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# THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: THE NEED FOR MECHANISMS TO ADDRESS NONCOMPLIANCE

CAITLIN M. BANNON\*

**Abstract:** International parental child abduction is a growing problem, the effects of which are devastating for both the children involved and the parents who are left behind. When a parent abducts a child across national borders, the Hague Convention on the Civil Aspects of International Child Abduction—an international treaty aimed at the expeditious return of the child to his or her country of habitual residence—provides the other parent’s primary legal recourse. This Note will examine the growing problem of international parental child abduction, including its prevalence and consequences, and the role of the Hague Convention in addressing this problem. Specifically, it will examine the issue of non-compliant Contracting States, the effects of that noncompliance, and the need for mechanisms to address noncompliance. Finally, this Note will examine two bills that have been proposed in the United States Congress that address the noncompliance issue and will argue that Congress should seriously consider one of these bills.

## INTRODUCTION

*So now after four years of trying desperately to be with my son, I find myself sitting in a hotel room in São Paulo since September 7th, hoping and praying to be reunited with my son, ready to bring him home and resume our life as father and son. We have much healing to do. I have never lost hope the day would come for us to be together again. I will never give up, but I need help.*

—David Goldman<sup>1</sup>

On June 16, 2004, David Goldman’s life changed forever when he became one of countless parents who have fallen victim to interna-

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\* Comment Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2010–2011).

<sup>1</sup> David Goldman, *David’s Story*, BRING SEAN HOME FOUND., <http://bringseanhome.org/wordpress/goldman-case/davids-story/> (last visited Jan 20, 2011) [hereinafter *David’s Story*] (excerpting a September 20, 2008 letter from David Goldman to local elected officials and the media).

tional parental child abduction (IPCA).<sup>2</sup> In an instant, his life, which had seemed to him and his friends to be the American dream, took an unforeseen and sudden turn.<sup>3</sup>

David, a New Jersey native, met Bruna Bianchi in Italy in 1997 and quickly fell in love with this twenty-three-year-old fashion student from Rio de Janeiro, Brazil.<sup>4</sup> Not long after, in December of 1999, David and Bruna were wed and began their married life in New Jersey.<sup>5</sup> On May 25, 2000, their son, Sean, was born and the young family was happy as could be—life was “like a fairy tale,” as one friend described it.<sup>6</sup> Over the next four years, David fell in love with his son and changed his work schedule to stay at home with Sean; the two developed a “special bond” and became inseparable.<sup>7</sup> Their closeness only made their later forced separation more painful.<sup>8</sup>

On June 16, 2004, David drove Bruna, four-year-old Sean, and Bruna’s parents to Newark airport for what was supposed to be a two-week vacation in Bruna’s native country.<sup>9</sup> Once Bruna arrived in Brazil, however, she called David and announced that she was never returning to the United States, that their marriage was over, and that she was keeping Sean in Brazil.<sup>10</sup> Even worse, she demanded that David sign away full custody of Sean to her and that David never seek criminal charges against her.<sup>11</sup> Of course, David was devastated, but matters grew worse as Bruna continued to call David and make demands and threats.<sup>12</sup> Eventually David began receiving death threats over the phone from an unknown man who stated that he knew where David lived and that David should prepare to die.<sup>13</sup> So quickly, David’s fairy tale had become a

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<sup>2</sup> See *id.*

<sup>3</sup> See *Dateline NBC: Bring Sean Home: The Untold Story* (NBC television broadcast Jan. 8, 2010), [http://www.msnbc.msn.com/id/34773680/ns/dateline\\_nbc-international/](http://www.msnbc.msn.com/id/34773680/ns/dateline_nbc-international/) [hereinafter *Dateline: Bring Sean Home*]; *David’s Story*, *supra* note 3.

<sup>4</sup> See *Dateline: Bring Sean Home*, *supra* note 3.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*; *David’s Story*, *supra* note 1.

<sup>7</sup> See *Dateline: Bring Sean Home*, *supra* note 3.

<sup>8</sup> See *id.*

<sup>9</sup> *Id.*; see also Bernard Aronson, *Brazil Helps Kidnap American Children*, WALL ST. J., June 17, 2009, at A11; *Larry King Live: Tug of War Over 8-Year-Old* (CNN television broadcast Mar. 4, 2009), <http://transcripts.cnn.com/TRANSCRIPTS/0903/04/lkl.01.html> (transcript only).

<sup>10</sup> *Dateline: Bring Sean Home*, *supra* note 3; *Larry King Live: Tug of War Over 8-Year-Old*, *supra* note 9.

<sup>11</sup> *Dateline: Bring Sean Home*, *supra* note 3; *Larry King Live: Tug of War Over 8-Year-Old*, *supra* note 9.

<sup>12</sup> *Dateline: Bring Sean Home*, *supra* note 3.

<sup>13</sup> See *id.*

nightmare.<sup>14</sup> Once the shock subsided, David realized that Bruna was never going to return and that his own wife had kidnapped their beloved son.<sup>15</sup> David hired an attorney and his legal battle began, though he never could have anticipated that it would be nearly five years before Sean would finally come home.<sup>16</sup>

Unfortunately, David is not alone in his experience.<sup>17</sup> Rather, IPCA is a growing problem that affects children and families throughout the world.<sup>18</sup> Though it is difficult to know for certain just how many American children are currently living abroad as the result of IPCA, a 2006 estimate placed the number at 11,000.<sup>19</sup> Another estimate placed the total national and international child abductions at 200,000 per year.<sup>20</sup> These numbers are great and the pain they represent is even greater.<sup>21</sup>

To address the problem of IPCA, the Hague Conference on Private International Law established the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) in 1980 to provide a mechanism for protecting abducted children and ensuring their quick return to their state of habitual residence.<sup>22</sup> By providing a civil mechanism by which parents can secure the return of their abducted children, the Convention has successfully reunited many parents and children.<sup>23</sup> Nevertheless, the Convention has presented a number of problems, including the issue of noncompliant Contracting

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See* Michael R. Walsh & Susan W. Savard, *International Child Abduction and the Hague Convention*, 6 BARRY L. REV. 29, 29–30 (2006).

<sup>18</sup> *See* Kathleen A. McKee, *A Primer on International Parental Abduction*, 6 REGENT J. INT'L L. 37, 38–39 (2008); Walsh & Savard, *supra* note 17, at 29–30.

<sup>19</sup> Walsh & Savard, *supra* note 17, at 29.

<sup>20</sup> *A Parent's Worst Nightmare: The Heartbreak of International Child Abduction: Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. 110 (2004) [hereinafter *A Parent's Worst Nightmare*] (prepared statement of the Hon. Dennis DeConcini, Chairman of the Board, National Center for Missing & Exploited Children); Walsh & Savard, *supra* note 17, at 29.

<sup>21</sup> *See* Office of Children's Issues, U.S. Dep't of State, *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction*, TRAVEL.STATE.GOV, 6–8 (2009), <http://www.travel.state.gov/pdf/2009HagueAbductionConventionComplianceReport.pdf> [hereinafter *Report on Compliance with the Hague Convention*]; *see also* Walsh & Savard, *supra* note 17, at 29–30.

<sup>22</sup> International Child Abduction Convention Between the United States of America and Other Governments, pmbl, adopted Oct. 25, 1980, entered into force in the United States July 1, 1988, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter International Child Abduction Convention].

<sup>23</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 10–11.

States that fail to fulfill their obligations under the Convention.<sup>24</sup> The results can be devastating, and in many cases the ultimate result is that the children are not returned.<sup>25</sup>

This Note examines the issue of IPCA, the protections and processes provided by the Convention, and the problem of noncompliance. It argues that there is a serious need for greater mechanisms for ensuring compliance with the Convention and focuses specifically on one legislative solution. Part I describes IPCA, its prevalence, and the detrimental effects that it has on children and parents. Part II examines the Convention, its goals and obligations, and how it operates among Contracting States. Part III briefly examines some of the problems presented by the Convention while focusing on the issue of Contracting States that fail to fulfill their obligations under the Convention. It explores the Goldman case in greater detail as an example of the detrimental effects of noncompliance. Finally, Part IV offers possible solutions for addressing noncompliance. In particular, it analyzes two bills that have been proposed in the U.S. House of Representatives that seek to provide mechanisms for ensuring compliance, and it argues that Congress should seriously consider one of these bills.

#### I. INTERNATIONAL PARENTAL CHILD ABDUCTION: AN OVERVIEW OF THE ISSUE

International parental child abduction is the wrongful removal or retention of a child, effected by a parent, outside the country of the child's "habitual residence" and in violation of the other parent's "rights of custody" under the law of the country of habitual residence.<sup>26</sup> The number of annual IPCA cases has increased significantly over the past two decades, largely because of the increased opportunities for international travel and international communication.<sup>27</sup> As the Honor-

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<sup>24</sup> *Id.* at 12, 26; see McKee, *supra* note 18, at 61–62; Walsh & Savard, *supra* note 17, at 56–57; Laura McCue, Note, *Left Behind: The Failure of the United States to Fight for the Return of Victims of International Child Abduction*, 28 SUFFOLK TRANSNAT'L L. REV. 85, 104–06 (2004).

<sup>25</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 43–63 (providing a list and synopsis of all "unresolved return applications" in noncompliant countries).

<sup>26</sup> International Child Abduction Convention, *supra* note 22, art. 3.

<sup>27</sup> See *A Parent's Worst Nightmare*, *supra* note 20, at 110 (prepared statement of the Hon. Dennis DeConcini, Chairman of the Board, National Center for Missing & Exploited Children); PAUL R. BEAUMONT & PETER E. McELEVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 2 (P.B. Carter ed., 1999); *Outline: Hague Child Abduction Convention*, HAGUE CONF. ON PRIVATE INT'L L., 1 (Sept. 2008), <http://www.hcch.net/upload/outline28e.pdf> [hereinafter *Convention Outline*]; Hon. William Rigler & Howard L. Wieder, *The Epidemic of Parental Child-Snatching: An Overview: Attempts to Prevent Parental Child Abduc-*

able Dennis DeConcini stated before the U.S. House of Representatives, “As the globe shrinks and international travel becomes more commonplace, more and more [child abduction] cases involve the transportation of a child across a national border.”<sup>28</sup> Moreover, marriages and divorces between binational couples have increased.<sup>29</sup> Such marriages inherently possess “cultural, ethnic, and religious differences” which are often a significant factor in IPCA.<sup>30</sup> This factor, combined with the increasing divorce rate globally and the fact that children of such binational marriages often maintain dual citizenship and possess two passports, is largely responsible for the increase in IPCA.<sup>31</sup>

In the past, parental child abductions were thought to be committed primarily by fathers who were dissatisfied with their access to and control of their children following a divorce; however, more recent studies indicate that IPCA is committed more often by mothers than by fathers.<sup>32</sup> Very often, IPCA occurs after the mother has moved abroad with the father and then later wishes to return to her native country.<sup>33</sup> Thus, IPCA usually occurs when the taking parent (TP) takes the child away from his or her country of habitual residence or when the child is permitted to go abroad to visit the TP and then not permitted to return.<sup>34</sup>

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*tion, Applicable United States Laws, and the Hague Convention*, TRAVEL.STATE.GOV, [http://travel.state.gov/abduction/resources/resources\\_545.html](http://travel.state.gov/abduction/resources/resources_545.html) (last visited Jan. 20, 2011). Though it is very difficult to estimate how many IPCA cases occur each year, annual estimates have shown marked increases: the estimated total number of Convention cases in 1996 was 1250, and the estimated number of Convention cases involving the U.S. in 2008 was 1426. BEAUMONT & MCELEAVY, *supra*, at 1; *Report on Compliance with the Hague Convention*, *supra* note 21, at 6.

<sup>28</sup> *A Parent's Worst Nightmare*, *supra* note 20, at 110 (prepared statement of the Hon. Dennis DeConcini, Chairman of the Board, National Center for Missing & Exploited Children) (testifying in support of H.R. 4347, the International Assistance to Missing and Exploited Children Act of 2004). The Act was never enacted. H.R. 4347, 180th Cong. (2004); *see H.R. 4347*, THE LIBRARY OF CONGRESS: THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.04347>: (last visited Jan. 20, 2011) (indicating that the latest major action on the bill was referral to subcommittee).

<sup>29</sup> *A Parent's Worst Nightmare*, *supra* note 20, at 110 (prepared statement of the Hon. Dennis DeConcini, Chairman of the Board, National Center for Missing & Exploited Children); BEAUMONT & MCELEAVY, *supra* note 27, at 2; *Convention Outline*, *supra* note 27, at 1; Rigler & Wieder, *supra* note 27.

<sup>30</sup> Rigler & Wieder, *supra* note 27; *see also* BEAUMONT & MCELEAVY, *supra* note 27, at 2; *Convention Outline*, *supra* note 27, at 1.

<sup>31</sup> Rigler & Wieder, *supra* note 27; *see also* BEAUMONT & MCELEAVY, *supra* note 27, at 2; *Convention Outline*, *supra* note 27, at 1.

<sup>32</sup> BEAUMONT & MCELEAVY, *supra* note 27, at 3–4.

<sup>33</sup> *Id.* This was the situation in the Goldman case. *Dateline: Bring Sean Home*, *supra* note 3.

<sup>34</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 8.

There is a wide range of motivations and self-justifications that leads TPs to abduct their children.<sup>35</sup> For example, some TPs take their children away from the left-behind parent (LBP) because he or she finds “fault with the other parent for nonsensical transgressions.”<sup>36</sup> Some TPs abduct their children for revenge after the relationship with the LBP has become contentious or has ended.<sup>37</sup> Others take their children because they believe it to be in the best interests of the child, either to remove the child from a dangerous environment or to ensure that the child is brought up in a more “suitable” society or environment.<sup>38</sup> Even more simply, a TP may no longer wish to remain in a relationship with the other parent and may wish to return to his or her native country, and so take the child and leave.<sup>39</sup>

Though many TPs feel that they are acting in the best interests of the child, or at least justify their actions that way, IPCA is very rarely in the best interests of the child; rather, it can have extremely negative short- and long-term effects.<sup>40</sup> Abducted children are “often taken from a familiar environment and suddenly isolated from their extended families, friends, classmates, and community.”<sup>41</sup> In some cases, the child is even separated from siblings.<sup>42</sup> Efforts to avoid law enforcement often result in repeated relocations that interfere with school attendance and the development of relationships with new friends.<sup>43</sup> As a result, an abducted child often suffers from long periods without schooling and is prevented from making new close friends.<sup>44</sup> In addition, TPs sometimes change children’s names and appearance.<sup>45</sup> Moreover, an abducted child is forced to deal with the separation from the LBP, and in some

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<sup>35</sup> BEAUMONT & McELEVAY, *supra* note 27, at 11; Rigler & Wieder, *supra* note 27.

<sup>36</sup> Rigler & Wieder, *supra* note 27.

<sup>37</sup> BEAUMONT & McELEVAY, *supra* note 27, at 11; Rigler & Wieder, *supra* note 27.

<sup>38</sup> BEAUMONT & McELEVAY, *supra* note 27, at 11; Rigler & Wieder, *supra* note 27.

<sup>39</sup> BEAUMONT & McELEVAY, *supra* note 27, at 11.

<sup>40</sup> TREVOR BUCK, INTERNATIONAL CHILD LAW 131 (2005); *Report on Compliance with the Hague Convention*, *supra* note 21, at 7 (“Parental child abduction is a tragedy because it affects some of society’s most vulnerable individuals.”); Rigler & Wieder, *supra* note 27.

<sup>41</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 7; see BUCK, *supra* note 40, at 131.

<sup>42</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 7; see BUCK, *supra* note 40, at 131.

<sup>43</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 7; see BUCK, *supra* note 40, at 131.

<sup>44</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 7; see BUCK, *supra* note 40, at 131.

<sup>45</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 7.

cases is told that “their other parent is dead, does not want them, or has not tried to get them back.”<sup>46</sup>

IPCA can result in “serious emotional and psychological problems.”<sup>47</sup> As reported by the Office of Children’s Issues (OCI) within the U.S. Department of State, “Research shows that recovered children often experience a range of problems including anxiety, eating problems, nightmares, mood swings, sleep disturbances, aggressive behavior, resentment, guilt, and fearfulness.”<sup>48</sup> These psychological and emotional problems, in many cases, result in additional issues during adulthood, including struggling “with identity issues, personal relationships, and possibly [experiencing] problems in parenting their own children.”<sup>49</sup>

IPCA detrimentally affects LBPs as well.<sup>50</sup> Emotionally and psychologically, the LBP suffers substantially, experiencing a range of emotions including sadness over the loss of the child (and in some cases, a spouse), depression, betrayal, and anger towards the other parent.<sup>51</sup> On top of these emotional and psychological effects is the helplessness that an LBP often experiences when attempting to recover his or her child.<sup>52</sup> The LBP often does not know where to begin and is overwhelmed by the complexities of foreign legal systems that may be characterized by cultural differences and foreign languages.<sup>53</sup>

LBPs may also face significant financial hardship as a result of IPCA.<sup>54</sup> Travel costs to visit abducted children (if permitted by the TP) can be substantial or even unaffordable.<sup>55</sup> Some LBPs cannot afford the considerable expense of hiring an attorney who is familiar with IPCA issues, and for those who can afford it, the costs can be great.<sup>56</sup> Simi-

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

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

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

<sup>50</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 8.

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

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

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

<sup>55</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 8.

<sup>56</sup> *Id.* David Goldman is acutely aware of the financial hardship imposed by IPCA. See *Donations*, BRING SEAN HOME FOUND., <http://bringseanhome.org/wordpress/donations/> (last visited Jan. 20, 2011) [hereinafter *Donations*, BRING SEAN HOME FOUND.]. In the first twelve months after Sean’s abduction, Goldman spent nearly \$95,000 on legal fees. Dorrit Harazim, *A Father in a Foreign Land*, PIAUÍ MAG., Nov. 2008, available at <http://bringseanhome.org/wordpress/goldman-case/newspaper-magazine-articles/a-father-in-a-foreign-land/>. By the end of the five-year battle to bring Sean home, Goldman had spent over \$400,000 on his efforts, including a team of both American and Brazilian lawyers and multiple trips to Brazil. *Dateline: Bring Sean Home*, *supra* note 3; *Donations*, BRING SEAN HOME FOUND., *supra*. A middle-



larly, efforts to recover an abducted child often require hiring translators and interpreters, which can also be costly.<sup>57</sup>

Finally, reunification after abduction can be a difficult experience for both abducted children and LBPs.<sup>58</sup> The relationship between the LBP and the child may have deteriorated, and they may no longer share a common language.<sup>59</sup> In cases in which the child was removed at a young age and the reunion occurs years later, the child may not even remember the LBP.<sup>60</sup> In many instances, the child will have difficulty trusting the LBP and “question why that parent did not try harder to get them back.”<sup>61</sup> Seeing a child go through this can be very difficult for the LBP despite the concurrent happiness over the fact that they have been reunited.<sup>62</sup> David Goldman experienced such difficulties following Sean’s return to New Jersey in December 2009.<sup>63</sup> In an interview just days after Sean’s return, David was asked whether he got “the feeling that at one moment [Sean] has a warmth toward you and then the next . . . he sees you as the enemy?”<sup>64</sup> David responded, “[Sean] pulls away. Well, [his stepfather and Brazilian relatives] told him I’m the enemy for so long, that I’m the bad guy. And I can see he . . . does struggle with that.”<sup>65</sup> David went on to reflect on Sean’s lack of tears in the days since leaving Brazil:

It would be natural for him to be crying. It would be normal for him to be crying. And he’s . . . closed it all in right now. There’s got to be pain hidden in there. I hope he can, in a very short time, open up to me. And will open up to me in a short time. But I’ll be patient.<sup>66</sup>

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class American, Goldman has been open about the financial strain that he has endured. Harazim, *supra*; *Donations*, BRING SEAN HOME FOUND., *supra*. In fact, he has set up a website about his story, and that site includes a page through which the public can make donations to “defray expenses relating to Sean Goldman’s abduction and repatriation to the United States.” *Donations*, BRING SEAN HOME FOUND., *supra*.

<sup>57</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 8.

<sup>58</sup> *Id.* at 7.

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

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See Dateline: Bring Sean Home*, *supra* note 3.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

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

<sup>66</sup> *Id.*

Despite the undeniable negative consequences, IPCA continues to increase in frequency.<sup>67</sup> In the 2008 fiscal year, OCI was notified of 1082 IPCA cases involving 1615 children removed from the United States.<sup>68</sup> This was an approximately sixty-nine percent increase over the 2006 fiscal year, in which 642 cases were reported.<sup>69</sup> Similarly, OCI was notified of 344 cases involving 484 children who were abducted to the United States from other countries.<sup>70</sup>

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

Recognizing the need to protect children and families from IPCA, the Hague Conference on Private International Law (the Conference) adopted the Convention on the Civil Aspects of International Child Abduction in October 1980.<sup>71</sup> The Convention addresses the unique legal challenges that LBPs face by virtue of the international nature of IPCA.<sup>72</sup> Specifically, it establishes standard procedures and obligations

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<sup>67</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 6.

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

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

<sup>70</sup> *Id.*

<sup>71</sup> International Child Abduction Convention, *supra* note 22. The Conference is “a global inter-governmental organisation” that, as a “melting pot of different legal traditions . . . develops and services multilateral legal instruments, which respond to global needs.” *Overview*, HAGUE CONF. ON PRIVATE INT’L L., [http://www.hcch.net/index\\_en.php?act=text.display&tid=26](http://www.hcch.net/index_en.php?act=text.display&tid=26) (last visited Jan. 20, 2011). With nearly seventy countries as members, the Conference seeks to address the problems that arise when citizens and businesses of one country are affected by and attempt to operate within the legal system of another country. *Id.* It does so by adopting “special rules known as ‘private international law’ rules.” *Id.* In doing so, the Conference aims to meet its statutory mission: “to work for the ‘progressive unification’ of these rules” by “finding internationally-agreed [upon] approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.” *Id.* Thus, the “ultimate goal of the [Conference] is to work for a world in which, despite the differences between legal systems, persons—individuals as well as companies—can enjoy a high degree of legal security.” *Id.* Since its first meeting in 1893, the Conference has established Conventions between nations to reach this goal. *Id.* There are currently thirty-nine international Conventions in effect. *Conventions Listing*, HAGUE CONF. ON PRIVATE INT’L L., [http://www.hcch.net/index\\_en.php?act=conventions.listing](http://www.hcch.net/index_en.php?act=conventions.listing) (last visited Jan 20, 2011).

<sup>72</sup> See ANNE-MARIE HUTCHINSON & HENRY SETRIGHT, INTERNATIONAL PARENTAL CHILD ABDUCTION 3 (1998). Hutchinson and Setright commented on the inherent difficulties of IPCA:

Inevitably, when a child has been abducted internationally, the rights of the person from whom the child has been abducted cannot usually be effectively enforced in his or her home State. Any effective remedy must be pursued in the country in which the child is physically present. It is the diversity of laws

for the governments of Contracting States to follow when dealing with IPCA cases.<sup>73</sup> By providing a civil mechanism by which to ensure the safe and prompt return of abducted children, the Convention provides much-needed legal recourse to LBPs.<sup>74</sup>

#### A. *The Underlying Policy Goals and Objectives*

The Conference adopted the Convention because it recognized “the paramount importance” of the interests of abducted children in custody matters.<sup>75</sup> Moreover, it recognized the importance of protecting LBPs’ rights of custody and rights of access.<sup>76</sup> Thus, the primary goal of the Convention is not to resolve custody issues, but rather to provide a civil mechanism by which LBPs, whose rights of access or custody have been violated, can “secure the prompt return of children wrongfully removed to or retained in any Contracting State.”<sup>77</sup> This important distinction is reflected and emphasized throughout the provisions of the Convention—rather than requiring or permitting countries to assess the merits of the custody issue (that is, address the best inter-

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and legal systems that such a situation produces that has given an impetus to the formulation of international conventions in child abduction.

*Id.* Additionally, the Convention itself recognizes this inherent difficulty that is attendant to the international nature of IPCA; one of the two objects of the Convention is “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.” International Child Abduction Convention, *supra* note 22, art. 1.

<sup>73</sup> International Child Abduction Convention, *supra* note 22, arts. 6–20. The term Contracting State is used in the Convention to refer to those nations that have agreed to be bound by the Convention either through ratification or accession. *See id.* arts. 37–38.

<sup>74</sup> *See id.* pmbi.

<sup>75</sup> *Id.* The preamble to the Convention states:

The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access, Have resolved to conclude a Convention to this effect . . . .

*Id.*

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

<sup>77</sup> *Id.* pmbi., art. 1; *supra* note 72. The Convention’s intention is that abducted children be returned promptly or, more specifically, within six weeks of the Convention application. *Id.* art. 11; *Report on Compliance with the Hague Convention*, *supra* note 21, at 22.

ests of the child), the Convention requires that countries act as expeditiously as possible to return the child.<sup>78</sup>

By emphasizing and securing the prompt return of the child to his or her country of habitual residence, the Convention aims to protect the interests of abducted children and reduce the harmful effects that abduction often has on children.<sup>79</sup> Moreover, returning the child to his or her country of habitual residence protects the interests and rights of LBPs by restoring the status quo which existed prior to the abduction, thereby providing an opportunity for custody issues to be appropriately resolved.<sup>80</sup> Restoration of the status quo is often particularly important because it strips the TP of any potential jurisdictional advantage gained by the abduction with respect to the adjudication of the custody issues.<sup>81</sup> Finally, a central aim of the Convention is to deter abductions and thereby protect the best interests of children and the rights of parents.<sup>82</sup>

The Convention also recognizes the importance of acting quickly in IPCA cases because delay results in greater harm to abducted children and to LBPs' relationships with their children.<sup>83</sup> Thus, a core objective of the Convention is to establish the most "expeditious" procedures possible by which LBPs can secure the return of their children.<sup>84</sup>

#### B. *The Convention in Action: Scope, Obligations, and Procedures*

Under the terms of the Convention, Contracting States are obligated to follow certain procedures and standards to effect the return of a child who has been the subject of "wrongful removal or retention."<sup>85</sup> The Convention defines a removal or retention of a child as wrongful when:

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the State in which the child was habitually resident immediately before the removal or retention; and

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<sup>78</sup> International Child Abduction Convention, *supra* note 22, arts. 10–11, 16–17, 19 ("A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.")

<sup>79</sup> BUCK, *supra* note 40, at 134; *Convention Outline*, *supra* note 27, at 1.

<sup>80</sup> *Convention Outline*, *supra* note 27, at 1.

<sup>81</sup> *Id.*

<sup>82</sup> BUCK, *supra* note 40, at 134; *Convention Outline*, *supra* note 27, at 1.

<sup>83</sup> International Child Abduction Convention, *supra* note 22, arts. 1–3, 11; BUCK, *supra* note 40, at 134.

<sup>84</sup> International Child Abduction Convention, *supra* note 22, arts. 2, 11.

<sup>85</sup> *Id.* arts. 3, 7–20.

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.<sup>86</sup>

The scope of the Convention extends to “any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights” and it applies until the child reaches sixteen years of age.<sup>87</sup>

The Convention mandates that each Contracting State establish a “Central Authority” to be responsible for discharging the “duties imposed by the Convention.”<sup>88</sup> The primary purpose of the Central Authorities is to “co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.”<sup>89</sup> Their responsibilities include, among other things, to take “all appropriate measures” to find abducted children, to prevent further harm, to secure the voluntary return of such children, and to “initiate or facilitate” judicial or administrative proceedings aimed at returning the child to his or her country of habitual residence.<sup>90</sup> Additionally, the Central Authorities are responsible for providing information about the child and about the law of their countries, as necessary, to assist in securing the child’s return.<sup>91</sup>

Under the Convention, an LBP can apply to either the Central Authority in the country of the child’s habitual residence or to the Central Authority of any other Contracting State.<sup>92</sup> Once an application is filed,

<sup>86</sup> *Id.* art. 3. The Convention defines “rights of custody” as “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.” *Id.* art. 5. The Convention defines “rights of access” as “the right to take a child for a limited period of time to a place other than the child’s habitual residence.” *Id.*

<sup>87</sup> *Id.* art. 4. Thus, the Convention applies in cases in which a child under the age of sixteen has been removed from his or her country of habitual residence in breach of rights of custody or rights of access of another person (such as the LBP) that were being exercised or attempted to be exercised. *Id.* arts. 3–4.

<sup>88</sup> *Id.* art. 6. The Central Authority in the United States is the Department of State and, within the Department, the Office of Children’s Issues is responsible for carrying out the duties of the Convention. *See* International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11608a (2006); Exec. Order No. 12,648, 3 C.F.R. 579 (1988), *reprinted in* 42 U.S.C. § 11606 (2006).

<sup>89</sup> International Child Abduction Convention, *supra* note 22, art. 7.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* art. 8. An applying LBP is required to provide specific information about the child, the child’s suspected whereabouts, and the basis of the LBP’s claim. *Id.* The LBP may also include any relevant documents, including copies of judicial decisions or agreements regarding rights of custody or access. *Id.*

the Central Authorities involved are required to seek to obtain the voluntary return of the child.<sup>93</sup> Because such efforts are often unsuccessful, the Convention also requires that the Central Authorities “initiate or facilitate” judicial or administrative proceedings in an effort to secure the child’s return.<sup>94</sup>

Once such judicial or administrative proceedings have been initiated, the judicial or administrative authority in the “requested state” must determine whether or not the removal was wrongful under the terms of the Convention.<sup>95</sup> In making this determination, the authority can consider a number of factors, including the laws and decisions of the country of habitual residence, any determinations made by the country of habitual residence regarding the wrongfulness of the removal or retention, and any determinations about custody issued either by the country of habitual residence or by the country to which the child was abducted.<sup>96</sup> However, prior custody decisions may be considered only for the limited purpose of “tak[ing] account of the reasons for that decision.”<sup>97</sup> The Convention clearly states, “The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested state shall not be a ground for refusing to return a child.”<sup>98</sup> Similarly, and quite significantly, the Convention proscribes the administrative or judicial authority from making any determination on the merits of custody rights.<sup>99</sup>

If the authority determines that the removal or retention was wrongful, the authority must automatically order the return of the child, unless the TP has provided a sufficient defense.<sup>100</sup> The Conven-

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<sup>93</sup> *Id.* art. 10. This provision is aimed at seeking an “amicable” resolution to the problem without resorting to judicial order. NIGEL LOWE ET AL., INTERNATIONAL MOVEMENT OF CHILDREN: LAW PRACTICE AND PROCEDURE 238–39 (2004). The Convention, however, does not describe details for how Central Authorities should go about seeking voluntary return. *Id.* at 239; *see also* International Child Abduction Convention, *supra* note 22, art. 10. Consequently, the interpretation and implementation of this provision of the Convention has varied from country to country. LOWE ET AL., *supra*, at 239. While the Central Authorities of some countries will do as much as take an active role in negotiations for the return of the child, other countries immediately commence judicial proceedings while possibly making “concurrent attempts to bring about a voluntary resolution.” *Id.*

<sup>94</sup> *See* International Child Abduction Convention, *supra* note 22, art. 7.

<sup>95</sup> *Id.* arts. 11, 14–18.

<sup>96</sup> *Id.* arts. 14–15, 17.

<sup>97</sup> *Id.* art. 17.

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

<sup>99</sup> International Child Abduction Convention, *supra* note 22, arts. 16, 19. The Convention explicitly states, “A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.” *Id.* art. 19.

<sup>100</sup> *Id.* art. 12.

tion provides five defenses against automatic return of a wrongfully retained or removed child.<sup>101</sup>

The first defense addresses the time elapsed between the wrongful removal or retention and the commencement of the judicial or administrative proceedings.<sup>102</sup> If, at the date of the commencement of the judicial or administrative proceedings, it has been less than one year since the wrongful removal or retention, the authority must order the return of the child.<sup>103</sup> If, however, more than a year has elapsed, the authority is not required to return the child if the TP establishes that “the child is now settled in its new environment.”<sup>104</sup>

The second defense addresses the non-exercise of rights by the LBP.<sup>105</sup> If the TP can prove that the LBP “was not actually exercising the custody rights at the time of removal or retention” the requested state is not required to order the child’s return.<sup>106</sup> Similarly, the third defense permits the denial of a return order if the TP demonstrates that the LBP “had consented to or subsequently acquiesced to the removal or retention.”<sup>107</sup>

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<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

<sup>103</sup> *Id.*

<sup>104</sup> International Child Abduction Convention, *supra* note 22, art. 12. The defense imposes a two-prong test that requires satisfaction of both prongs—more than a year has elapsed and the child is well settled in his or her new environment. *See id.*; JAMES D. GARBOLINO, INTERNATIONAL CHILD CUSTODY CASES: HANDLING HAGUE CONVENTION CASES IN U.S. COURTS 153 (3d ed. 2000). For example, in a 1991 case in New York, fourteen months elapsed before the application was made by the LBP; nonetheless, the court denied the delay defense because the second prong of the test had not been satisfied. *In re David S. v. Zamira S.*, 574 N.Y.S.2d 429, 433 (Fam. Ct. 1991). The TP failed to provide adequate evidence that the children were well settled, so the court looked to the young age of the children—three years old and eighteen months old—to determine that the children were not well settled. *Id.* Because they were so young, the court concluded that the children were not yet old enough to have established significant community or social ties such as “meaningful friendships” or “school, extra-curricular, community, religious or social activities.” *Id.* Thus, despite the fact that more than a year had elapsed between the wrongful removal and the filing of the Convention application, the court denied the delay defense. *Id.*

<sup>105</sup> International Child Abduction Convention, *supra* note 22, art. 13. Under U.S. case law, this is a very narrow exception. *See Friedrich v. Friedrich*, 78 F.3d 1060, 1066 (6th Cir. 1996); *see also* GARBOLINO, *supra* note 104, at 168–69. In *Friedrich*, the court held: “if a person has valid custody rights to a child under the law of the country of the child’s habitual residence, that person cannot fail to ‘exercise’ those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child.” 78 F.3d at 1066.

<sup>106</sup> International Child Abduction Convention, *supra* note 22, art. 13.

<sup>107</sup> *Id.* In *Friedrich*, the Sixth Circuit laid out a stringent test for determining whether an LBP has consented or acquiesced to the removal or retention, stating “we believe that acquiescence under the Convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of

The fourth defense removes the automatic return obligation if the TP can demonstrate that “there is a grave risk that the [child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>108</sup>

Finally, the fifth exception allows the judicial or administrative authority to “refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”<sup>109</sup>

Thus, if the administrative or judicial authority determines that removal or retention was wrongful and that none of the five defenses apply, the Convention requires that the child be promptly ordered back to his or her country of habitual residence.<sup>110</sup>

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rights; or a consistent attitude of acquiescence over a significant period of time.” 78 F.3d at 1070 (footnotes omitted).

<sup>108</sup> International Child Abduction Convention, *supra* note 22, art. 13. U.S. courts have been restrictive in their interpretation of this defense and have generally permitted it in two types of situations: (1) where there is “evidence that deals with the inappropriateness of the general environment to which the child will be returned”; and (2) where there is “evidence that bears on specific dangers which might pose a grave risk to the child.” GARBOLINO, *supra* note 104, at 171. For example, U.S. courts have held that the “grave risk” must relate not to the “specific home” that the child would be returned to but rather to the “general environment in the country” where the child would live. *Id.* TPs have asserted a range of “specific dangers” that could pose a “grave risk” in attempting to establish this defense, including domestic violence, neglect or abuse, psychological harm, and exposure to a zone of war or disease. *Id.* at 172–78, 184–85.

<sup>109</sup> International Child Abduction Convention, *supra* note 22, art. 13. This defense was included in the Convention only after significant debate and was included, at least in part, because of the Conference’s recognition that “forcible repatriation of those just below the age of 16 would have a detrimental effect on the Convention.” LOWE ET AL., *supra* note 93, at 352–53. Just the same, there was significant concern that such a provision would “make the child the ultimate judge of the abduction’s success or failure” and that such discretion would unavoidably lead to consideration of the merits of custody, which is inconsistent with the Convention’s goals. *Id.* Additionally, there were concerns that the provision would impose far too great a responsibility on young children who are simply incapable of handling such a great psychological burden, particularly in light of the fact that TPs or other family members would very likely exert pressure and control over the child. *Id.* The Convention addresses these concerns by leaving the ultimate decision to return the child within the court’s discretion; objection by the child is not determinative. *Id.* Indeed, part of the judge’s consideration must include a determination of whether or not the child has reached an age and level of maturity to enable the child to understand the situation and formulate his or her own preferences and objections. *Id.* at 360–61. Though the Conference declined to choose a minimum age, records from the drafting sessions indicate that those involved generally thought that children under the age of twelve would not normally be considered to have reached a sufficient age and level of maturity. *Id.* Nevertheless, there have been cases in which children as young as six and seven have been found to be mature enough to have their objections considered. *Id.* at 361.

<sup>110</sup> *See* International Child Abduction Convention, *supra* note 22, arts. 8–20.



C. *Contracting States and Reciprocity: The Process of Ratification,  
Accession, and Acceptance*

Reciprocity is a central characteristic of the Convention's operation.<sup>111</sup> Because the Convention is private law, it is binding only on those countries that agree to be bound by it—the Contracting States.<sup>112</sup> For the Convention to apply in a particular case, both the country of habitual residence and the country to which the child has been taken must be Contracting States; if one is not, the LBP does not have the benefit of the Convention.<sup>113</sup> Moreover, in some situations the Convention is not in force between countries even though both are Contracting States.<sup>114</sup>

Countries agree to be bound by the Convention either by ratification or accession.<sup>115</sup> Under the terms of the Convention, all countries that were members of the Conference at the time the Convention was originally signed in 1980 are permitted to ratify the Convention.<sup>116</sup> By ratifying the Convention, a country agrees to be bound by the Convention.<sup>117</sup> Member countries that were not members of the Conference at the time the Convention was originally signed are permitted to accede to the Convention and thus be legally bound by it.<sup>118</sup>

The important distinction between ratification and accession is that ratification automatically puts the Convention into force between the ratifying country and all other Contracting States; acceptance does

<sup>111</sup> See *id.* art. 38; GARBOLINO, *supra* note 104, at 21.

<sup>112</sup> GARBOLINO, *supra* note 104, at 21; see also International Child Abduction Convention, *supra* note 22, arts. 37–38; LOWE ET AL., *supra* note 93, at 210.

<sup>113</sup> GARBOLINO, *supra* note 104, at 21; see also International Child Abduction Convention, *supra* note 22, arts. 37–38; LOWE ET AL., *supra* note 93, at 210.

<sup>114</sup> See International Child Abduction Convention, *supra* note 22, arts. 37–38; GARBOLINO, *supra* note 104, at 23–24; LOWE ET AL., *supra* note 93, at 210; *infra* notes 119–26 and accompanying text.

<sup>115</sup> International Child Abduction Convention, *supra* note 22, arts. 37–38; GARBOLINO, *supra* note 104, at 23–24; LOWE ET AL., *supra* note 93, at 210–11; *Frequently Asked Questions: What Is the Difference Between Signing, Ratifying and Acceding to a Hague Convention?*, HAGUE CONF. ON PRIVATE INT'L L., [http://www.hcch.net/index\\_en.php?act=faq.details&fid=38](http://www.hcch.net/index_en.php?act=faq.details&fid=38) (last visited Jan. 20, 2011) [hereinafter *Hague Conference FAQ*].

<sup>116</sup> International Child Abduction Convention, *supra* note 22, art. 37; GARBOLINO, *supra* note 104, at 23–24; LOWE ET AL., *supra* note 93, at 211.

<sup>117</sup> International Child Abduction Convention, *supra* note 22, art. 37; GARBOLINO, *supra* note 104, at 23–24; LOWE ET AL., *supra* note 93, at 210–11; *Hague Conference FAQ*, *supra* note 115.

<sup>118</sup> International Child Abduction Convention, *supra* note 22, arts. 37–38; GARBOLINO, *supra* note 104, at 23–24; LOWE ET AL., *supra* note 93, at 210–11; see also *Hague Conference FAQ*, *supra* note 115.

not play a role in ratification.<sup>119</sup> When a country accedes to the Convention, however, the Convention does not automatically enter into force between the acceding country and the other Contracting States; rather, the accession is subject to acceptance by the other Contracting States.<sup>120</sup> The other Contracting States are permitted to either accept or not accept that country's accession.<sup>121</sup> If the Contracting State expressly accepts the acceding country, the Convention enters into force between those two countries.<sup>122</sup> If the Contracting State chooses not to accept the acceding country, the Convention does not enter into force between those two countries.<sup>123</sup>

The decision whether or not to accept an acceding country is based primarily on the Contracting State's perception of the acceding country's ability to implement the provisions and fulfill the obligations of the Convention.<sup>124</sup> The central concern is, of course, the ability of the acceding country to meet its obligations of reciprocity.<sup>125</sup> If a Contracting State believes the acceding country is unlikely to adequately implement and comply with the Convention, the Contracting State will likely choose not to accept the acceding country, thereby avoiding the obligations that come with reciprocity.<sup>126</sup>

When the Convention was originally signed in 1980, only four countries immediately signed.<sup>127</sup> By 1990, still only twelve countries had ratified and two countries had acceded.<sup>128</sup> Since then, there has been significant increase in participation in the Convention.<sup>129</sup> Today, there are more than eighty Contracting States, prompting the Conference to

<sup>119</sup> GARBOLINO, *supra* note 104, at 23–24; LOWE ET AL., *supra* note 93, at 210–11.

<sup>120</sup> GARBOLINO, *supra* note 104, at 23–24; LOWE ET AL., *supra* note 93, at 210–11; *Hague Conference FAQ*, *supra* note 115; *see also* International Child Abduction Convention, *supra* note 22, art. 38.

<sup>121</sup> GARBOLINO, *supra* note 104, at 23–24; LOWE ET AL., *supra* note 93, at 210–11; *Hague Conference FAQ*, *supra* note 115; *see also* International Child Abduction Convention, *supra* note 22, art. 38.

<sup>122</sup> GARBOLINO, *supra* note 104, at 23–24; LOWE ET AL., *supra* note 93, at 210–11; *Hague Conference FAQ*, *supra* note 115; *see also* International Child Abduction Convention, *supra* note 22, art. 38.

<sup>123</sup> GARBOLINO, *supra* note 104, at 23–24; LOWE ET AL., *supra* note 93, at 210–11; *Hague Conference FAQ*, *supra* note 115; *see also* International Child Abduction Convention, *supra* note 22, art. 38.

<sup>124</sup> *See* GARBOLINO, *supra* note 104, at 25; Walsh & Savard, *supra* note 17, at 31.

<sup>125</sup> *See* GARBOLINO, *supra* note 104, at 25; Walsh & Savard, *supra* note 17, at 31.

<sup>126</sup> *See* GARBOLINO, *supra* note 104, at 25; Walsh & Savard, *supra* note 17, at 31.

<sup>127</sup> BEAUMONT & MCELEAVY, *supra* note 27, at 23.

<sup>128</sup> LOWE ET AL., *supra* note 93, at 211.

<sup>129</sup> *See id.*; *Convention Outline*, *supra* note 27, at 3.

tout it as “one of the most successful family law instruments to be completed under the auspices of the [Conference].”<sup>130</sup>

The United States signed the Convention on December 23, 1981 and ratified it on November 10, 1986.<sup>131</sup> The Convention went into force for the United States on July 1, 1988.<sup>132</sup> In order to implement the Convention, Congress adopted the International Child Abduction Remedies Act (ICARA), which provides the necessary legislative provisions to ensure that the Convention is properly implemented and that its obligations are fulfilled in the United States.<sup>133</sup>

### III. THE PROBLEM OF NONCOMPLIANT CONTRACTING STATES

#### A. *The Critical Role of Noncompliance in the Goldman Case*

David Goldman’s son was taken to Brazil on June 16, 2004.<sup>134</sup> Sean did not return to New Jersey until December 31, 2009—more than five years later.<sup>135</sup> During those five long years, David fought for his son every

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<sup>130</sup> *Convention Outline*, *supra* note 27, at 3. The Conference website provides the most up-to-date list of Contracting States as well as detailed information about their ratification, accession and acceptance statuses. See *Contracting States Chart*, HAGUE CONF. ON PRIVATE INT’L L., [http://www.hcch.net/upload/abductoverview\\_e.pdf](http://www.hcch.net/upload/abductoverview_e.pdf) (last visited Jan. 20, 2011). Additionally, it is important to note that while there has been significant success in securing ratification of and accession to the Convention, increased membership is still an important goal because abductions involving non-party countries “account for nearly half of parental child abductions and result in the fewest returns.” McCue, *supra* note 24, at 106–07; see also Laura C. Clemens, Note, *International Parental Child Abduction: Time for the United States to Take a Stand*, 30 SYRACUSE J. INT’L L. & COM. 151, 166–68 (2003); *Report on Compliance with the Hague Convention*, *supra* note 21, at 37. In particular, Japan has become the target of increasing criticism and pressure in light of its failure to sign the Convention. See, e.g., Press Release, Ambassadors of Australia, Canada, France, Italy, New Zealand, Spain, the United Kingdom, and the United States, Joint Statement on International Child Abduction (Oct. 16, 2009), <http://tokyo.usembassy.gov/e/p/tp-20091016-78.html> [hereinafter Joint Statement] (“Japan is the only G-7 nation that has not signed the Convention. The [LBPs] of children abducted to or from Japan have little realistic hope of having their children returned . . .”); Malcolm Foster, *U.S. Warns Japan Child Custody Laws Could Harm Ties*, ABC NEWS, Feb. 2, 2010, <http://abcnews.go.com/International/wireStory?id=9723898>; Michael Inbar, *Dad in Japan Custody Case: I’m Dead to My Kids*, TODAYSHOW.COM (Nov. 9, 2009), <http://today.msnbc.msn.com/id/33788543>. In addition to growing media attention in response to the many cases of IPCA to Japan, Japan has become the target of increasing political pressure. See Joint Statement, *supra*; Foster, *supra*; Inbar, *supra*.

<sup>131</sup> International Child Abduction Convention, *supra* note 22, presidential proclamation.

<sup>132</sup> *Id.*

<sup>133</sup> See ICARA, 42 U.S.C. §§ 11601–11611 (2006).

<sup>134</sup> *Dateline: Bring Sean Home*, *supra* note 3; *Larry King Live: Tug of War Over 8-Year-Old*, *supra* note 9.

<sup>135</sup> See *Dateline: Bring Sean Home*, *supra* note 3.

day, enduring a difficult and exhausting legal battle.<sup>136</sup> As soon as it had become clear that his wife would not voluntarily return Sean, David retained a lawyer in the United States.<sup>137</sup> When presented with the facts of the case, the lawyer was confident that it would be an “open and shut” case and that Sean “would be immediately returned” because Brazil was a Contracting State.<sup>138</sup> It ended up being not nearly that simple.<sup>139</sup>

On August 26, 2004, a New Jersey court held that Sean’s removal was wrongful under the Convention and that the United States was Sean’s country of habitual residence.<sup>140</sup> The New Jersey court issued an order that Sean immediately be returned to New Jersey.<sup>141</sup> Bruna Goldman ignored the order.<sup>142</sup> On September 3, 2004, David reported the removal to the U.S. State Department (the U.S. Central Authority) thereby initiating Hague proceedings.<sup>143</sup> In October 2004, David, growing anxious to expedite the process, hired Brazilian attorneys and, on November 16, 2004, initiated Hague proceedings in the federal courts in Rio de Janeiro.<sup>144</sup> Without regard to the Hague mandate that judicial authorities proceed as expeditiously as possible, the federal court in Brazil acted with significant delay.<sup>145</sup> By May 2005, the case was still pending, and Bruna successfully delayed the proceedings further by filing a motion to contest the competence of the Brazilian federal court, effectively “paralyzing” the federal court.<sup>146</sup> This paralysis continued until September 21, 2005, when the competence of the federal court was confirmed.<sup>147</sup>

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<sup>136</sup> See *id.*; *Larry King Live: Tug of War Over 8-Year-Old*, *supra* note 9.

<sup>137</sup> See *Dateline: Bring Sean Home*, *supra* note 3; *Larry King Live: Tug of War Over 8-Year-Old*, *supra* note 9.

<sup>138</sup> *Larry King Live: Tug of War Over 8-Year-Old*, *supra* note 9.

<sup>139</sup> See Christopher H. Smith, *Will Brazil Do the Right Thing?: American Boy Held There By Stepdad After Mother Dies*, WASH. TIMES, June 19, 2009, at A19; *Dateline: Bring Sean Home*, *supra* note 3; *Larry King Live: Tug of War Over 8-Year-Old*, *supra* note 9.

<sup>140</sup> Order to Show Cause with Temporary Restraints at 3, *Goldman v. Goldman*, No. FD-13-395-05C (N.J. Super. Ct. Ch. Div. Aug. 26, 2004).

<sup>141</sup> *Id.*

<sup>142</sup> Letter from Ricardo Zamariola Jr., Attorney for David Goldman, to National Council for the Rights of Children and Adolescents (Mar. 16, 2009), <http://bringseanhome.org/wordpress/goldman-case/the-american-by-joao-paulo-lins-e-silva/reply-by-ricardo-zamariola/> [hereinafter Letter from Ricardo Zamariola Jr.].

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*; see also International Child Abduction Convention, *supra* note 22, art. 11.

<sup>146</sup> Letter from Ricardo Zamariola Jr., *supra* note 142.

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

Subsequently, the Hague proceedings continued, and on October 13, 2005, a decision was finally rendered.<sup>148</sup> Devastatingly, the court determined that, indeed, Sean had been wrongfully removed from the United States under the terms of the Convention, but the court, in violation of the Convention, refused to order Sean's return on the ground that too much time had passed and Sean was settled with his mother.<sup>149</sup> The federal court's refusal to return Sean was in direct noncompliance with the requirements of the Convention.<sup>150</sup> Under Article 12 of the Convention, if proceedings before a judicial authority are commenced within one year of a wrongful removal, the judicial authority "shall order the return of the child."<sup>151</sup> Whether or not to return the child simply was not a determination within the court's discretion.<sup>152</sup> The Brazilian court, however, disregarded this obligation; instead, it acted in accordance with the Brazilian judiciary's tendency to favor mothers over fathers in custody proceedings, and it did so despite the fact that Hague proceedings are not supposed to be treated as custody matters.<sup>153</sup>

David immediately appealed the decision, but his nightmare only grew in the months and years that followed.<sup>154</sup> As he navigated through the appeals process to the Superior Court of Justice and later to the Brazilian Federal Supreme Court, the Goldman case took many twists and turns, most of which were for the worse.<sup>155</sup> The appeals process

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*; see also International Child Abduction Convention, *supra* note 22, arts. 11–12.

<sup>151</sup> International Child Abduction Convention, *supra* note 22, art. 12; *supra* note 104 and accompanying text.

<sup>152</sup> See International Child Abduction Convention, *supra* note 22, art. 12; *supra* note 104 and accompanying text.

<sup>153</sup> See International Child Abduction Convention, *supra* note 22, arts. 11–12, 16; *Report on Compliance with the Hague Convention*, *supra* note 21, at 17; Letter from Ricardo Zamariola Jr., *supra* note 142.

<sup>154</sup> Letter from Ricardo Zamariola Jr., *supra* note 142; see also *Dateline: Bring Sean Home*, *supra* note 3; *Larry King Live: Tug of War Over 8-Year-Old*, *supra* note 9.

<sup>155</sup> See Letter from Ricardo Zamariola Jr., *supra* note 142; see also *Dateline: Bring Sean Home*, *supra* note 3; *Larry King Live: Tug of War Over 8-Year-Old*, *supra* note 9. Specifically, Bruna was awarded custody by a Brazilian court, she obtained a divorce from David in Brazil without his knowledge or presence, and she married Joao Paulo Bagueira Leal Lins e Silva, a Brazilian attorney who specializes in IPCA. Letter from Ricardo Zamariola Jr., *supra* note 142; *Dateline: Bring Sean Home*, *supra* note 3; *David's Story*, *supra* note 1. Then in August 2008, Bruna died giving birth to a child with her new husband. *David's Story*, *supra* note 1. Instead of being awarded immediate custody in light of the fact he was Sean's only remaining biological parent, Goldman was forced into a legal battle with Bruna's widower. See Letter from Ricardo Zamariola Jr., *supra* note 142. In the wake of Bruna's death, Lins e Silva launched a relentless battle to keep Sean with him in Brazil and took arguably uncon-

finally ended on December 22, 2009, when the Brazilian Supreme Court ordered that Sean be returned to his father.<sup>156</sup> This successful outcome, however, did not come without great effort and political pressure.<sup>157</sup> During the course of his legal battle, Goldman made fifteen trips to Brazil.<sup>158</sup> He hired a legal team of American and Brazilian attorneys.<sup>159</sup> He incurred costs of more than \$400,000.<sup>160</sup> He started a website and gathered a group of supporters.<sup>161</sup> He received significant public assistance and support from the American media, U.S. Secretary of State Hillary Clinton, and President Barack Obama.<sup>162</sup> He worked directly with U.S. Representative Chris Smith for nearly all of 2009, and Representative Smith accompanied David to Brazil and garnered support for the Goldman case in the U.S. Congress.<sup>163</sup> At Representative Smith's urging, both the House and the Senate passed resolutions in 2009 calling for Brazil to comply with the Hague Convention and return Sean to the United States.<sup>164</sup> An incredible amount of effort from countless people was necessary to secure Sean's return to the United States.<sup>165</sup> Certainly, this was not what the drafters of the Convention envisioned; needless to say, much went very wrong.<sup>166</sup>

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scionable measures in doing so. *See id.* Instead of filing for custody of Sean following Bruna's death, Lins e Silva attempted to have David's name removed from Sean's birth certificate and replaced with his own. *Id.* He publicly discredited David's reputation as a father and husband and made false statements in doing so. *Id.* He failed to comply with Brazilian orders awarding David visitation with Sean in Brazil, effectively seeking to interfere with and inhibit any relationship between David and his son. *Id.* Lins e Silva also sought significant delays in court proceedings. *Id.*

<sup>156</sup> Daniel B. Wood, *Brazil Custody Case: David Goldman Gets Custody of Son Sean*, CHRISTIAN SCI. MONITOR, Dec. 22, 2009, available at <http://www.csmonitor.com/USA/2009/1222/Brazil-custody-case-David-Goldman-gets-custody-of-son-Sean>.

<sup>157</sup> *See, e.g.*, S. Res. 37, 111th Cong. (2009) (enacted); H. R. Res. 125, 111th Cong. (2009) (enacted); Smith, *supra* note 139; *Dateline: Bring Sean Home*, *supra* note 3 (providing statements from Representative Christopher Smith, Representative Walter Jones, Secretary of State Hillary Clinton, and President Barack Obama).

<sup>158</sup> *Dateline: Bring Sean Home*, *supra* note 3.

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

<sup>160</sup> *Donations*, BRING SEAN HOME FOUND., *supra* note 56.

<sup>161</sup> *See generally* BRING SEAN HOME FOUND., <http://www.bringseanhome.org/wordpress> (last visited Jan. 20, 2011).

<sup>162</sup> *See, e.g.*, Aronson, *supra* note 9; Smith, *supra* note 139; *Dateline: Bring Sean Home*, *supra* note 3 (President Barack Obama stated, "We have advised the Brazilian government that we want to move this forward expeditiously. And that we want folks to abide by international law.")

<sup>163</sup> *See* Smith, *supra* note 139; *Dateline: Bring Sean Home*, *supra* note 3.

<sup>164</sup> *See* S. Res. 37, 111th Cong. (2009) (enacted); H. R. Res. 125, 111th Cong. (2009) (enacted); Smith, *supra* note 139.

<sup>165</sup> *See supra* notes 156–163 and accompanying text.

<sup>166</sup> *See supra* notes 75–84 and accompanying text.

Unfortunately for David, Sean was abducted to one of seven countries that the U.S. Department of State has noted for demonstrating “patterns of non-compliance” with the Convention.<sup>167</sup> The legal battle that Goldman endured was the result of the Brazilian government’s failure to comply with the mandates of the Convention.<sup>168</sup>

B. *Countries That Fail to Comply: Rates, Ways, and Consequences*

Pursuant to § 11611 of ICARA, the Department of State is required to provide an annual report on Contracting States that fail to comply with the Convention.<sup>169</sup> This annual report provides information about “countries in which implementation of the Convention is incomplete or in which a particular country’s executive, judicial, or law enforcement authorities do not properly apply the Convention’s requirements.”<sup>170</sup> In making its assessments, the Department considers “systemic patterns” in Contracting States, and it bases its analysis primarily on the standards and practices in the *Guide to Good Practice* issued by the Permanent Bureau of the Hague Conference on Private International Law.<sup>171</sup> Additionally, the Department’s analysis focuses on three compliance areas: (1) Central Authority performance; (2) judicial performance; and (3) law enforcement performance.<sup>172</sup> Based on this analysis, the Department places the appropriate countries in one of two categories: “Countries Not Compliant with the Convention” and “Countries Demonstrating Patterns of Noncompliance” with the Convention.<sup>173</sup> For a country to be “not compliant,” it must be failing in all three performance ar-

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<sup>167</sup> See *Report on Compliance with the Hague Convention*, *supra* note 21, at 13.

<sup>168</sup> See *id.* at 16–17.

<sup>169</sup> ICARA, 42 U.S.C. § 11611 (2006).

<sup>170</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 12.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* The Central Authority analysis assesses issues such as speed of application process, “the existence of and adherence to procedures for assisting LBPs in locating knowledgeable, affordable legal assistance,” and “responsiveness to inquiries made by [the U.S. Central Authority] and LBPs.” *Id.* It also includes an assessment of the programs and resources for judicial education about the Convention. *Id.* The “judicial performance” analysis addresses the issues of timeliness and expeditiousness of the country’s court system in processing Convention applications and appeals, how well the courts apply the Convention’s legal mandates, and the efforts made by the court system to enforce return or access decisions. *Id.* Finally, the “law enforcement performance” analysis addresses how successful law enforcement in the country is at quickly locating abducted children as well as how successful it is at enforcing court orders. *Id.*

<sup>173</sup> *Id.*

eas.<sup>174</sup> For a country to be “demonstrating patterns of noncompliance” it must be failing in one or two of the performance areas.<sup>175</sup>

The Department’s 2008 report indicates that Honduras is the only nation in the “not compliant” category, and that seven other countries demonstrate “patterns of noncompliance:” Brazil, Chile, Greece, Mexico, Slovakia, Switzerland, and Venezuela.<sup>176</sup> There are many ways in which these countries fail to comply with the Convention, and there is often overlap among the countries.<sup>177</sup> For example, five of the seven countries frequently treat Convention cases as custody cases.<sup>178</sup> Despite the fact that the Convention clearly states that custody issues are not to be determined in Convention proceedings, these countries continue to make such determinations based on “best interests” types of analysis.<sup>179</sup>

Similarly, all but one of the seven countries were found to have court systems that have unacceptable delays in Convention proceedings.<sup>180</sup> This is particularly problematic because such delays often have detrimental effects on the LBP’s ability to secure the child’s return.<sup>181</sup> For example, the Chilean court system fails to handle Convention applications in the expeditious manner mandated by the Convention; consequently, Chile has a notable trend for refusing to return children because they are “settled” in the new country.<sup>182</sup> Such determinations could be avoided if the cases were dealt with in the prompt manner required by the Convention because children would not have the time necessary to “settle.”<sup>183</sup>

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

<sup>175</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 12.

<sup>176</sup> *Id.* at 13.

<sup>177</sup> *Id.* at 15–25.

<sup>178</sup> *Id.* at 17–18, 21, 23, 25.

<sup>179</sup> *Id.*; *see also* International Child Abduction Convention, *supra* note 22, art. 16.

<sup>180</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 15–23.

<sup>181</sup> *Id.* at 18, 21–22 (“[W]hen a lengthy court process enables a court to deny a child’s return to his country of habitual residence, the principles of the Convention are not satisfied.”).

<sup>182</sup> *Id.* at 18.

<sup>183</sup> *See id.* Another example of the detrimental effect of delays is provided by a case in which a child was wrongfully removed to Slovakia. *Id.* at 22. There, the initial hearing was not conducted until eight months after the removal. *Id.* The court ordered the return of the child, and the TP appealed twice. *Id.* The first appeal, in which the original decision was affirmed, was not heard until nine months after the original decision. *Id.* The second appeal was not heard until eight months after the first appellate decision and, as a consequence of the delay, resulted in the original decision being overturned. *Id.* In the second appeal, the court determined that it would consider the child’s preferences because he had reached sufficient “age and degree of maturity” as required by the Convention. *Id.* Had the delays not occurred, this would not have happened. *Id.* at 12.



In addition to treating Convention cases as custody cases and imposing prohibited delays, several of the seven countries have displayed trends of biases.<sup>184</sup> Such biases include favoring native TPs over the foreign LBP and favoring mothers over fathers.<sup>185</sup> In fact, the highest court in Switzerland, in upholding a lower court's refusal to return a child to the United States, justified its decision by noting the "special relationship" between children and their mothers.<sup>186</sup> The Department of State disapproved of this justification in its annual compliance report.<sup>187</sup>

Other forms of noncompliance cited by the Department include failure by law enforcement to enforce return or visitation orders promptly and effectively; lack of Central Authority assistance to LBPs; lack of communication between foreign Central Authorities and the U.S. Central Authority; and inadequate resources allocated to locating abducted children.<sup>188</sup>

In Brazil, the trends of noncompliance are significant and had a direct impact on the Goldman case.<sup>189</sup> The U.S. Department of State categorized Brazil as demonstrating patterns of noncompliance because of failures in both judicial performance and Central Authority performance.<sup>190</sup> Specifically, Brazil has a serious backlog of cases because of the Central Authority's failure to allocate adequate public prosecutors to assist with LBPs' applications.<sup>191</sup> Consequently, the Brazilian Central Authority advises LBPs to hire private attorneys, but once they do so, the Brazilian Central Authority discontinues its involvement in and monitoring of the case.<sup>192</sup> This leaves the LBPs without the support and assistance that the Convention intends Central Authorities to provide.<sup>193</sup> Additionally, the Brazilian courts have demonstrated a trend of treating Convention cases as custody cases and, as a result, often refuse to issue return orders because the child has adapted to Brazilian culture.<sup>194</sup> The court system also has displayed notable delays in processing cases, and the courts "exhibit widespread patterns of bias to-

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<sup>184</sup> *Id.* at 17–18, 23.

<sup>185</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 17–18, 23.

<sup>186</sup> *Id.* at 23.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 16, 21, 23, 25.

<sup>189</sup> *See id.* at 16–17, 44; *see also* Aronson, *supra* note 9; Smith, *supra* note 139; *Dateline: Bring Sean Home*, *supra* note 3; *Larry King Live: Tug of War Over 8-Year-Old*, *supra* note 9.

<sup>190</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 16.

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

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

<sup>193</sup> *See id.*; *see also* International Child Abduction Convention, *supra* note 22, art. 7.

<sup>194</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 16–17.

wards Brazilian mothers.”<sup>195</sup> Indeed, the Goldman case was affected by most, if not all, of these patterns of noncompliance.<sup>196</sup>

#### IV. THE NEED FOR A MECHANISM FOR ADDRESSING NONCOMPLIANCE AND A POSSIBLE SOLUTION

##### A. *The Convention’s Major Shortcoming: The Lack of a Mechanism for Addressing Noncompliance*

With the existence and extent of noncompliance understood, the logical next question is “Why is this allowed to happen?”<sup>197</sup> The answer is simple: the Convention does not provide a mechanism for ensuring that Contracting States fulfill their obligations or for dealing with those Contracting States that fail to do so.<sup>198</sup> Professors Paul Beaumont and Peter McEleavy summed it up well: “Faced with sustained non-compliance 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>199</sup> Thus, noncompliance occurs with few ramifications for noncompliant countries.<sup>200</sup>

The very existence of the Department of State’s annual noncompliance report demonstrates that noncompliance is an important issue that demands attention.<sup>201</sup> In fact, U.S. Assistant Secretary of State for Consular Affairs Janice L. Jacobs highlighted this in the report’s introductory letter:

Compliance with the Convention is an ongoing challenge; continuing evaluation of treaty implementation in partner countries and in the United States is vital for its success. Very few options exist for parents and children who are victims of parental child abduction. As the U.S. Central Authority for this

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

<sup>196</sup> *See id.* at 16–17, 44; *see also* Aronson, *supra* note 9; Smith, *supra* note 139; *Dateline: Bring Sean Home*, *supra* note 3; *Larry King Live: Tug of War Over 8-Year-Old*, *supra* note 9.

<sup>197</sup> *See Report on Compliance with the Hague Convention*, *supra* note 21, at 16–25; *see also* Aronson, *supra* note 9; Smith, *supra* note 139; *Dateline: Bring Sean Home*, *supra* note 3; *Larry King Live: Tug of War Over 8-Year-Old*, *supra* note 9.

<sup>198</sup> BEAUMONT & MCELEAVY, *supra* note 27, at 242. *See generally* International Child Abduction Convention, *supra* note 22 (not including a provision for enforcement or addressing noncompliance).

<sup>199</sup> BEAUMONT & MCELEAVY, *supra* note 27, at 242.

<sup>200</sup> *See id.*; *Report on Compliance with the Hague Convention*, *supra* note 21, at 16–25, 42–63; Smith, *supra* note 139.

<sup>201</sup> *See Report on Compliance with the Hague Convention*, *supra* note 21, at 2.

important Convention, the Office of Children's Issues . . . will continue to work with each of our Convention partners to resolve abduction cases promptly and to improve understanding and full and complete implementation of the Convention.<sup>202</sup>

In that spirit, the U.S. Department of State has taken some action to help strengthen the implementation of the Convention in Contracting States.<sup>203</sup> For example, the Department worked with the U.S. Embassy in Mexico City to persuade the Mexican government to increase its efforts to locate abducted children.<sup>204</sup> Similarly, the Department participated in meetings between Latin American Contracting States and the Conference to help strengthen the operation of the Convention in Central and South America.<sup>205</sup> These efforts included taking part in conferences in Buenos Aires which were "aimed at training judges, drawing up model implementing legislation, and developing programs to improve Convention performance."<sup>206</sup> More generally, the Department stays actively abreast of the improvement measures being taken in countries that have demonstrated patterns of noncompliance, and the Department pursues coordination and communication with the Central Authorities of those countries.<sup>207</sup>

These relatively gentle measures, however, simply are not enough to address the extreme noncompliance that exists.<sup>208</sup> Rather, stronger, more assertive action must be taken.<sup>209</sup> U.S. Representative Chris Smith made this observation in the context of the Goldman case, in which he played a critical role in ensuring Sean's return.<sup>210</sup> Representative Smith made the following statement not only about Brazil's noncompliance but also about Convention noncompliance more generally:

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 2, 16–25, 37–38.

<sup>204</sup> *Id.* at 21.

<sup>205</sup> *Id.* at 37.

<sup>206</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 37.

<sup>207</sup> *See id.* at 16–25.

<sup>208</sup> *See id.* at 16–25, 37–38; *see also* Aronson, *supra* note 9; Smith, *supra* note 139; 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* Smith, *supra* note 139; Smith, *supra* note 208, at 1–4; *see also* Aronson, *supra* note 9.

<sup>210</sup> *See* Smith, *supra* note 139. *See generally* International Child Abduction Prevention Act of 2009, H.R. 3240, 111th Cong. (2009); Suspend Brazil GSP Act, H.R. 2702, 111th Cong. (2009).

From my work as author of numerous human rights laws, . . . I have learned that offending countries are far likelier to take human rights abuse seriously if a predictable, hefty penalty awaits indifference or noncompliance. Moral suasion occasionally succeeds but far too often is ignored. The bottom line is that the [Brazilian] government and some other governments are ignoring their commitments under the Hague Convention. Many American families are being severely hurt, and the State Department and Congress need to urgently turn our attention to the matter, and address it head-on.<sup>211</sup>

In response to the Goldman case, Representative Smith introduced two significant bills aimed at addressing Convention noncompliance.<sup>212</sup> The first, House Bill 2702 (HB 2702), was introduced during the Goldman litigation and is aimed at pressuring Brazil to comply with the Convention.<sup>213</sup> The second bill, House Bill 3240 (HB 3240) was also introduced during the Goldman litigation, but it is aimed more broadly at addressing international child abduction generally, including Convention noncompliance.<sup>214</sup> Both bills provide the type of “predictable, hefty penalty” that is necessary to resolve the noncompliance issue and HB 3240, in particular, provides a real promise of hope for the future.<sup>215</sup>

#### B. *United States House Bill 2702*

Representative Smith introduced HB 2702 in the House on June 4, 2009, with the dual goals of resolving the Goldman case and securing the return of “all children to the United States who are being held wrongfully in Brazil in contravention of the Hague Convention.”<sup>216</sup> The bill imposes sanctions on Brazil by “suspend[ing] the application of the Generalized System of Preferences for Brazil” until Brazil’s Central Authority, judicial system, and law enforcement system comply with the Convention in all IPCA cases that involve children from the United States.<sup>217</sup>

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<sup>211</sup> Smith, *supra* note 139.

<sup>212</sup> *See id.* *See generally* H.R. 3240; H.R. 2702.

<sup>213</sup> *See generally* H.R. 2702.

<sup>214</sup> *See generally* H.R. 3240.

<sup>215</sup> *See* Smith, *supra* note 139; Smith, *supra* note 208, at 1. *See generally* H.R. 3240; H.R. 2702.

<sup>216</sup> *See* H.R. 2702 § 2.

<sup>217</sup> *See id.* § 3. The Generalized System of Preferences (GSP) is a program administered by the United States Trade Representative (USTR), and its purpose is to “promote economic growth in developing countries and countries in transition by stimulating their ex-

Representative Smith provided support for this bill by stating, “Our country has extended these duty-free benefits to help Brazil economically. But if Brazil does not live up to its treaty obligations—at least 65 American children remain abducted in Brazil—something more than diplomatic chatter should underscore our resolve.”<sup>218</sup> These economic sanctions are that “something more.”<sup>219</sup>

Suspending the benefits of the Generalized System of Preferences (GSP) has proven to be an effective way of incentivizing changes in behavior and policy in developing countries; thus, HB 2702 has the potential to incentivize the Brazilian government to take its Convention obligations more seriously and to take the steps necessary to come into full compliance with the Convention.<sup>220</sup> Suspension can have an incentivizing effect because GSP benefits provide important, immediate eco-

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ports.” See WILLIAM H. COOPER, CONG. RESEARCH SERV., ORDER CODE 97-389, GENERALIZED SYSTEM OF PREFERENCES 1 (2006), available at <http://www.nationalaglawcenter.org/assets/crs/97-389.pdf>. The GSP seeks to achieve this goal by “providing preferential duty-free entry for about 4,800 products from 131 designated beneficiary countries and territories.” *Generalized System of Preference (GSP)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp> (last visited Jan. 20, 2011). Brazil is among the developing nations that receive the duty-free benefits this program provides. H.R. 2702 § 2(a)(10).

<sup>218</sup> Smith, *supra* note 139.

<sup>219</sup> See H.R. 2702; Smith, *supra* note 139.

<sup>220</sup> See COOPER, *supra* note 217, at 3 (“[T]he threat of losing benefits sometimes persuades beneficiary countries to change objectionable policies or practices.”); Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LAB. L. & POL’Y J. 199, 209 (2001); *USTR Reinstates Generalized System of Preferences Benefits for Ukraine*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preferences-gsp/gsp-documents-4> (last visited Jan. 20, 2011) [hereinafter *Ukraine Reinstatement*]. For example, in 2001, the USTR suspended Ukraine’s GSP benefits and shortly thereafter imposed 100% tariff sanctions on Ukraine because Ukraine was the greatest producer and exporter of pirated DVDs and CDs. *Ukraine Reinstatement, supra*. These sanctions were imposed in an effort to pressure Ukraine to address this issue. See *id.* After the Ukrainian government successfully passed legislation aimed at addressing the piracy issues, the tariff sanctions were lifted in 2005 but the GSP suspension continued in effect. *Id.* Ukraine continued to take steps at monitoring the piracy issues and enforcing the laws aimed at curbing piracy. *Id.* In light of Ukraine’s improvements in “the enforcement and protection of intellectual property rights,” the USTR reinstated Ukraine’s GSP benefits in 2009. *Id.* This demonstrates the incentivizing potential of suspension of GSP benefits. See *id.* Suspension of GSP benefits has played a similar role in improving the labor policy and labor rights in developing countries. Compa & Vogt, *supra*, at 209. In 1984, Congress passed legislation that linked a developing country’s eligibility for GSP benefits to whether the country was “taking steps to afford internationally recognized worker rights.” 19 U.S.C. § 2462(b)(2)(G) (2006). As a result, within seventeen years, thirteen countries had been suspended from the GSP program, prompting several to take the necessary steps to reform their labor policy to meet the new GSP requirements and successfully regain GSP benefits. Compa & Vogt, *supra*, at 209. Again, this demonstrates the incentivizing power of suspending the economic benefits of GSP. See *id.*

conomic support by increasing export potential and thus providing for economic growth.<sup>221</sup> Perhaps even more significantly, a developing country's eligibility for GSP benefits sends important signals about the country to members of the U.S. market with whom private companies in developing countries seek to do business.<sup>222</sup> Put simply, "[l]oss of GSP beneficiary status sends . . . a strong signal that a country is potentially bad business."<sup>223</sup> Consequently, removing that status can provide a significant incentive to take the actions necessary to get the status reinstated.<sup>224</sup>

That HB 2702 was originally directed, in large part, at the now-resolved Goldman case does not render the bill ineffective.<sup>225</sup> Rather, the bill would impose GSP suspension regardless, and would reinstate GSP benefits only when Brazil's Central Authority, judicial system and law enforcement system are "complying with [their] obligations under the Hague Convention with respect to international child abduction cases involving children from the United States"—not just with respect to Sean Goldman.<sup>226</sup>

Just the same, noncompliance is not just a Brazilian problem; rather, six other countries have demonstrated patterns of noncompliance and one country has been deemed entirely noncompliant.<sup>227</sup> HB 2702 would not address this larger problem.<sup>228</sup> As a result, Congress' efforts would be put to better use in giving serious consideration to the more comprehensive HB 3240, which is aimed at addressing all Convention noncompliance, regardless of the country, as well as making improvements to how IPCA is addressed more generally.<sup>229</sup>

### C. *United States House Bill 3240*

Unlike HB 2702, HB 3240 takes a comprehensive approach to improving how international child abductions (ICA) are addressed in the United States and around the world; thus, while its goals include ad-

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<sup>221</sup> See COOPER, *supra* note 217, at 1, 3; Compa & Vogt, *supra* note 220, at 204, 209.

<sup>222</sup> Compa & Vogt, *supra* note 220, at 204.

<sup>223</sup> *Id.*

<sup>224</sup> See COOPER, *supra* note 217, at 3; Compa & Vogt, *supra* note 220, at 204, 209; *Ukraine Reinstatement*, *supra* note 220.

<sup>225</sup> See Suspend Brazil GSP Act, H.R. 2702, 111th Cong. §§ 2(b), 3(c) (2009).

<sup>226</sup> See H.R. 2702 §§ 2(b), 3(c).

<sup>227</sup> *Report on Compliance with the Hague Convention*, *supra* note 21, at 13.

<sup>228</sup> See generally H.R. 2702.

<sup>229</sup> See *Report on Compliance with the Hague Convention*, *supra* note 21, at 13. See generally International Child Abduction Prevention Act of 2009, H.R. 3240, 111th Cong. (2009); H.R. 2702.

dressing Convention noncompliance, they are also much broader.<sup>230</sup> The purposes of the bill include protecting the rights of children; assisting parents and providing them with the tools necessary to resolve ICA cases; promoting an international consensus that custody issues should be resolved in a child's country of habitual residence; and "facilitat[ing] the creation and effective implementation of international mechanisms, particularly the [Convention], to protect children from the harmful effects of their wrongful removal or retention."<sup>231</sup> Because HB 3240 provides a realistic and aggressive approach to addressing the growing problem of IPCA, Congress should seriously consider this important legislation.<sup>232</sup>

House Bill 3240 would do two major things: (1) establish an Office on International Child Abductions (OICA), headed by an Ambassador at Large for International Child Abductions (AAL), within the Department of State, and (2) provide an integral role for the President, along with the Department of State, to designate countries as "engaged in a pattern of noncooperation" with respect to ICA and to impose punitive actions and sanctions on those countries.<sup>233</sup>

The AAL, as head of OICA, would be completely dedicated to addressing ICA.<sup>234</sup> The AAL would have a range of responsibilities including advocating for abducted children, assisting LBPs, promoting measures aimed at preventing ICA, and seeking to "advance mechanisms to prevent and resolve cases of [ICA] abroad."<sup>235</sup> Additionally, the AAL would be a principal advisor to the President and the Secretary of State regarding ICA and would make recommendations regarding how best to address ICA.<sup>236</sup> The AAL would also play an important diplomatic role in improving how ICA is addressed in other countries and in securing the resolution of specific ICA cases.<sup>237</sup>

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<sup>230</sup> See H.R. 3240 § 2(c).

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

<sup>232</sup> See H.R. 3240; Smith, *supra* note 208, at 1.

<sup>233</sup> H.R. 3240 §§ 101(a)-(b), 201(a)(2).

<sup>234</sup> *Id.* § 101.

<sup>235</sup> *Id.* § 101(a)-(c)(1).

<sup>236</sup> *Id.* § 101(c)(2).

<sup>237</sup> *Id.* § 101(c)(3). Additional responsibilities would include establishing a case file management system so as to maintain complete information on all ICA cases about which the OICA is notified; making legal advice available to the Central Authority of the United States to assist with "country-specific legal issues;" establishing "user-friendly resources" including a toll-free number to the OICA that includes a "language line" for non-English speaking LBPs; and producing and issuing training courses about the Convention for federal and state judges in the United States. *Id.* § 101(c)(5), (8)-(10).

The AAL, in conjunction with the Secretary of State, would be responsible for producing an Annual Report on International Child Abduction (“the Annual Report”) which would ultimately replace the current report on noncompliance that is produced by OCI.<sup>238</sup> This report would provide much more information than the current annual non-compliance report does.<sup>239</sup> Instead of providing information about ICA cases only in those countries that are Contracting States of the Convention, the Annual Report would provide information about all relevant countries (those that are involved in ICA cases), designating them as “Hague Convention Signatory Countries,” “MOU Countries,” or “Non-signatory Countries.”<sup>240</sup> The annual report would require a list of all pending cases in all countries and specific details about the cases, including what is being done to resolve each case.<sup>241</sup> For MOU countries, it would provide not only a description about the elements of the MOU but also information about whether the MOU country is moving toward accession to the Convention.<sup>242</sup> Similarly, for nonsignatory countries, it would provide “[i]nformation on efforts by the Department of State to encourage each such nonsignatory country to become a Hague Convention signatory country or MOU country.”<sup>243</sup> The report would also include additional information aimed at identifying the nature of the ICA problem, including information about the number of military families affected, information about the use of airlines in ICA and recommendations for best airline practices, and information about steps taken by the United States to train domestic and foreign judges on the application of the Convention.<sup>244</sup> Thus, unlike the current noncompliance report, the Annual Report would be broader in focus and targeted not

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<sup>238</sup> *See id.* § 102.

<sup>239</sup> Compare ICARA, 42 U.S.C. § 11611 (2006) (listing the information required to be included in the Central Authority’s annual report on noncompliance), with H.R. 3240 (listing the information that would be required in the Annual Report on International Child Abduction).

<sup>240</sup> H.R. 3240 § 102(a). “MOU Country” refers to “a country or entity with which the United States has entered into a memorandum of understanding to resolve cases of international child abduction” as opposed to being in a reciprocal Convention relationship. *See id.* § 3(9). “Nonsignatory Country” refers to “a country which is neither a Hague Convention signatory nor a MOU country to which a United States child has been abducted or in which a United States child remains wrongfully retained.” *Id.* § 3(10).

<sup>241</sup> *Id.* § 102(a).

<sup>242</sup> *See id.* § 102(a)(2).

<sup>243</sup> *Id.* § 102(a)(3)(B).

<sup>244</sup> *Id.* § 102(c).



only at noncompliance issues but also at ICA and IPCA more generally.<sup>245</sup>

The other major component of HB 3240 is the power and responsibility that it affords the President in addressing not only countries that fail to comply with the Convention but also those MOU and Nonsignatory Countries that fail to cooperate in resolving ICA cases.<sup>246</sup> Specifically, the bill would require the President to make an annual review of the unresolved ICA cases in each foreign country and from that review designate countries as demonstrating “patterns of noncooperation.”<sup>247</sup> This categorization would apply to those countries that have demonstrated a “systemic failure” with respect to resolving ICA cases, including but not limited to countries that are Contracting States.<sup>248</sup>

Then, in consultation with each noncooperative country, the LBPs, and any other interested U.S. parties, the President would determine the appropriate action to address the noncooperation.<sup>249</sup> Ideally, the President would attempt to resolve the pattern of noncooperation through “noneconomic policy options,” but once those have been exhausted, it would be the President’s responsibility to take any of the eighteen listed actions, or other commensurate action as substituted by the President, to address the noncooperation.<sup>250</sup> These actions range from “private demarche” and “public condemnation” to serious economic sanctions including suspension of GSP benefits, limitations on export licenses, and prohibition from accessing loans and financial credit opportunities from U.S. financial institutions.<sup>251</sup> Such presidential actions would remain in effect until waived by the President once the President has determined that the sanctioned country “has satisfactorily resolved the unresolved cases giving rise to the application of such actions” and the country has addressed its pattern of noncooperation to ensure it will effectively address ICA cases in the future.<sup>252</sup> Thus, HB 2702 has the potential to incentivize Convention compliance, but

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<sup>245</sup> Compare ICARA, 42 U.S.C. § 11611(2006) (listing the information required to be included in the Central Authority’s annual report on noncompliance), with H.R. 3240 (listing the information that would be required in the Annual Report on International Child Abduction).

<sup>246</sup> See H.R. 3240 §§ 201–202.

<sup>247</sup> *Id.* § 20(b)(1)(A).

<sup>248</sup> See *id.* § 3(12).

<sup>249</sup> See *id.* §§ 202(c)–(d), 204(a).

<sup>250</sup> See *id.* §§ 202(c), 203(5), 204(a)–(b).

<sup>251</sup> H.R. 3240 § 204(a) (listing eighteen possible actions).

<sup>252</sup> *Id.* § 206(a) (listing specific requirements for Hague Convention Signatory Countries, MOU Countries, and Nonsignatory Countries).

HB 3240 has the potential to incentivize compliance while also improving IPCA resolutions in Nonsignatory and MOU countries.<sup>253</sup> This is the precise type of pressure that is necessary to ensure that IPCA cases are properly resolved.<sup>254</sup>

Thus, HB 3240 has the potential to provide the mechanism for ensuring compliance that the Convention currently lacks.<sup>255</sup> It also has the potential to further address the growing problem of IPCA.<sup>256</sup> The latest major action taken on HB 3240, however, was assignment to a subcommittee on September 14, 2009.<sup>257</sup> It currently sits in five House committees and two subcommittees.<sup>258</sup> It is essential that this bill, and the hope that it provides, not be lost to the legislative process.<sup>259</sup> It must not meet the fate of most bills introduced in Congress: it must not die in committee.<sup>260</sup> Rather, the committees to which this bill has been assigned must push it through the legislative process and give it the consideration it deserves.<sup>261</sup> They must make it the best piece of legislation possible and see it through to the White House.<sup>262</sup> In doing so, Congress will improve Convention compliance and implementation around the world.<sup>263</sup>

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<sup>253</sup> See *id.* §§ 204(a), 206(a); Smith, *supra* note 139; *supra* notes 219–223 and accompanying text.

<sup>254</sup> See H.R. 3240 §§ 204(a), 206(a); Smith, *supra* note 139; *supra* notes 219–223 and accompanying text.

<sup>255</sup> See H.R. 3240 §§ 204(a), 206(a); Smith, *supra* note 139; *supra* notes 219–223 and accompanying text.

<sup>256</sup> See *supra* notes 229–231 and accompanying text. See generally H.R. 3240 (aimed at addressing international child abduction generally while also addressing Convention non-compliance).

<sup>257</sup> H.R. 3240, THE LIBRARY OF CONGRESS: THOMAS, <http://thomas.loc.gov> (Under “Search Bill Summary & Status,” select “Bill Number” and search for H.R. 3240) (last visited Jan. 20, 2011) (indicating that the latest major action on the bill was referral to subcommittee).

<sup>258</sup> *Id.*

<sup>259</sup> See H.R. 3240 §§ 204(a), 206(a); Smith, *supra* note 139; *supra* notes 219–223 and accompanying text.

<sup>260</sup> See H.R. 3240 §§ 204(a), 206(a); Smith, *supra* note 139; *Legislative Process*, CQ—ROLL CALL GROUP, <http://corporate.cq.com/wmspage.cfm?parm1=231> (last visited Jan. 20, 2011) [hereinafter *Legislative Process*] (“Most bills simply die in committee.”); *supra* notes 219–223 and accompanying text. For example, of the more than 9000 bills and joint resolutions introduced in the 107th Congress (2001–2003), only 377 were enacted into law. *Legislative Process*, *supra*.

<sup>261</sup> See H.R. 3240 §§ 204(a), 206(a); Smith, *supra* note 139; *Legislative Process*, *supra* note 260; *supra* notes 219–223 and accompanying text.

<sup>262</sup> See H.R. 3240 §§ 204(a), 206(a); Smith, *supra* note 139; *Legislative Process*, *supra* note 260; *supra* notes 219–223 and accompanying text.

<sup>263</sup> See H.R. 3240 §§ 204(a), 206(a); Smith, *supra* note 139; *supra* notes 219–223 and accompanying text.

## CONCLUSION

On December 31, 2009—more than five years after being taken to Brazil—Sean Goldman returned home to New Jersey with his father. Though it was a moment for celebration after a long-fought legal battle, Sean's return highlighted the damage that the abduction had done to his relationship with his father and the repair that would have to take place going forward. Yet, despite their lost time together and the work ahead, Sean and David are lucky: they, unlike so many families affected by IPCA in noncompliant countries, defied the odds. International parental child abduction is a devastating and tragic phenomenon, but what is more tragic are the cases that remain unresolved due to Convention noncompliance. The value of the Convention is great, but that value is severely undermined in noncompliant countries, and the LBPs and abducted children are forced to pay the price. The time has come for addressing noncompliance so that the Convention can provide the legal recourse and protection of children and families that it was intended to provide. House Bill 3240 provides a comprehensive and appropriate response that would provide this missing element of the Convention. For the sake of all families like the Goldmans, this bill warrants Congress' serious consideration.