Worse still, taking parents sometimes force their children to alter their appearance or change their name,²⁰ and may tell their children the left-behind parent is dead, does not want them, or is not trying to get them back.²¹ Abducted children often experience “anxiety, eating problems, nightmares, mood swings, sleep disturbances, aggressive behavior, resentment, and fearfulness,” and these problems may persist through adulthood.²²

¹⁵ Another source estimated that there are more than 200,000 cases of international child abduction per year, which would significantly increase the number of American children who are believed to be living abroad as a result of international parental child abduction. *A Parent's Worst Nightmare: The Heartbreak of Int'l Child Abduction: Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. 110 (2004) (statement of the Hon. Dennis DeConcini, Chairman of the Board, National Center for Missing & Exploited Children), available at http://commdocs.house.gov/committees/intlrel/hfa94505.000/hfa94505_of.htm.

¹⁶ Michael Walsh & Susan Savard, *Int'l Child Abduction and the Hague Convention*, 6 BARRY L. REV. 29, 29 (2006).

¹⁷ H.R. 3212, *supra* note 12.

¹⁸ U.S. Dep't of State, *Report on Compliance with the Hague Convention on the Civil Aspects of Int'l Child Abduction* 10 (Apr. 2010) [hereinafter *2010 Compliance Report*], available at <http://travel.state.gov/content/dam/childabduction/complianceReports/2010ComplianceReport.pdf>.

¹⁹ Caitlin Bannon, *The Hague Convention on the Civil Aspects of International Child Abduction: The Need for Mechanisms to Address Noncompliance*, 31 B.C. THIRD WORLD L.J. 129, 134 (2011).

²⁰ U.S. Dep't of State, *Report on Compliance with the Hague Convention on the Civil Aspects of Int'l Child Abduction* 7 (Apr. 2009) [hereinafter *2009 Compliance Report*], available at <http://travel.state.gov/content/dam/childabduction/complianceReports/2009HagueAbductionConventionComplianceReport.pdf>.

²¹ *Id.*

Similarly, left-behind parents frequently experience psychological, emotional, and financial problems while attempting to secure the return of their children.²³ Left-behind parents often feel “helplessness and the sense they do not know where to start in the process of recovering their child.”²⁴ A lack of financial resources exacerbates these emotions, since the left-behind parent may be restricted in traveling abroad, retaining an attorney, hiring translators and interpreters, and proceeding with the case.²⁵

The Hague Convention on the Civil Aspects of International Child Abduction (the “Hague Convention” or the “Convention”) was enacted to ensure that victims of international parental child abduction are returned to their custodial parent.²⁶ The text of the Convention, however, does not set forth standards or procedures to implement the Convention.²⁷ Consequently, many countries have failed to comply because of internal difficulties with enforcement.²⁸

This comment will examine the problem of noncompliance, with a focus on children abducted between the U.S. and Mexico. Part II provides a general overview of the Convention and examines its objectives and operation between contracting states. Part III assesses the problems of the Convention, particularly its lack of an enforcement mechanism. Part IV describes the differences between the U.S. and Mexico’s legal systems, with an emphasis on custody rights. Part V explains the history of the Convention in the U.S. and Mexico, focuses on each country’s compliance efforts, and provides an overview of recent compliance efforts in Latin America. Finally, Part VI explores potential solutions for addressing noncompliance, including creating Hague Convention courts and providing adequate resources to left-behind parents and Central Authorities.

²² *Id.*

²³ 2010 Compliance Report, *supra* note 18, at 11.

²⁴ 2009 Compliance Report, *supra* note 20, at 7.

²⁵ *Id.*

²⁶ The Convention on the Civil Aspects of Int’l Child Abduction, *opened for signature* Oct. 25, 1980, 1343 U.N.T.S. 98 [hereinafter Abduction Convention], *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=24.

²⁷ Elisa Perez-Vera, Hague Conf. on Private Int’l Law, Explanatory Report 430 (1981) [hereinafter Perez-Vera Report], *available at* <http://www.hcch.net/upload/expl28.pdf>.

²⁸ Bannon, *supra* note 19, at 153.

II. THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

On October 24, 1980, twenty-nine Member States of the Hague Conference unanimously adopted the Convention, which was signed the following day.²⁹ Currently, more than eighty countries are party to the Convention, including the U.S. and Mexico.³⁰ The Convention's primary goal is for countries to work together to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of habitual residence"³¹.³² The Convention also seeks to ensure that rights of custody and access are returned to the "status quo" that existed before the child was abducted.³³ Finally, the Convention seeks to deter abducting parents from engaging in international forum shopping to find a country in which they believe they can obtain a favorable custody agreement.³⁴

A. Objectives of the Hague Convention

The Hague Convention states two primary objectives:³⁵ (1) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State,"³⁶ and (2) "to ensure that rights of

²⁹ Perez-Vera Report, *supra* note 27, at 426.

³⁰ *Members of the Organisation*, HAGUE CONF. ON PRIVATE INT'L LAW, http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=24 (last visited Jan. 26, 2014), *now available at* http://www.hcch.net/index_en.php?act=states.listing.

³¹ Neither the Hague Convention nor ICARA define a child's state of habitual residence. In *Abbott*, however, the Supreme Court explained that a child's state of habitual residence is "fixed by the custody arrangement," so the child should be returned to the country of his or her custodial parent. *Abbott v. Abbott*, 560 U.S. 1, 33 (2010).

³² Abduction Convention, *supra* note 26, at Preamble.

³³ Perez-Vera Report, *supra* note 27, at 429.

³⁴ *Id.*; Walsh & Savard, *supra* note 16, at 30.

³⁵ Both of the Convention's objectives assume that the return of the child to the state of habitual residence is in his or her best interest. Although the Convention does not explicitly refer to the child's best interest, contracting states consider them to be of utmost importance when determining custody and access rights. Perez-Vera Report, *supra* note 27, at 431.

custody and access under the law of one Contracting State are effectively represented in the other Contracting States.”³⁷ A taking parent’s duty to return a child is triggered only when the child’s removal or retention is deemed wrongful under the Convention.³⁸ Removal or retention is considered wrongful where it is (1) in breach of custody rights in the state in which the child was habitually resident immediately prior to his or her removal or retention, and (2) when the left-behind parent was actually exercising those custody rights at the time of the removal or retention.³⁹

The Convention defines custody rights as “relating to the care of . . . the child and, in particular, the right to determine the child’s place of residence.”⁴⁰ Custody rights differ from access rights, which are the “rights to take a child for a limited period of time to a place other than the child’s habitual residence.”⁴¹ Custody rights may arise by law, or by a judicial or administrative decision or agreement that has legal effect under the law of the child’s state of habitual residence.⁴²

B. The Role of the Central Authority

To execute the mandates of the Hague Convention, contracting states are required to assign a Central Authority.⁴³ The primary role of the Central Authority is to return abducted children by encouraging cooperation between officials in each state and among other contracting states.⁴⁴ In addition, Central Authorities must assist in locating the child, attempt to facilitate a voluntary return of the child, and, if necessary, initiate legal proceedings for the

³⁶ A contracting state is “any country which is a party to the Convention.” 22 C.F.R. § 94.1 (2013).

³⁷ Abduction Convention, *supra* note 26, at art. 1.

³⁸ Perez-Vera Report, *supra* note 27, at 444.

³⁹ Abduction Convention, *supra* note 26, at art. 3.

⁴⁰ *Id.* at art. 5(a).

⁴¹ *Id.* at art. 5(b).

⁴² *Id.* at art. 3.

⁴³ *Id.* at art. 6.

⁴⁴ Abduction Convention, *supra* note 26, at art. 7.

child's return.⁴⁵ In the U.S., the designated Central Authority is the Office of Children's Issues within the U.S. Department of State.⁴⁶ In Mexico, the Central Authority is the Secretaría de Relaciones Exteriores.⁴⁷

C. Filing a Hague Convention Application

For assistance in returning an abducted child, left-behind parents who believe their child has been wrongfully removed or retained must apply to a Central Authority.⁴⁸ The Central Authority then must act "without delay" to transmit the application to its pertinent counterpart Central Authority,⁴⁹ which must "take[] all appropriate measures" to locate the child and secure his or her prompt return.⁵⁰

A left-behind parent must satisfy three threshold requirements before filing a valid Hague Convention application. First, the child's country of habitual residence and country of abduction must both be signatories to the Convention.⁵¹ Second, the child must have been removed from the state of habitual residence in breach of custody or access rights authorized in that state.⁵² Third, the child must be younger than sixteen years of age.⁵³ Even if the child is abducted or an application for the child's return is initiated

⁴⁵ *Id.*; *Outline: Hague Child Abduction Convention*, HAGUE CONF. ON PRIVATE INT'L LAW (July 2012), <http://www.hcch.net/upload/outline28e.pdf>.

⁴⁶ *Authorities*, HAGUE CONF. ON PRIVATE INT'L LAW, http://www.hcch.net/index_en.php?act=authorities.details&aid=133 (last visited Jan. 26, 2014).

⁴⁷ *Int'l Parental Child Abduction*, U.S. DEP'T OF STATE, <http://travel.state.gov/content/childabduction/english/country/mexico.html> (last visited Jan. 26, 2014).

⁴⁸ Abduction Convention, *supra* note 26, at art. 8; Perez-Vera Report, *supra* note 27, at 455 (stating that the applicant may apply to whichever Central Authority it deems most appropriate).

⁴⁹ Abduction Convention, *supra* note 26, at art. 9.

⁵⁰ *Id.* at art. 10.

⁵¹ *Id.* at art. 35.

⁵² *Id.* at art. 3.

⁵³ *Id.* at art. 4.

before the child turns sixteen years old, the Convention ceases to apply as soon as the child reaches this age.⁵⁴

If all three requirements are satisfied and the child is successfully located, the appropriate Central Authority must assist the left-behind parent to initiate court proceedings in the country in which the child is located.⁵⁵ In these proceedings, the court should not consider the merits of the underlying custody dispute.⁵⁶ Instead, the court's sole focus is to determine whether the child was wrongfully removed according to custody rights in the child's state of habitual residence and to return those children it determines to have been wrongfully removed.⁵⁷ If the parents desire to modify their custody agreement, they must contact the appropriate authorities in the child's state of habitual residence once the child has been returned.⁵⁸

D. Defenses to the Hague Convention

To protect the child's best interests, the Hague Convention does not require the prompt return of abducted children under five circumstances.⁵⁹ First, there is no obligation to return a child if more than one year has elapsed from when the child was wrongfully removed or retained to when the left-behind parent made a request for the child's return, as long as the child has settled in to his or her new environment.⁶⁰ Second, there is no duty to return a child if the parent with custodial rights was not exercising those rights at the time of the child's removal or retention.⁶¹ Third, if the left-behind parent consented or acquiesced in the child's removal or retention, the

⁵⁴ Abduction Convention, *supra* note 26, at art. 4.

⁵⁵ Perez-Vera Report, *supra* note 27, at 455.

⁵⁶ Abduction Convention, *supra* note 26, at art. 16-19.

⁵⁷ Perez-Vera Report, *supra* note 27, at 429.

⁵⁸ *Id.* at 430.

⁵⁹ The first three defenses listed must be proved by a preponderance of the evidence, and the last two must be proved by clear and convincing evidence. *Nat'l Report Int'l Child Custody*, U.S. DEP'T OF STATE, http://travel.state.gov/content/dam/childabduction/International_Child_Abduction_Remedies_Act.pdf (last visited Sept. 14, 2015).

⁶⁰ Abduction Convention, *supra* note 26, at art. 12.

⁶¹ *Id.* at art. 13(a).

taking parent is not required to return the child.⁶² Fourth, there is no obligation to return a child if the abducting country determines that doing so would pose a “grave risk” or place the child in an otherwise “intolerable situation.”⁶³ Finally, a taking parent is not required to return a child if doing so would go against the requesting state’s fundamental principles relating to the protection of human rights and fundamental freedoms.⁶⁴

III. PROBLEMS OF THE HAGUE CONVENTION

Prior to the Hague Convention, a left-behind parent would have little to no legal remedy to ensure his or her child’s rightful return.⁶⁵ The Department of State could not enforce an American custody agreement outside of the U.S.,⁶⁶ since custody rights authorized in the U.S. could not be enforced in other countries.⁶⁷ In addition, courts in the U.S. were reluctant to enforce a left-behind parent’s custody rights, since the abducted child was no longer located within the U.S.⁶⁸

The Convention has not achieved its laudable goals. The Convention was designed to ensure that wrongfully removed children would be returned in accordance with custody rights ordered in the child’s state of habitual residence (and effectively return the situation

⁶² *Id.*

⁶³ *Id.* at art. 13(b).

⁶⁴ *Id.* at art. 20.

⁶⁵ Tai Vivatvaraphol, *Back to Basics: Determining a Child’s Habitual Residence in Int’l Child Abduction Cases Under the Hague Convention*, 77 FORDHAM L. REV. 3325, 3332-33 (2009); see also Susan Mackie, *Procedural Problems in the Adjudication of Int’l Parental child Abduction Cases*, 10 TEMP. INT’L & COMP. L.J. 445, 448 (1996) (stating that before the Convention, taking parents would obtain a favorable custody agreement in the abducting country, precluding the left-behind parent from establishing his or her custody rights).

⁶⁶ *Int’l Child Abduction*, U.S. DEP’T OF STATE (Jan. 1995), available at <http://dosfan.lib.uic.edu/ERC/population/children/9501.html>.

⁶⁷ Vivatvaraphol, *supra* note 65, at 3332.

⁶⁸ *Id.*

to the “status quo”⁶⁹); however, the Convention is not performing as it was originally intended.⁷⁰

The Convention’s primary issue is that its text does not contain an enforcement mechanism for “ensuring that Contracting States fulfill their obligations or for dealing with those Contracting States that fail to do so.”⁷¹ As a result, enforcement of the Convention hinges solely on the cooperation and willingness of contracting states.⁷² If contracting states do not comply, there are no consequences or repercussions.⁷³ Left-behind parents report that even when their children are abducted to countries that are signatories to the Convention, most of these countries “routinely reject the responsibility that comes with participation in [the Convention]” and the U.S. “fail[s] to respond to their pleas for help.”⁷⁴

As a result of the lack of an enforcement mechanism, numerous parties to the Convention are considered noncompliant.⁷⁵ The International Child Abduction Remedies Act (ICARA),⁷⁶ enacted in the U.S. to enforce the Convention, requires the Department of State to release an annual compliance report.⁷⁷ Reports include detailed country-by-country international child abduction statistics, summaries of unresolved cases, address issues contracting states are having with compliance, and describe efforts to encourage parties to the Convention to use nongovernmental organizations to assist left-behind parents seeking the return of their children.⁷⁸ Compliance

⁶⁹ Perez-Vera Report, *supra* note 27, at 429.

⁷⁰ Bannon, *supra* note 19, at 153.

⁷¹ *Id.*

⁷² *Id.* (quoting Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on Int’l Child Abduction* 242 (P.B. Carter ed., 1999)).

⁷³ *Id.*

⁷⁴ H.R. Con. Res. 293, 106th Cong. (2000).

⁷⁵ Bannon, *supra* note 19, at 153.

⁷⁶ See discussion *infra*, at Part V.B.

⁷⁷ 42 U.S.C. § 11611(a) (1988).

⁷⁸ *Id.*

reports also list all countries the Department of State determines are having difficulties enforcing the Convention.⁷⁹

When evaluating a contracting state's compliance, the Department of State evaluates three areas: Central Authority performance, judicial performance, and law enforcement performance.⁸⁰ First, the Department of State evaluates how quickly a country's Central Authority processes Convention applications, its willingness to help left-behind parents find competent legal assistance, and its responsiveness to inquiries made by the U.S. Central Authority (USCA) and left-behind parents.⁸¹ Next, the Department evaluates judicial performance, including how quickly the country's courts process Convention applications and appeals, whether the courts correctly apply the Convention's legal procedures, and how effective courts are in enforcing decisions.⁸² Finally, the Department reviews law enforcement performance by examining whether law enforcement officials are successful in expeditiously locating abducted children and taking parents, and enforcing court orders issued under the Convention.⁸³

Based on contracting states' performance, they may be labeled by the Department of State as either "Countries Not Compliant with the Convention" or "Countries Demonstrating Patterns of Noncompliance with the Convention."⁸⁴ A "Country Not Compliant with the Convention" designation signals the country is not competent in all performance areas.⁸⁵ A "Country Demonstrating Patterns of Noncompliance" designation indicates the country is not competent in one or two of the three performance

⁷⁹ *Id.*

⁸⁰ 2009 *Compliance Report*, *supra* note 20, at 6.

⁸¹ *Id.* at 12.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ U.S. Dep't of State, *Report on Compliance with the Hague Convention on the Civil Aspects of Int'l Child Abduction* 6 (Apr. 2008) [hereinafter 2008 *Compliance Report*], available at <http://travel.state.gov/content/dam/childabduction/complianceReports/2008HagueAbductionConventionComplianceReport.pdf>.

⁸⁵ *Id.*

areas.⁸⁶ Mexico has earned both of these designations in recent years.⁸⁷ In addition, a country is considered compliant if it is competent in all three areas, although the Department of State considers even one unresolved case to possibly “reflect broader problems of concern with the country’s compliance.”⁸⁸

IV. DIFFERENCES IN LEGAL SYSTEMS BETWEEN MEXICO AND THE U.S.

Mexico and the U.S. possess different legal systems, and different philosophies regarding custody and parental rights.⁸⁹ In deciding Hague Convention return cases, the law of the child’s state of habitual residence governs the validity of the claim.⁹⁰ This law must be construed broadly to “embrac[e] both written and customary rules of law⁹¹ . . . and the interpretations placed upon them by case-law.”⁹² This has led to misunderstandings in enforcing custody agreements, and makes it difficult for the U.S. and Mexico to uniformly enforce the Hague Convention. Ultimately, this conflict contributes to the Department of State’s determination that Mexico is noncompliant.⁹³

⁸⁶ *Id.*

⁸⁷ See U.S. Dep’t of State, *Report on Compliance with the Hague Convention on the Civil Aspects of Int’l Child Abduction* 15 (Apr. 2007) [hereinafter *2007 Compliance Report*], available at http://travel.state.gov/content/dam/childabduction/complianceReports/2007child_abduction_Compliance_Report.pdf; *2008 Compliance Report*, *supra* note 83, at 16; *2009 Compliance Report*, *supra* note 20, at 21; *2010 Compliance Report*, *supra* note 18, at 22.

⁸⁸ *2010 Compliance Report*, *supra* note 18, at 15.

⁸⁹ Mexico’s legal system derives from civil law, so judges look primarily at the Code when deciding legal issues. The U.S.’ legal system derives from common law, so judges decide legal issues based on statutes and precedent. Antoinette Sedillo Lopez, *U.S./Mexico Cross-Border Child Abduction – the Need for Cooperation*, 29 N.M. L. REV. 289, 294 (1999).

⁹⁰ Perez-Vera Report, *supra* note 27, at 445.

⁹¹ An example of a customary rule of law is the concept of patria potestas in Mexico. See discussion *infra*, at Part IV.A.

⁹² Perez-Vera Report, *supra* note 27, at 445.

⁹³ *2010 Compliance Report*, *supra* note 18, at 22.

A. Custody Rights in Mexico

In Mexico, the concept of *patria potestad*,⁹⁴ translated to parental authority, is applied to the legal relationship between children and their parents.⁹⁵ Exercising parental authority involves a duty of care and custody to the minor child.⁹⁶ As Mexican courts apply this concept, custody of a child involves special care, attention, and love.⁹⁷ Further, “[c]ustody cannot be understood separately from the physical supervision of the children, because that connection is a means to protect them, raise them . . . and provide for them.”⁹⁸ Parental authority is distinct from the physical custody of a child or an arrangement of visitation rights, however, because parental authority is inherent in the relationship between children and their parents.⁹⁹

Historically, parental authority referred to paternal power, so “a father had a near absolute right to his children, whom he viewed as chattel.”¹⁰⁰ This natural right was viewed as so strong that courts were virtually “powerless” to interfere.¹⁰¹ Over time, however, Mexican courts began to subordinate the concept of parental authority to the best interests of the child.¹⁰²

Today, parental authority in Mexico is largely governed by the Civil Code,¹⁰³ and “has evolved from an *absolute* power into a *legal* power.”¹⁰⁴ Parental authority has slowly transformed into a joint

⁹⁴ “Patria potestad” is Spanish for “parental authority.” Patricia Begné, *Symposium on Comparative Custody Law: North American Parental Authority and Child Custody in Mexico*, 39 FAM. L.Q. 527, 527 (2005).

⁹⁵ *Id.*

⁹⁶ *Id.* at 533.

⁹⁷ *Id.* at 534.

⁹⁸ *Id.*

⁹⁹ *Whallon v. Lynn*, 230 F.3d 450, 453 (1st Cir. 2000).

¹⁰⁰ Kathryn Mercer, *A Content Analysis of Judicial Decision-Making – How Judges use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 14 (1998).

¹⁰¹ *Id.*

¹⁰² *Id.* at 16.

¹⁰³ JOSÉ ANTONIO MÁRQUEZ GONZÁLEZ, *FAMILY LAW IN MEXICO* 80 (Kluwer Law Int’l 2011).

¹⁰⁴ Begné, *supra* note 94, at 528.

responsibility between the father and mother.¹⁰⁵ In divorce cases, both parents continue to exercise parental authority over the child,¹⁰⁶ unless this authority is legally terminated.¹⁰⁷ Since Mexican family law courts are instructed to consider the best interests of the child in deciding custody arrangements,¹⁰⁸ children are commonly placed with their mothers following a divorce.¹⁰⁹ Only one to five of every one hundred fathers are awarded custody of their children.¹¹⁰ In fact, mothers are automatically awarded custody of children under age seven (and sometimes up to age twelve, depending on the state), unless the father proves that the mother poses a significant danger to the child's development.¹¹¹

B. Custody Rights in the U.S.

Similar to Mexico, the U.S. historically awarded custody rights to fathers, since children were considered the father's property.¹¹² In the eighteenth and nineteenth centuries, states increasingly awarded custody based on the best interests of the child.¹¹³ As a result, mothers were often awarded custody of their children, especially in the case of young children.¹¹⁴

Recently, the "maternal presumption" has lessened, and the legislature considers joint custody and uses a primary caretaker standard to determine the child's best interests.¹¹⁵ Joint custody assumes that allowing a child to maintain relationships with both

¹⁰⁵ Sedillo Lopez, *supra* note 89, at 297.

¹⁰⁶ *Id.*

¹⁰⁷ Allison Maxim, *Int'l Parental Child Abduction: Essential Principles of the Hague Convention*, 69 APR BENCH & B. MINN. 18, 20 (Apr. 2012).

¹⁰⁸ Begné, *supra* note 94, at 539.

¹⁰⁹ Sedillo Lopez, *supra* note 89, at 298.

¹¹⁰ Aline Juárez Nieto, *Patria Potestad, Donde la Biología Juega en Contra de los Varones*, CNN MEXICO (July 11, 2012, 3:32 PM), <http://mexico.cnn.com/salud/2012/07/11/patria-potestad-donde-la-biologia-juega-en-contra-de-los-varones>.

¹¹¹ C.C.D.F. art. 282, § VI.

¹¹² Mercer, *supra* note 100, at 16.

¹¹³ *Id.* at 17-18.

¹¹⁴ *Id.* at 26.

¹¹⁵ MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE U.S.* 129 (1994).

parents is in the child's best interests.¹¹⁶ The primary caretaker standard presumes that it is in the child's best interest to live with whichever parent has provided continuous care.¹¹⁷ Despite movements toward these new standards, mothers are still awarded custody of their children more frequently than fathers.¹¹⁸ For example, in 2012, only 18.3 percent of custodial parents were fathers.¹¹⁹

V. HISTORY OF THE HAGUE CONVENTION BETWEEN THE U.S. AND MEXICO

Mexico is the most popular destination for children abducted from the U.S., and vice versa.¹²⁰ For example, in 2009, the USCA was involved with 558 cases in which American children were abducted to Mexico.¹²¹ Japan had the second largest number of active cases with thirty-eight.¹²² This phenomenon likely results from Mexico's proximity to, and historical and cultural connections with, the U.S.¹²³ Today, there are roughly 11.7 million individuals living in the U.S. who were born in Mexico, and Mexico-U.S. migration is the largest bi-national migration flow in the world.¹²⁴

¹¹⁶ J. SHOSHANNA EHRLICH, *FAMILY LAW FOR PARALEGALS* 211 (4th ed. 1008).

¹¹⁷ Mercer, *supra* note 100, at 47.

¹¹⁸ Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2011*, U.S. CENSUS BUREAU (Oct. 2013), available at <http://www.census.gov/prod/2013pubs/p60-246.pdf>.

¹¹⁹ *Id.*

¹²⁰ Sedillo Lopez, *supra* note 89, at 290.

¹²¹ Ernie Allen, President & CEO, Nat'l Ctr. for Missing & Exploited Children, Speech to the Amber Alert S. Border Initiative: Child Abductions: Globally, Nationally and Along the U.S./Mexico Border (Aug. 31, 2009) (transcript available at http://www.icmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_X1&PageId=4108).

¹²² *Id.*

¹²³ Sedillo Lopez, *supra* note 89, at 289.

¹²⁴ Marc R. Rosenblum, William A. Kandel, Clare Ribando Seelke & Ruth Ellen Wasem, *Mexican Migration to the U.S.: Policy and Trends*, CONG. RESEARCH SERV. (June 7, 2012), available at <http://www.fas.org/sgp/crs/row/R42560.pdf>.

A. Mexico's Compliance with the Hague Convention

In recent years, the Department of State has found that Mexico has struggled to fulfill its obligations under the Hague Convention.¹²⁵ For three consecutive years, Mexico was designated as a country exhibiting “patterns of noncompliance” because the Mexican Central Authority (MCA) was ineffective at locating abducted children and taking parents within Mexico.¹²⁶ For example, in 2009, there were forty-seven cases of children abducted from the U.S. to Mexico, and the children were only located in thirteen of these cases.¹²⁷

In 2010, Mexico was labeled as “not compliant.”¹²⁸ The USCA reported it “experienced serious difficulties” working with the MCA, causing left-behind parents to endure “costly inconvenience” and “significant delays” in processing return applications.¹²⁹ For example, the USCA requested the MCA’s assistance in locating children involved in thirty-eight unresolved cases that had been pending for more than eighteen months, but the MCA failed to locate them “[i]n many of the cases.”¹³⁰

Three factors contribute to Mexico’s difficulties enforcing the Hague Convention. First, Mexico has not enacted legislation, like ICARA in the U.S., to effectively implement the Convention.¹³¹ Instead, this responsibility is reserved to the states.¹³² As a result, Congress unanimously adopted a resolution urging Mexico and other noncompliant countries “to ensure their compliance with the Hague

¹²⁵ See 2007 Compliance Report, *supra* note 87, at 15; 2008 Compliance Report, *supra* note 84, at 16; 2009 Compliance Report, *supra* note 20, at 21; 2010 Compliance Report, *supra* note 18, at 22.

¹²⁶ See 2007 Compliance Report, *supra* note 87, at 15; 2008 Compliance Report, *supra* note 84, at 16; 2009 Compliance Report, *supra* note 20, at 21.

¹²⁷ 2009 Compliance Report, *supra* note 20, at 21.

¹²⁸ 2010 Compliance Report, *supra* note 18, at 22.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Reyna Aurora Martínez López, *The Experience of Mexico on Int’l Child Abduction* (last visited Feb. 1, 2014), available at <http://www.auswaertigesamt.de/cae/servlet/contentblob/482364/publicationFile/4325/RedeLopez.pdf>.

¹³² *Id.*

Convention by enacting effective implementing legislation and educating their judicial and law enforcement authorities.”¹³³ Mexico, however, continues to enforce the Convention according to independent state law.¹³⁴

Second, Mexico does not have sufficient resources to locate abducted children and taking parents, or to educate officials and judges about the Convention’s procedures.¹³⁵ For example, some Mexican judges continue to adjudicate cases arising under the Convention based on procedures found in state civil codes¹³⁶ and the merits of the underlying custody dispute, which is inconsistent with the Convention.¹³⁷ Instead, judges are supposed to assume the existing custody agreement from the child’s state of habitual residence is valid, and must return the child based on this agreement.¹³⁸ Recently, Congress encouraged Mexico and other noncompliant countries to “further educate its central authority and local law enforcement authorities regarding the Hague Convention . . . and the need for immediate action when a parent of an abducted child seeks their assistance.”¹³⁹

Third, taking parents may file an “*amparo*,” a special appeal in which the taking parent claims that the government has violated a constitutional right.¹⁴⁰ When an *amparo* is filed, the case is put on hold until a ruling on the *amparo* has been made.¹⁴¹ A ruling on an *amparo* may be appealed multiple times, resulting in costly delays to the left-behind parent.¹⁴²

¹³³ S. Con. Res. 98, 106th Cong. (2000) (enacted).

¹³⁴ Martínez López, *supra* note 131.

¹³⁵ 2010 Compliance Report, *supra* note 18, at 22-23.

¹³⁶ *Id.* at 23.

¹³⁷ U.S. Dep’t of State, *Report on Compliance with the Hague Convention on the Civil Aspects of Int’l Child Abduction 5* (Apr. 2011) [hereinafter 2011 Compliance Report], available at <http://travel.state.gov/content/dam/childabduction/complianceReports/2011HagueComplianceReport.pdf>.

¹³⁸ Perez-Vera Report, *supra* note 27, at 430.

¹³⁹ S. Con. Res. 98, 106th Cong. (2000) (enacted).

¹⁴⁰ 2011 Compliance Report, *supra* note 137, at 5.

¹⁴¹ *Id.*

¹⁴² 2009 Compliance Report, *supra* note 20, at 21.

In an attempt to solve these problems, in 2008, the U.S. Embassy in Mexico City began working with the MCA “to persuade the Mexican branch of Interpol to apply more resources and effort to locate abducted children, and to educate the judiciary in an effort to increase understanding of the Convention.”¹⁴³ Further, the MCA began working with the Agencia Federal de Investigación (AFI) in an effort to more efficiently locate abducted children.¹⁴⁴ Finally, the MCA has also claimed that it has undertaken legislative initiatives to restrict the use of *amparos* in Hague return cases.¹⁴⁵

For the past three years, the Department of State has noted the MCA has made significant improvements in its enforcement of the Convention.¹⁴⁶ Unfortunately, the MCA and Mexican law enforcement continue to experience difficulties locating abducted children because of inadequate staffing and other resources.¹⁴⁷ Mexican courts are also exceptionally slow in processing Hague return applications,¹⁴⁸ and judges continue to adjudicate Hague return cases inconsistently.¹⁴⁹ As a result, the number of unresolved return applications is increasing.¹⁵⁰

B. The U.S.’ Compliance with the Hague Convention

Congress enacted ICARA to give effect to the Hague Convention in the U.S.¹⁵¹ The Act gives the Convention the force of law in the U.S., and imposes consequences, such as contempt, if the Convention is not complied with.¹⁵² ICARA and the Convention

¹⁴³ *Id.*

¹⁴⁴ 2011 Compliance Report, *supra* note 137, at 5.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 2010 Compliance Report, *supra* note 18, at 23.

¹⁴⁸ *Id.* at 22.

¹⁴⁹ *Id.* at 23.

¹⁵⁰ See generally 2011 Compliance Report, *supra* note 137.

¹⁵¹ Formerly 42 U.S.C. § 11601(b)(1) (1988), now 22 U.S.C.A. § 9001 (b)(1) (2015).

¹⁵² Laura McCue, *Left Behind: The Failure of the U.S. to Fight for the Return of Victims of Int’l Child Abduction*, 28 SUFFOLK TRANSNAT’L L. REV. 85, 95 (2004).

serve “to deter international child abduction and to provide a mechanism for the prompt return of abducted children.”¹⁵³

Parts of ICARA, however, hinder operation of the Convention. For example, ICARA grants state and federal courts concurrent jurisdiction over all claims arising under the Convention.¹⁵⁴ It is recommended that Hague Convention return cases be filed in federal court because “[f]ederal judges are considered . . . better equipped to [rule according to the Convention] as opposed to state court judges, who are accustomed to making best interests of the child determinations and who may be more inclined to do so in Hague Convention cases.”¹⁵⁵ Consequently, a left-behind parent may engage in forum-shopping to obtain the most favorable venue to pursue his or her Hague return case, resulting in additional costs and delays.¹⁵⁶

The Department of States’ three most recent compliance reports do not include statistics analyzing the U.S.’ handling of incoming Hague Convention cases.¹⁵⁷ Nonetheless, in 2009, there were 324 newly filed Convention applications involving 454 children that were abducted into the U.S.¹⁵⁸ Of these 454 children, the U.S. only returned 154 of them to their country of habitual residence.¹⁵⁹ 120 of these children were abducted from Mexico, and only fifty-three were returned.¹⁶⁰ Although the U.S. does not evaluate its own

¹⁵³ Judge Veronica Torrez, Cheryl Coleman & Tina Burses, *The International Abduction of International Children: Conflicts of Laws, Federal Statutes, and Judicial Interpretation of the Hague Convention on the Civil Aspects of International Child Abduction*, 5 WHITTIER J. CHILD & FAM. ADVOC. 7, 30 (2005).

¹⁵⁴ 22 U.S.C.A. § 9001 (b)(4) (2015).

¹⁵⁵ Kilpatrick Townsend, *Litigating Int’l Child Abduction Cases Under the Hague Convention*, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN 69 (2012), available at http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf.

¹⁵⁶ Linda Silberman, *Patching Up the Abduction Convention: A Call for a New Int’l Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT’L L.J. 41, 57-58 (2003).

¹⁵⁷ See generally 2009 Compliance Report, *supra* note 20; 2010 Compliance Report, *supra* note 18; 2011 Compliance Report, *supra* note 137.

¹⁵⁸ 2010 Compliance Report, *supra* note 18, at 6.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 15.

performance, these numbers suggest that, despite ICARA, the U.S. also experiences difficulties enforcing the Convention.

C. Latin American Efforts to Promote Compliance with the Hague Convention

In 2004, judges and Central Authorities from seventeen Latin American countries, Spain, and the U.S. met to discuss ways to improve regional operation of the Hague Convention.¹⁶¹ Officials concluded that cooperation with the Convention would require “[r]egular international meetings and contacts among Judges and Central Authorities for the purpose of exchanging information, ideas and good practice.”¹⁶² At follow-up meetings, officials recommended and developed “regional model law of procedure” to “facilitate national implementation of the [Convention].”¹⁶³

In 2011, officials from Latin American countries and organizations, Spain, and the U.S. met “to discuss how to improve, among the countries represented, the operation of the [Convention] . . . and to provide information on the implementation of the [Convention].”¹⁶⁴ The meeting proposed to develop a “practical handbook” to assist judges in Hague proceedings, recommended limiting grounds for appeals to streamline proceedings, and emphasized the importance of communication between Central Authorities and judges.¹⁶⁵ In theory, educating all

¹⁶¹ *The Latin American Judges’ Seminar on the 1980 Hague Convention on the Civil Aspects of Int’l Child Abduction*, HAGUE CONF. ON PRIVATE INT’L LAW, available at <http://www.hcch.net/upload/monterrey2.pdf> (last visited Feb. 2, 2014).

¹⁶² Officials also made other conclusions and recommendations, including establishing national training programs from judges, central authority, personnel, and attorneys. *Id.*

¹⁶³ *Conclusions and Recommendations of the Inter-American Expert Meeting on Int’l Child Abduction*, HAGUE CONF. ON PRIVATE INT’L LAW (Nov. 10, 2006), available at http://www.hcch.net/upload/concl_iin_e.pdf.

¹⁶⁴ *Mexico Inter-American Meeting*, HAGUE CONF. ON PRIVATE INT’L LAW (Feb. 25, 2011), available at http://www.hcch.net/index_en.php?act=events.details&year=2011&varevent=217.

¹⁶⁵ *Int’l Child Protection Conferences and Seminars*, HAGUE CONF. ON PRIVATE INT’L LAW, available at

judges in every contracting state and encouraging communication between Central Authorities is a viable solution. Streamlining these efforts and providing resources to facilitate the return of children will best serve the Convention's goals.

VI. SOLUTIONS FOR ADDRESSING NONCOMPLIANCE BETWEEN THE U.S. AND MEXICO

Compliance with the Hague Convention is critical for protecting abducted children.¹⁶⁶ The Convention is often considered a “one-way street” for Americans.¹⁶⁷ Left-behind parents from noncompliant countries benefit from the “almost certain” guarantee that children abducted into the U.S. will be returned, while American parents lack these same guarantees.¹⁶⁸ In truth, the U.S. also has a meager track record for returning children. Consequently, the Convention remains an empty promise for many left-behind parents. The U.S. and Mexico (and other contracting states) must ensure that abducted children are promptly returned to their custodial parent.

A. Educating Judges About Hague Return Cases

Despite efforts to educate judges about Hague return cases, these cases are often decided inconsistently within a country and between countries.¹⁶⁹ Judges are told to rule based on a broad interpretation of law, which includes the customary laws of the child's state of habitual residence.¹⁷⁰ Many judges also determine

http://www.hcch.net/upload/newsletter/nl2012tome18e_p25.pdf (last visited Feb. 2, 2014).

¹⁶⁶ 2010 Compliance Report, *supra* note 18, at 10.

¹⁶⁷ Thomas A. Johnson, *The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans*, 33 N.Y.U. J. INT'L L. & POL. 125, 135 (2000).

¹⁶⁸ *Id.* at 129.

¹⁶⁹ Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1057 (2005).

¹⁷⁰ Perez-Vera Report, *supra* note 26, at 445.

family law issues according to the best interests of the child, but this may be inconsistent with the existing custody agreement.¹⁷¹

Educating each judge in the U.S. and Mexico about the Hague Convention is a daunting task, particularly because many of these judges will never be assigned a Hague return case. Ideally, providing a dedicated group of judges or courts would alleviate the problems associated with an inconsistent judiciary. In the U.S., Congress may use its Article I powers “[t]o constitute tribunals inferior to the Supreme Court.”¹⁷² In Mexico, each state’s Congress has the power to create federal administrative courts.¹⁷³ A court dedicated to Hague return cases would allow judges to become intimately familiar with the Convention and case law from other countries.¹⁷⁴ As a result, Hague Convention return cases would be adjudicated consistently with the objectives of the Convention.

B. Providing Adequate Financial Resources to Left-Behind Parents

The U.S. does not provide adequate resources to left-behind parents. The U.S. made a reservation¹⁷⁵ to Article 26 of the Hague Convention. Although making a reservation to Article 26 has not posed significant problems to other countries, it is a major source of delays in the U.S.¹⁷⁶ The U.S. places the burden of paying for legal proceedings and attorneys solely on the left-behind parent, unless

¹⁷¹ Silberman, *supra* note 168, at 1057.

¹⁷² Two examples of Article I courts are the Court of Appeals for Veterans’ Claims and the Court of Appeals for the Armed Forces. U.S. CONST. art. I, § 8, cl. 9.

¹⁷³ Ana Elena Fierro & Adriana García, *Design Matters: The Case of Mexican Admin. Courts*, CIDE (Dec. 2010), available at <http://www.libreriacide.com/librospdf/DTEJ-48.pdf>.

¹⁷⁴ The International Child Abduction Database (INCADAT) was established in 1999 “to promote mutual understanding, consistent interpretation and thereby the effective operation of the [H] Convention.” INCADAT allows judges (and others) to search for judicial decisions handed down in other countries to examine legal analysis and holdings. INCADAT, <http://www.incadat.com/index.cfm?act=text.text&lng=1> (last visited Feb. 1, 2014).

¹⁷⁵ Article 42 allows countries to make a reservation to Article 26 of the Convention. Abduction Convention, *supra* note 26, at Art. 42.

¹⁷⁶ Mackie, *supra* note 65, at 454-55.

these costs are covered by legal aid or assumed by pro bono attorneys.¹⁷⁷ The legal aid system in the U.S., however, is underfunded,¹⁷⁸ and the availability of pro bono attorneys is decreasing, especially for family law-related claims.¹⁷⁹

The expenses of a Hague Convention return case extend beyond the legal proceedings.¹⁸⁰ Despite the U.S. legal aid system's lack of funds, the U.S. should be required to assist indigent left-behind parents in these proceedings, since this benefits the abducted child and minimizes the time the child spends in an unfamiliar environment. The United Kingdom, for example, has been successful in requiring its legal aid system to cover all legal costs to the extent it can bear.¹⁸¹ The U.S. could also require taking parents to cover the left-behind parents' legal expenses, but this may not be feasible depending on the taking parent's financial situation.

C. Providing Adequate Resources to Central Authorities

Mexico does not provide adequate resources to the MCA to locate abducted children and taking parents.¹⁸² Although the MCA works with Interpol and AFI, the Authority still lacks the manpower and funds necessary to be effective, especially when the left-behind parent does not know the child's exact location.¹⁸³ Mexico's lack of resources makes cooperation with the U.S. paramount.

The USCA should limit using its resources to educate Mexican judges, the MCA, and law enforcement on Hague return cases. Although the Department of State has noted recent improvements,¹⁸⁴ the bulk of the MCA's problems no longer result

¹⁷⁷ Abduction Convention, *supra* note 26, at Art. 26.

¹⁷⁸ Mackie, *supra* note 65, at 455.

¹⁷⁹ *Id.* at 458.

¹⁸⁰ For example, left-behind parents often must pay to locate the child, travel to the country the child is located in, and travel home. The left-behind parent may also miss work, and the taking parent may stop making child support or alimony payments. Mackie, *supra* note 65, at 457.

¹⁸¹ *Id.* at 456.

¹⁸² 2010 Compliance Report, *supra* note 18, at 23.

¹⁸³ *Id.*

¹⁸⁴ 2011 Compliance Report, *supra* note 137, at 5.

from a lack of information. Instead, the USCA should expend its resources in the form of manpower to assist the MCA and Mexican law enforcement in locating abducted children in Mexico.

VII. CONCLUSION

The Hague Convention lacks an enforcement mechanism to ensure that abducted children are promptly returned. In many countries, the Convention is an empty promise for left-behind parents. Although the U.S. enacted ICARA to implement the Convention, the U.S. has an unacceptable track record in returning abducted children. The U.S. and Mexico must work together to ensure that children are promptly located and returned. Consequently, the U.S. and Mexico should create courts with judges dedicated to Hague Convention return cases to ensure consistency and accuracy in decisions. The U.S. must provide financial assistance to left-behind parents, and Mexico and the U.S. must provide resources to the MCA to locate abducted children and taking parents. Under the current framework, the Convention fails to protect thousands of children and families every year. We can do better. Our children deserve better.