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Creating a Legal Society in the Western Hemisphere to Support the Hague Convention on Civil Aspects of International Child Abduction

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Creating a Legal Society in the Western Hemisphere to Support the Hague Convention on Civil Aspects of International Child Abduction

Timothy L. Arcaro

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I. INTRODUCTION

The premise for this article stems from the Cross Border Mediation Training that took place in February 2008 at the University of Miami School of Law in Miami, Florida. The training brought together legal and mediation professionals from the Americas and abroad to explore the creation of a mediation platform for use in cases arising under the Hague Abduction Convention on Civil Aspects of International Child Abduction (“Abduction Convention” or “Convention”). As part of the training, attendees identified practical, legal, cultural, and social issues presented in Convention cases and discussed how those issues impact the non-judicial dispute resolution process. In this collaborative spirit, it seemed quite appropriate to further examine how countries of the Western Hemisphere could more closely work together to achieve the overall goals of the Convention, with or without the adoption

of a formal mediation process. There was particular interest in Latin American countries given their representation at the training, the close geographical proximity to the United States, and the identified regional needs.

The Hague Permanent Bureau has invested considerable resources in Latin America to create an infrastructure for implementation, accession, and operation of the Abduction Convention and other international instruments. A new legal society to support the Abduction Convention would build upon this emerging infrastructure while simultaneously strengthening the collaborative approach demonstrated by Member States, international and national governmental organizations, and regional and national non-governmental organizations. In this note I will propose the development of a legal society located in the Western Hemisphere to support the operation, objectives, and goals of the Abduction Convention.

This note is divided into three parts. Part I provides a brief explanation on the operation of the Abduction Convention. Part II explains the need for additional technical and advisory support on the implementation and operation of the Convention in the Western Hemisphere, particularly in Latin America. Part III proposes the creation of a legal society located in the Western Hemisphere and explore ways in which the society might collaborate regionally to advance and harmonize best practices under the Abduction Convention. Additionally, this note explains the role that such a society may play in promoting greater understanding of trans-border access cases, an area of growing international attention.

II. A BRIEF INTRODUCTION TO THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The Abduction Convention is a multilateral treaty implemented by state parties in contracting states ("Member States").¹ Each Member State is responsible for the effective implementation and enforcement of the Convention objectives within the framework of their respective national laws.² Convention remedies exist within the legal and administrative authority of each Member State and must be exhausted within each respective

1. Hague Convention on the Civil Aspects of International Child Abduction Preamble, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 98, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=24 [hereinafter Hague Convention on Child Abduction].

2. *Id.* at Art. 2.

jurisdiction. No judicial or administrative authority exists to enforce the Convention beyond a Member State.³ The Convention is premised on the mutual and collective benefits that flow to all Member States through consistent and effective enforcement of the Convention. The challenge for Member States is to remain loyal to the underlying international interests that frequently conflict with national interests.⁴

A. *The Abduction Convention*

On October 24, 1980, the twenty-nine Member States of the Hague Conference unanimously adopted the Convention on the Civil Aspects of International Child Abduction.⁵ The objectives of the Convention are to “protect children internationally from the harmful effects of their wrongful removal or retention”⁶ and “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other contracting states.”⁷ The Convention’s primary goal is to effectuate the prompt return of children, wrongfully removed or retained in violation of rights of custody,⁸ to their country of “habitual residence”⁹ for resolution of underlying custodial matters. Signatories to the Abduction Convention resolve to protect children internationally from the harmful effects of their wrongful removal or retention.¹⁰ The common interest for all signatories is the mutual and collective benefits derived from reciprocal enforcement of the

3. Hague Convention on Child Abduction, *supra* note 1.

4. This conflict is rooted in national values reflected in the work domestic courts are called upon to routinely perform such as the protection of its citizens and their children.

5. Hague Convention on Child Abduction, *supra* note 1 (The Hague Conference is an international organization of member governments whose Permanent Bureau is located at the Hague, Netherlands).

6. *Id.* at Preamble.

7. *Id.* at Art. 1.

8. *See id.* at Art. 1(a). “The objects of the present Convention are- (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”

9. *See id.* at Art. 4. Although the Convention only applies where a child was “habitually resident” in a Contracting State immediately prior to the wrongful removal or retention, no definition of habitual residence is provided within the body of the Convention. This approach was designed to avoid narrow application of technical legal jargon that would create unintentional barriers to Convention remedies. *See* Elisa Perez-Vera, Explanatory Report, Hague Convention on Private International Law, Actes et documents de la Quatrosieme session 426, 445-46 (1982).

10. *See* Hague Convention on Child Abduction, *supra* note 1, at Art. 4.

treaty.¹¹ This approach recognizes and respects the sovereign right of each Member State to resolve child custody disputes that arise within its territorial jurisdiction through the application of national domestic law.

Under the Convention, a child's wrongful removal or retention occurs where it is in breach of "Rights of Custody" that were actually being exercised or would have been exercised but for the wrongful removal or retention.¹² Rights of custody are determined by the domestic laws governing the state of habitual residence and do not extend to or protect "Rights of Access."¹³ The Convention specifically defines the rights of custody to include, "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."¹⁴ The Convention provides no international standards for determining custodial or visitation rights and affords no enforcement protections for custodial decrees from foreign states.¹⁵ The Convention speaks only to

11. Dana R. Rivers, *The Hague International Child Abduction Convention and the International Child Abduction Remedies Act: Closing the Doors to the Parent Abductor*, 2 *TRANSNAT'L LAW* 589, 592 (1989) (explaining the concept of international cooperation as it relates to a global and concerted effort to deter parents from abducting children and to promote fair uniform resolution of subsequent custody claims).

12. *See* Hague Convention on Child Abduction, *supra* note 1, at Art. 3. (stating "[t]he removal or the retention of a child is to be considered wrongful where - - (a) it is in breach of the rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and (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.")

13. *See id.* at Arts. 3 & 5. In order for the child's removal and retention to be wrongful within the meaning of the Convention it must be in violation of Articles 3 & 5 of the Convention.

14. *See id.* at Art. 5(a). "Rights of Custody" arise by operation of law; judicial or administrative decision; or legally recognized agreement pursuant to the law in the Contracting State of habitual residence of the child. *Id.* at Art. 3. *See generally* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 *U.C. DAVIS L. R.* 1049 (2005). Rights of Custody have not been held to include a negative right to prohibit a party from relocating. Custodial rights have been interpreted to exist where the parent has a legal right to participate in the decision making as a matter of law. This is an unsettled legal principle within the international jurisprudence. It is also important to point out that "Rights of Access" are differentiated from "Rights of Custody" affording markedly less protection than custodial rights under the Convention. "Rights of Access" for purposes of the Convention, "shall include the right to take a child for a limited period of time to a place other than the child's habitual residence." *See* Hague Convention on Child Abduction, *supra* note 1.

15. Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 *FAM. L.Q.* 9, 11 n.9. (1994); *see also* Hague Convention on Child Abduction, *supra* note 1, at Art. 21.

the wrongful removal or retention of children in a civil context; there is no criminalization of this conduct under the Convention.¹⁶

The Convention only addresses the remedy of return; it does not mandate or require a change of custody as a condition precedent to the child's return nor does it require a change of custody upon the child's actual return.¹⁷ As a result, return orders under the Convention direct a child's return to the child's country of habitual residence and not to a specific parent.¹⁸ The Convention gives great deference to the fact that the state of habitual residence has the autonomous right to make the most informed decision on custodial matters.¹⁹ Generally, the most relevant facts and circumstances surrounding the child's care and best interests exist in the child's state of habitual residence prior to wrongful removal or retention.²⁰ The Convention flatly prohibits Member States from making return decisions based on the merits of substantive custodial disputes.²¹

Return applications initiated within one year from the date of the child's wrongful removal or retention require mandatory return of the child to the state of habitual residence.²² Once a party establishes that removal or retention was wrongful, the child's return is mandatory unless one of the narrow Convention defenses applies.²³ When a defense to a child's return is estab-

16. Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction* 14 FAM.L.Q. 99, 103 n.24 (1980) (stating that the word abduction appears only in the title and is there qualified by the words *civil aspects*). *It was felt that abduction standing by itself may have a criminal law connotation. For the same reason the word abductor has been avoided. Id.*

17. *Barzilay v. Barzilay*, 536 F.3d 844, 847 (8th Cir. 2008); *see also Shalit v. Coppe*, 182 F.3d 1124, 1128 (9th Cir. 1999).

18. *Barzilay*, 536 F.3d at 847.

19. Hague Convention on Child Abduction, *supra* note 1, at Art. 6. *See generally Ohlander v. Larson*, 114 F.3d 1531 (10th Cir. 1997).

20. *See Perez-Vera*, *supra* note 9, at 434 (stating "the Convention rests implicitly upon the principle that any debate on the merits of the question, i.e. of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to this removal.").

21. Hague Convention on Child Abduction, *supra* note 1, at Art. 16. (stating "the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention . . ."); *see also id.* at Art. 19 (stating that "a decision under this Convention concerning the return of the child shall not to be taken as a determination on the merits of any custody issue.").

22. *Id.* at Art. 12.

23. *See generally* Hague Convention on Child Abduction, *supra* note 1. Once a plaintiff establishes that removal was wrongful, the child must be returned unless the defendant can establish one of four defenses. Two of these defenses can be

lished, the remedy of mandatory return becomes discretionary which is also true of applications not initiated within the one-year time window.²⁴

The “grave risk” exception found under Article 13(b) of the Convention is the most frequently asserted defense in application cases. This defense requires a court to balance the harm resulting from wrongful removal or retention against the child’s best interest in being returned to a place of threatened harm.²⁵ The defense permits a court to refuse return of the child where “return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”²⁶ The grave risk excep-

established by a preponderance of the evidence in the U.S. *See* 42 U.S.C. § 11603(e)(2)(B) (2008). The proceeding must have been commenced more than one year after the removal of the child and the child has become settled in his or her new environment or the person seeking return of the child consented to or subsequently acquiesced in the removal or retention. *See* Hague Convention on Child Abduction, *supra* note 1, at arts. 12 & 13(a). The other two defenses must be shown by clear and convincing evidence in the U.S. *See* 42 U.S.C. § 11603(e)(2)(A) (2008). This standard is necessary when there is a grave risk that the return of the child would expose it to physical or psychological harm. Hague Convention on Child Abduction, *supra* note 1, at Art. 13(b). Additionally, when the return of the child “would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.” *Id.* at Art. 20. All four of these exceptions are “narrow.” *See* 42 U.S.C. § 11601(a)(4) (2008). They are not a basis for avoiding return of a child merely because an American court believes it can better or more quickly resolve a dispute. *See* *Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir. 1995) (citing *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993)). In fact, a federal court retains, and should use when appropriate, the discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention. *Feder v. Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995) (citing Pub. Notice 957, 51 Fed.Reg. 10494, 10509 (1986)); *Friedrich v. Friedrich*, 78 F.3d 1067 (6th Cir. 1996). A party who resists returning the child has defenses under Article 13. *See* *Perez-Vera*, *supra* note 9, at 434 (stating that exceptions are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter).

24. Hague Convention on Child Abduction, *supra* note 1, at Art. 12 (stating that where proceedings have been commenced after the expiration of a one year period a court may refuse an application if it is demonstrated that the child is now well settled in the new environment).

25. Hague Convention on Child Abduction, *supra* note 1, at Art. 13(b); *Friedrich*, 78 F.3d at 1060. The court interpreted Article 13(b) to apply in limited circumstances when it is “believe[d] that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute — e.g., returning the child to a zone of war, famine, or disease.” *Id.* at 1067. “Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.” *Id.* at 1069; *see also* *Tahan v. Duquette*, 613 A.2d 486, 490 (Ct. App. N.J. 1992) (rejecting psychological defense).

26. Hague Convention on Child Abduction, *supra* note 1, at Art. 13.

tion relates to the risk presented by returning the child to the country of habitual residence and not the risk of returning the child to a specific parent.²⁷ This exception is most frequently applied in situations in which the return of the child would place the child in an intolerable situation by exposing the child to abuse.²⁸ Although this defense opens the door to a limited analysis of best interests, most courts resist expanding the defense to fit a full-blown best interest custodial analysis.²⁹ Article 20 also provides a defense where return of the child would be a violation of human rights.³⁰ Generally, defenses under the Convention are narrowly construed as they create exceptions to the primary objective of the Convention.³¹

Under the Convention, trial courts have the discretion to consider the child's views regarding their return.³² The Convention specifically authorizes the trier of fact to consider the child's wishes if the court finds the child has reached an age and degree of maturity to consider those views.³³ The Convention ceases to

27. See generally Sharon C. Nelson, *Turning Our Backs on the Children: Implications of Recent Decisions Regarding The Hague Convention on International Child Abduction*, 2001 U. ILL. L. REV. 669 (2001); Peter Glass, *Blondin v. Dubois: A Closer Step to Safeguarding the Welfare of Abducted Children?*, 26 BROOK. J. INT'L L. 723 (2000); Kerri Smetzer Mast, *The Application of the Fundamental Principles Exception of the Hague Convention on the Civil Aspects of International Child Abduction* 17 EMORY INT'L L. REV. 241(2003); Elizabeth Ising, *Refusing to Debate Wheaties versus Milchreis: Blondin v. Dubois and the Second Circuit's Interpretation of the Hague Abduction Convention's Grave Risk Exception*, 25 N.C.J. INT'L L. & COM. REG. 619 (2000).

28. While children were wrongfully removed from Venezuela by their mother under the International Child Abduction Remedies Act, implementing the Hague Convention of the Civil Aspects of International Child Abduction, denial of father's petition for their return was warranted by evidence of a history of his physical and psychological abuse of his son and the mother; return of any of the children to Venezuela would expose them to a grave risk of physical and psychological harm and place them in an intolerable situation International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(A), (B); see *Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456 (D. Md. 1999).

29. *Rodriguez*, 33 F. Supp. 2d 456.

30. See *Perez-Vera*, *supra* note 9, at 434. See generally Nelson, *supra* note 27; Glass, *supra* note 27; Mast, *supra* note 27; Ising, *supra* note 27.

31. See *Perez-Vera*, *supra* note 9, at 434 (stating that exceptions are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter).

32. See generally Rainia Nanos, *The Views of a Child: Emerging Interpretation and significance of the Child's Objection Defense Under the Hague Child Abduction Convention*, 22 BROOK. J. INT'L. L. 437 (1996) (providing judicial decisions from various countries ruling on the child's objection defense to return).

33. Hague Convention on Child Abduction, *supra* note 1, at Art. 13 (stating that "the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.").

apply when the child reaches the age of sixteen.³⁴ This does not prohibit the return of the child by other legal means; it simply means the Convention will not be the instrument to effectuate that goal after the child reaches the age of sixteen.³⁵

The Convention calls for summary proceedings in all abduction cases.³⁶ These proceedings are designed to be narrow in scope and completed within a time period of six-weeks.³⁷ This timetable plays a vital role in moving cases forward in an effort to avoid unnecessary and harmful delays.³⁸ Convention cases require judges to firmly manage their cases and strictly adhere to the statutory time limits to timely complete the judicial proceedings.³⁹ While it may be necessary for courts to receive substantive evidence on limited defenses set forth in the Convention, this process should not, but does periodically delay case resolution. Unfortunately, significant delays frequently occur when appellate reme-

34. *Id.* at Art. 4 (stating that “the Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16.”).

35. *Id.*

36. Jan Rewers McMillan, *Getting them Back: The Disappointing Reality of Return Orders Under the Hague Convention on the Civil Aspects of International Child Abduction*, 14 J. AM. ACAD. MATRIM. LAW. 99, 114 (1997); see also Hague Convention on Child Abduction, *supra* note 1, at Art 7.

37. Hague Convention on Child Abduction, *supra* note 1, at Art 11 (stating that “[t]he judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay.”).

38. See Rt. Hon. Lord Justice Thorpe, *How Judges Can Support the Operation of the Child Abduction Convention* (Sep. 2000), available at http://travel.state.gov/family/abduction/resources/resources_544.html [hereinafter Lord Justice Thorpe] (explaining how it is the responsibility of the judge to ensure the application is neither frustrated nor delayed by the introduction of unnecessary issues or evidence).

39. See Lord Justice Thorpe, *supra* note 38 (explaining how the advantage of the English Court model in advancing the timeliness of judicial decisions in the spirit of the convention); see also The Common Law Judicial Conference on International Child Custody, Best Practices, available at http://travel.state.gov/family/abduction/resources/resources_548.html# (“Prompt decision-making under the Hague Child Abduction Convention serves the best interest of children. It is the responsibility of the judiciary at both the trial and appellate levels firmly to manage the progress of return cases under the Convention. Trial and appellate courts should set and adhere to timetables that ensure the expeditious determination of Hague applications.”); Nigel V. Lowe, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: An English Viewpoint* 33 N.Y.U. J. INT’L. & POL. 179, 182 (2001).

dies are sought.⁴⁰

B. Central Authorities

The Convention requires each contracting state to designate a Central Authority to discharge the administrative duties imposed by the Convention.⁴¹ Those duties include assisting left-behind parents with access to Convention remedies, communicating with other Central Authorities, communicating with national judges on specific cases, and attempting to amicably resolve cases where possible.⁴² Effective communication between Central Authorities enhances the important task of providing relevant case developments in a timely manner.⁴³ Central Authorities play a critical role in the overall operation of the Convention given their multiple responsibilities.⁴⁴ One measure of their effectiveness includes a Central Authority's efforts to obtain a quick and amicable case resolution as called for in the Convention.⁴⁵

The Convention permits a left-behind parent to initiate proceedings under the Convention by filing an application⁴⁶ with the

40. See generally *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000). See, e.g., *Blondin v. Dubois*, 19 F. Supp. 2d 123 (SDNY 1998); *Blondin v. Dubois*, 189 F.3d 240 (2d Cir. 1999); *Blondin v. Dubois*, 78 F. Supp. 2d 283 (S.D.N.Y. 2000); *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001) (trial court ruled on petition on August 17, 1998, case was subsequently appealed and remanded with final appellate order being entered on January 4, 2001).

41. Hague Convention on Child Abduction, *supra* note 1, at Art 6 (explaining that although each contracting state is required to establish at least one (1) Central Authority, "Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extend to their powers.").

42. See generally Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, available at http://hcch.e-vision.nl/upload/abdguide_e.pdf.

43. See Conclusions and Recommendation for the Inter-American Expert Meeting on International Child Abduction, Nov. 10, 2006, available at http://www.hcch.net/upload/concl_iin_e.pdf.

44. See Hague Convention on Child Abduction, *supra* note 1 at Art. 7. (stating that a Central Authority may fulfill its obligations under Article 7(h), to take or cause to be taken an action to protect the welfare of children by: "providing such administrative arrangements as may be necessary and appropriate to secure the safe return of the child.").

45. Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, Annex II, Mar. 20 1997, available at <http://hcch.e-vision.nl/upload/abduc97e.pdf> [hereinafter Report of the Third Special Commission].

46. Hague Convention on Child Abduction, *supra* note 1, at Art. 8. (Pursuant to Article 8 of the Hague Abduction Convention, applications for assistance shall contain- "(a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child; (b) where available, the date of birth of the child; (c) the grounds on which the applicant's claim for return of the

Central Authority of the child's habitual residence or the Central Authority located in the state where the child is wrongfully removed or retained.⁴⁷ A Central Authorities' ability to protect children and parents is limited to their respective state's system of domestic law and administrative arrangements which requires Central Authorities to be flexible in their approach to their Convention obligations.⁴⁸ Member States that receive few applications are less likely to invest a great deal of resources in their Central Authority which will adversely impact their ability to quickly and efficiently process any application that is made.⁴⁹ These limitations and the overall performance of any given Central Authority may cause some left-behind parents to hire private counsel for representation in Convention proceedings, bypassing the Central Authority altogether.

III. THE JUSTIFICATION FOR A LEGAL SOCIETY IN THE WESTERN HEMISPHERE TO SUPPORT THE OPERATION OF THE ABDUCTION CONVENTION

When the U.S. ratified the Convention in 1988, there were only two signatories to the Convention in the Western Hemisphere;⁵⁰ today there are twelve.⁵¹ A state party becomes a member of the Convention by either ratifying or acceding to the Convention.⁵² Ratification occurs only when the Convention is

child is based; (d) all available information relating to the whereabouts of the child and the identity of the person which whom the child is presumed to be. The application may be accompanied or supplemented by- (e) an authenticated copy of any relevant decision or agreement; (f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the Child's habitual residence, or from a qualified person, concerning the relevant law of that State; (g) any other relevant document.”)

47. *Id.* (noting that “[a]ny person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.”).

48. Report of the Third Special Commission, *supra* note 45, at *Conclusions* #2.

49. See Nigel V. Lowe and Katarina Horosova, *The Operation of the 1980 Hague Abduction Convention - A Global View*, 41 *FAM. L. Q.* 59, 66 (2007) (explaining that jurisdictions that handle fewer abduction cases will lack experience in all aspects of the process from the Central Authorities function to practitioners and judges) [hereinafter *The Operation*].

50. Convention on the Civil Aspects of International Child Abduction, *supra* note 42, at Status Table.

51. *Id.*

52. See Carol S. Bruch, *Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases Under the Hague Child Abduction Convention*, 33 *N.Y.U. J. INT'L L. & Pol.* 49, 49 (2000). (“A special form of accession, not ratification,

open for signatories to join; the time frame for the Abduction Convention ended on date.⁵³ For a party to accede to the Convention, the State Party must file its accession with the Hague Permanent Bureau.⁵⁴ After the accession is filed, Member States then determine if they will accept the accession.⁵⁵ Given the multilateral nature of the Convention, each Member State is not required to accept the accession of subsequent State parties. The Convention is therefore a multilateral instrument that may work as a bilateral treaty between specific Member States.⁵⁶ There are currently eighty-one Contracting Parties to the Abduction Convention.⁵⁷

must be used by countries that were not members of the Hague Conference on Private International Law (Hague Conference) in 1980, when the Convention was promulgated.”). Ratification is open for Member States exclusively, and other states may accede to the convention once it is in force. “According to the Hague Conference’s terminology, ratification is, in general, reserved for Member States exclusively. Others States wishing to become a Party to a Hague Convention may accede. This, however, is only possible once the Convention has entered into force.” Frequently Asked Questions, http://hchc.e-vision.nl/index_en.php?act=faq.details&fid=38 (last visited October 1, 2008).

53. Nigel Lowe & Debbie Ong, *Why the Child Abduction Protocol Negotiations Should Not Deflect Singapore from Acceding to the 1980 Hague Abduction Convention*, 2007 SING. JOURN. OF L. STUD. 216, 236 (2007). (“In common with other Hague Conventions, the *Hague Abduction* Convention makes a distinction between ratifications and accessions inasmuch as all contracting states, both present and future, are obliged to accept all ratifying States but have a choice as to whether to accept an acceding State. Unusually, Article 38 provides for an “opt in” system by which each existing Contracting State must formally accept an accession before it can come into force between the two States. In other words, even after accession, the *Hague Abduction* Convention will only come into force with another Contracting State when that State formally decides. Some States such as Australia, Canada, Israel and the Netherlands seem ready to accept most accessions. Others such as France, UK and the USA, are more circumspect. Since the power of ratification only extends to States that were members of the Hague Conference on Private International Law at the time of its Fourteenth Session (i.e. when the 1980 Convention was concluded), Singapore can only accede. To effect accession, the instrument of accession has to be deposited with the Ministry of Foreign Affairs of the Netherlands and will come into force three calendar months after the deposit. Likewise, declarations of acceptance have to be deposited with the Dutch Ministry and will come into force three calendar months later.”).

54. *Id.*

55. *Id.* (“At the Fourth Meeting of the Special Commission to review the operation of the Abduction Convention held in 2001, it was resolved that newly acceding States have to complete a standard questionnaire, which is intended both to provide an aid memoir to those new States and also to provide information to existing contracting states to enable them to decide whether or not to accept the accession. Many States, particularly the UK and USA, pay particular attention to the questionnaire response.”).

56. *Id.*

57. Status Table, *supra* note 50; see also Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 331 (defining “contracting state” as “a State which has consented to be bound by the treaty, whether or not the treaty has entered into force”

Pursuant to Executive Order No. 12648, on August 11, 1988, President Ronald Reagan designated the Department of State as the Central Authority of the United States for purposes of the Convention.⁵⁸ The U.S. Central Authority now handles more applications than any other Member State.⁵⁹ In the fiscal year 2007, the United States Central Authority provided assistance to left-behind parents in the United States in 575 cases involving 821 children and 355 applications incoming to the U.S. involving 518 children.⁶⁰ The Convention partner with both the most incoming applications to the United States and the most outgoing applications for assistance in 2007 was Mexico, with 117 incoming cases involving 175 children and 195 outgoing cases involving 320 children.⁶¹ The Convention partners with the greatest number of returns of abducted children to the United States were Mexico with eighty-two and Canada with twenty-five.⁶² These figures represent only formal applications for assistance presented to the U.S. Central Authority. They reflect geographical significance of neighboring countries to the U.S. and the need to consider regional implications in child abduction cases.

Each year the Department of State, Office of Children's Issues is required to submit to Congress a report on U.S. treaty partners' compliance with the Convention.⁶³ The report includes country-by-country case number statistics and summary information to provide a well-rounded picture of the Convention's application and the state of international child abduction.⁶⁴ Additionally, the report identifies the Department's concerns regarding countries in which the implementation of the Convention is incomplete or in which a particular country's executive, judicial, or law enforce-

and defining "party" as "a State which has consented to be bound by the treaty and for which the treaty is in force").

58. See Scott M. Smith, *Construction and application of International Child Abduction Remedies Act* (42 U.S.C. §§ 11601 et seq.), 125 A.L.R. Fed. 217 (1995). On April 1, 2008 the Office of Children's Issues at the U.S. State Department replaced the National Center for Missing and Exploited Children as the Central Authority for all incoming and outgoing applications under the Convention. *Id.*

59. The Operation, *supra* note 49, at 65.

60. See Dept. of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, 2008, available at <http://travel.state.gov/pdf/2008HagueAbductionConventionComplianceReport.pdf> [hereinafter Report on Compliance].

61. *Id.*

62. *Id.* at 6.

63. *Id.* at 2.

64. *Id.*

ment authorities do not properly apply the Convention.⁶⁵ The report categorizes these countries as either “Countries Not Compliant with the Convention” or “Countries Demonstrating Patterns of Noncompliance with the Convention.”⁶⁶

The Department’s analysis of compliance with the Convention is largely based on the standards and practices outlined in the Permanent Bureau of the Hague Conference on Private International Law’s Guide to Good Practice.⁶⁷ There are three areas of compliance that are evaluated by the Department: Central Authority performance, judicial performance, and law enforcement performance.⁶⁸ Central Authority performance involves the speed of processing applications, advising left-behind parents on procedures to secure knowledgeable, affordable legal assistance, availability of judicial resource programs, and responsiveness to inquiries by the U.S. Central Authority and left-behind parents.⁶⁹ Judicial performance involves correct application of the Convention, timeliness of petitions under the Convention, timeliness of subsequent appeals, and court efforts to enforce decisions of return or access.⁷⁰ Law enforcement performance involves success in promptly locating abducted children and the prompt enforcement of court orders issued pursuant to the Convention.⁷¹ Countries designated “Not Compliant” are failing in all three performance areas for the reporting period, while “Countries Demonstrating Patterns of Noncompliance” have a systemic failure to comply with the Convention in one or two of the three performance areas.⁷²

Although Member States in Latin America have received a variety of intensive support packages from the Hague Permanent Bureau as well as regional and international governmental and non-governmental organizations, many of these states continue to struggle to meet their respective obligations under the Convention. As assessed by the U.S. State Department’s most recent Country Compliance Assessment Report of 2008, Honduras was “Not Compliant” with its obligations under the Abduction Convention, while Brazil, Chile, Ecuador, Mexico, and Venezuela were

65. *Id.* at 6.

66. *Id.*

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

identified as demonstrating “Patterns of Non-Compliance.”⁷³ The U.S. Central Authority views many Latin American Member States as having demonstrated some history of challenge in meeting their obligations under the Convention.⁷⁴

For example, Brazil acceded to the Abduction Convention on October 19, 1999 and the Convention entered into force between Brazil and the United States in December 1, 2003.⁷⁵ Brazil has been identified by the United States Central Authority (USCA) in the 2008 Country Compliance Report as “Demonstrating Patterns of Noncompliance” in Judicial Performance for the following reasons: Brazilian courts have on several occasions treated Convention decisions as custody determinations; some judges continue to show a bias in favor of mothers and Brazilian citizens; and the judicial process is exceedingly lengthy and made even longer through the appellate process.⁷⁶

Chile acceded to the Abduction Convention on February 23, 1994 and the Convention entered into force between Chile and the United States on July 1, 1994.⁷⁷ Chile has been identified by the USCA in the 2008 Country Compliance Report as “Demonstrating Patterns of Noncompliance” in judicial performance for the following reasons: Chilean courts continue to treat Convention cases as custody determinations; some judges continue to show a bias towards Chilean parents, especially Chilean mothers; and the judicial process is exceedingly lengthy and made even longer through the appellate process.⁷⁸

Honduras acceded to the Abduction Convention on December 20, 1993 and the Convention entered into force between Honduras

73. *See id.* at 7.

74. *See id.* at 9-18 (stating that since the United States began producing the Annual Country Compliance Report, it has raised concerns regarding the following countries in the Western Hemisphere: Ecuador was identified as being “Not-Compliant” in 2006, 2005, 2004, 2002, and 2003; Honduras was identified as being “Not-Compliant” in 2006, 2005, 2004, 2001, 2000, and 1999; Venezuela was identified as being “Not-compliant” in 2006; Brazil was identified as being “Not-Fully Compliant” in 2006; Chile was identified as being “Not Fully Compliant” in 2006 and 2005; Columbia was identified as being “Not-Compliant” in 2005 and 2004, it was also identified as being “Not Fully Compliant” in 2006; Mexico was identified as being “Not Compliant” in 2004, 2002, 2003, and 1999, it was also identified as being “Not Fully Compliant” in 2006, 2005, 2001, and 2000; Panama was identified as being “Not Compliant” in 2005, 2002, 2003, 2001, 2000, it was also identified as being “Not Fully Compliant” in 2006; Bahamas was identified as being a Country of Concern in 2006, 2005, 2004, 2003, 2002, and 2001).

75. *See id.* at 10.

76. *See id.*

77. *See id.* at 12.

78. *See id.* at 12.

and the United States on June 1, 1994.⁷⁹ Honduras has been identified by the USCA in the 2008 Country Compliance Report as “Not Compliant” with their Convention obligations. Honduras does not have a functioning Central Authority,⁸⁰ courts are unreliable in adjudication of Convention claims, and the country has failed to pass legislation⁸¹ implementing the Convention under Honduran law.⁸²

Ecuador acceded to the Abduction Convention on January 22, 1992 and the Convention entered into force between Ecuador and the United States on April 1, 1992.⁸³ Ecuador has been identified by the USCA in the 2008 Country Compliance Report as “Demonstrating Patterns of Noncompliance” in Judicial Performance and Central Authority Performance for the following reasons: Ecuador’s courts continue to treat Convention cases as custody determinations; there are excessive delays in the judicial process; and the Central Authority of Ecuador is unresponsive to requests for information and has made no efforts to train judges about the Convention.⁸⁴

Mexico acceded to the Abduction Convention on June 20, 1991 and the Convention entered into force between Mexico and the United States on October 1, 1991.⁸⁵ Mexico has been identified by the USCA in the 2008 Country Compliance Report as “Demonstrating Patterns of Noncompliance” in Judicial Performance and Law Enforcement Performance for the following reasons: abuse of the Mexican *amparo* appeal system often lead to excessive delays and further increased legal costs for left- behind parents; the persistent inability to locate children abducted children taken to Mexico; the lack of sufficient resources dedicated to finding missing children and bringing abducting parents to justice.⁸⁶

Venezuela acceded to the Abduction Convention on October

79. *See id.* at 9.

80. *See id.* at 9. Although the Honduran Institute of Children and Family is charged with handling Convention Applications as the named Honduran Central Authority, the USCA is not aware of any staff that performs the required functions even though the USCA has made several attempts to contact the Central Authority through diplomatic channels.

81. *See id.*

82. *See id.*

83. *See id.* at 13.

84. *See id.*

85. *See id.* at 16.

86. *See id.* (stating that the USCA reports that in the 2008 reporting year, of the thirty-one unresolved cases from Mexico, twenty-three remain unresolved because the abducting parent and the child have not been located).

16, 1996, and the Convention entered into force between Venezuela and the United States on January 1, 1997.⁸⁷ Venezuela has been identified by the USCA in the 2008 Country Compliance Report as “Demonstrating Patterns of Noncompliance” in Judicial Performance and Central Authority Performance for the following reasons: Venezuelan courts regularly incorporate custodial determinations into Convention decisions; there are excessive delays in the judicial process exacerbated by the appellate process; and the Central Authority of Venezuela is unresponsive and difficult to communicate with.⁸⁸

While Member States may not particularly appreciate their designation in the annual Country Compliance Report, the U.S. has not been alone in raising concerns about the operation of the Convention in Latin America. The Hague Permanent Bureau has also taken notice of Latin America’s approach to implementation and operation of the Convention. In so doing, the Permanent Bureau has initiated a series of directives to help improve the performance of the Convention in the Region.

A. *Collaborative Efforts in Latin America*

In 2004 the Latin American Judges’ Seminar on the Abduction Convention met in Mexico to discuss ways to improve regional operation of the Convention.⁸⁹ Most important, the Seminar produced a number of sound conclusions and recommendations designed to enhance the implementation and enforcement of member states’ obligations under the Convention.⁹⁰ The attendees recognized that cooperation should include regular international meetings and contacts among judges and Central Authorities for the purpose of exchanging information, ideas, and principles of

87. *See id.* at 18.

88. *See id.*

89. The official title of the seminar was “The Latin American Judge’s Seminar on The 1980 Hague Convention on Civil Aspects of International Child Abduction.” The Seminar was attended by Judges, Central Authority Officials and other experts from Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Spain, United States of America, Uruguay, and Venezuela and the following organizations: Organization of American States - Inter-American Children’s Institute, International Centre for Missing and Exploited Children, American Bar Association - Latin American Law Initiative Council, Texas-Mexico Bar Association and the law School of Instituto Tecnológico y de Estudios Superiores de Monterrey.

90. Hague Conference on Private International Law, The Latin American Judge’s Seminar on Civil Aspects of International Child Abduction, at 1 (Dec. 1-4, 2001), available at <http://www.hcch.net/upload/monterrey2.pdf>.

good practice.⁹¹ Additionally, they concluded that contracting states in the region should promote and facilitate national training programs on the Abduction Convention.⁹² A Second Latin America Judges' Seminar was held in the Hague in December 2005 and attended by eighteen judges from sixteen states of the Americas compared to ninety judges attending the 2004 seminar in Mexico.⁹³

As a result of the 2004 Latin American Judges' Seminar, a Special Programme for Latin American States was developed and implemented.⁹⁴ The program deployed in multiple phases which began with a comprehensive review and assessment of Hague Conventions within Member States in the Region.⁹⁵ Phase 1 resulted in the establishment of a regional judicial/Central Authority network, regional expansion of the International Child Abduction Database (INCADAT) and creation of "The Judges' Newsletter."⁹⁶ Phases II through IV introduced new programs designed to promote interest and involvement in the work of the Hague Conference and cooperation with regional organizations.⁹⁷ Phase V focused on facilitating access to information concerning operation of the Hague Conventions and increasing visibility of

91. *Id.* This conclusion is reached based in part on the long history of inclusion fostered by the Hague Conference, the US State Department Office and the National Center for Missing and Exploited Children in the United States, and by those invited to attend the 2004 Judicial Seminar.

92. *Id.* at 2.

93. Hague Conference on Private International Law, Post-Convention Work, Regional Developments and the Need for a Systematic Programme of Training, Annex B at ii (March 2006), available at http://www.hcch.net/upload/wop/gaf_pd08e2006.pdf [hereinafter Post Convention Work Report].

94. *Id.* at Annex C.

95. Special Programme Phase I included visits to Latin American countries from Mr. Ignacio Goicoechea, the Hague Conference Liaison Legal Officer for Latin America; the Secretary General of the Hague Conference on Private International Law accompanied Mr. Ignacio on three official visits each of the following: Brazil, Colombia and Guatemala. During these visits the Special Programme assisted in: (1) increasing the visibility of the Hague Conference work in the region; (2) assessing the operation of the Hague Convention within each State; (3) identifying obstacles to effective implementation and discussing ways in which those obstacles may be removed; (4) providing information in respect of Hague Conventions currently being examined in certain states; (5) encouraging the accession to and ratification of Hague Conventions; and (6) reinforcing links with officials, judges and others with responsibility under the Hague Conventions.

96. Hague Conference on Private International Law, Information Document- The Hague Conference International Centre For Judicial Studies and Technical Assistance, Annex B at 26, 27 (Oct. 10, 2007) [hereinafter Judicial Studies and Technical Assistance], available at <http://www.hcch.net/upload/intcentre.pdf>.

97. *Id.* at 27-28.

the Hague Conference work in Latin America.⁹⁸ Exploration into possible methods of cooperation with other international and regional organizations was identified as a way to strengthen and promote this facet of the Special Programme.⁹⁹ Overall, the Special Programme was well received and strong support was voiced by Member States in the Region.¹⁰⁰

In addition to the work of the Hague Conference, other regional efforts to support the work of the Abduction Convention have also been initiated in Latin America.¹⁰¹ In 2006 the first concrete steps were taken between the Hague Conference and the Inter-American Institute of Children in Latin America to coordinate efforts on the Abduction Convention with experts and contracting state parties in attendance from Argentina, Brazil, Chile, Dominican Republic, Ecuador, Mexico, Panama, Peru, the United States and Uruguay.¹⁰² This meeting produced specific recommended timelines for fluency of communications for Central Authorities, a cooperative approach to the development of a feasibility study for cross-border mediation in family matters, a proposal to develop a regional model law of procedure to implement the Abduction Convention in addition to addressing a number of other important regional concerns.¹⁰³ These concerns and the agenda items set for the 2008 meeting reflect a mix of problems facing new States Parties from Latin America as well as those that have struggled to effectively implement the Convention.¹⁰⁴

B. *Mediation Initiatives*

Mediation in child custody and visitation disputes has become a popular method of empowering individuals to control case outcomes in highly sensitive matters that will impact the parent/

98. Post Convention Work Report *supra* note 93, at Annex C vi.

99. *Id.*

100. *Id.*

101. Regional organizations such as Organization of American States / Instituto Interamericano del Niño (INN) have been very active in supporting the implementation and operation of the Abduction Convention.

102. Hague Conference on Private International Law, Conclusions and Recommendations of the Inter-American Child Abduction, at 2 (Nov. 10, 2006), available at http://www.hcch.net/upload/concl_iin_e.pdf.

103. *Id.*

104. Agenda topics for the 2007 meeting to be organized by IIN included: the safe return of the child; access rights; rehabilitation of victims; prevention; promotion of the Hague Convention of October 19, 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures of Protection of Children. *Id.*

child relationship long after the legal process has ended.¹⁰⁵ Research overwhelmingly indicates that when parties resolve their disputes through a mediation process, as opposed to a forced judicial decree, they are far more likely to comply with the terms of their settlement.¹⁰⁶ Mediation is widely used in domestic courts and has recently received significant attention as a means to resolve issues presented under the Abduction Convention. The express language of the Abduction Convention does not specifically include mediation as a required component of the application process. However, support for an alternative dispute resolution approach is rooted in both Articles 7 and 10 of the Convention.¹⁰⁷

The development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children is particularly relevant in the context of the Abduction Convention.¹⁰⁸ Given that the overall return rate for applications granted under the Convention by judicial decree is approximately 66%, litigants should be motivated to explore an alternative dispute resolution approach.¹⁰⁹ Conversely, access rights under the Convention are infrequently awarded by judicial decree,¹¹⁰ and many Member States provide no form of judicial remedy.¹¹¹ The experience of the past twenty-five years of the Con-

105. Mediation is presented in this context as an alternative dispute resolution process affecting the parent/child relationship in domestic relations cases even though it is not limited to this particular subject matter.

106. See generally Catherine M. Lee et al., *Attorneys' Opinions Regarding Child Custody and Mediation and Assessment Services: The Influence of Gender, Years of Experience, and Mediation Practice*, 36 FAM. & CONCILIATION CTS. REV. 216, 221 (1998) (exploring the results from a study examining attorneys' opinions regarding mediation).

107. Hague Convention on Child *Abduction*, supra note 1, at Arts. 7 & 10. (article 7(c) requires Central Authorities to take all appropriate measures to "secure the voluntary return of the child or to bring about an amicable resolution of the issues" while Article 10 requires Central Authorities to "take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child").

108. See generally Hague Conference on International Law, Note on the Development of Mediation, Conciliation and Similar Means to Facilitate Agreed Solutions in Transfrontier Family Disputes Concerning Children Especially in the Context of the Hague Convention of 1980, (Oct. 5, 2006), available at http://www.hcch.net/upload/wop/abd_pd05e2006.pdf.

109. See generally *The Operation*, supra note 49.

110. *Id.* at 23-25. (explaining that the "overall" access rate sank from 43% in 1999 to 33% in 2003. The overall access rate takes into consideration the "rate of applications ending where access was agreed or granted.").

111. See generally Hague Conference on Private International Law, *Transfrontier Access/Contact General Principles and Good Practice*, at 37 (Oct. 4, 2006), available at http://www.hcch.net/upload/wop/abd_pd04e2006.pdf [hereinafter *Transfrontier Access*]. See also *The Operation*, supra note 49.

vention has proven unsatisfactory with respect to development and protection of access rights under the Convention.¹¹² It is clear in the comprehensive Report on Transfrontier Access / Contact that access rights under the Convention will not be uniformly respected in the near future and may require additional protocols to gain recognition and enforcement under the Convention.¹¹³

In April 2006, the Special Commission on General Affairs and Policy invited the Permanent Bureau to prepare a feasibility study on cross-border mediation in family matters.¹¹⁴ In 2007, the Permanent Bureau prepared a comprehensive report on trans-border access in cases arising under the Abduction Convention.¹¹⁵ The results chronicled a wide variety of issues including access to mediation services, associated costs, mediator training, and the involvement of the child.¹¹⁶ The report also identified programs already employing mediation schemes in Convention cases¹¹⁷ and new initiatives to utilize mediation in trans-frontier access cases.¹¹⁸ A significant development in this field is "The Malta Process" which encompasses ongoing efforts to create a dialogue on a cooperative framework, and ultimately a judicial structure, for the resolution of cross-border family disputes involving traditionally Islamic states.¹¹⁹

IV. THE DEVELOPMENT OF A LEGAL SOCIETY IN SUPPORT OF THE HAGUE ABDUCTION CONVENTION IN THE WESTERN HEMISPHERE

A. *Ongoing Support, Training Needs, and a Growing Emphasis on Transborder Access*

Analysis of the most recent statistical data on the operation of the Abduction Convention indicates that the number of cases aris-

112. Catherine McGuinness, Special Commission: A View from the Chair, XI Judges' Newsl. 17 (2006), available at <http://hcch.e-vision.nl/upload/news2006.pdf>.

113. See generally Transfrontier Access, *supra* note 111, at 37.

114. Hague Conference on Private International Law, Conclusions of the Special Commission of 3-5 April 2006 on General Affairs and Policy of the Conference, at 3, Preliminary Doc. 11 (June 2006), available at http://www.hcch.net/upload/wop/genaff_pd11e2007.pdf.

115. See generally Transfrontier Access, *supra* note 111.

116. *Id.*

117. See generally *id.*

118. *Id.*

119. Judicial Studies and Technical Assistance, *supra* note 96, at 22; Hague Conference on Private International Law, The Malta Judicial Conference on Cross-Frontier Family Law Issues (March 2004), available at http://www.hcch.net/upload/maltadecl_e.pdf.

ing under the Convention is increasing.¹²⁰ The findings were based on a global analysis, country by country evaluation, focusing on the following factors: the total number of applications filed, the parties involved in the abduction, the outcome of the application, and the length of time to reach case outcome.¹²¹ While the number of contracting states increased by 14% from 1999 to 2003, the total number of applications under the Convention rose by 25% during that same period.¹²² The data suggests there has been no significant change in the overall return rate for abducted children but it has become abundantly clear that access rights are not being uniformly enforced under the Convention.¹²³ These findings correlate multiple reports from the Permanent Bureau and Special Commissions calling for increased awareness and support of the Abduction Convention with particular emphasis on organizing, securing, and enforcing access rights.¹²⁴

The Hague Conference has provided comprehensive support services for Convention implementation and operation for over a decade.¹²⁵ More than sixty percent of the Permanent Bureau's time and resources are dedicated to post-Convention work, which includes treaty administration, technical assistance, and review to promote and develop the full potential of Conventions.¹²⁶ The post-Convention work of the Hague is one of its most important functions and one of its recognized hallmarks.¹²⁷

120. The Operation, *supra* note 49, at 32.

121. See generally Hague Conference on Private International Law, Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, Hcch Doc. (Nov. 9 2006), available at http://www.hcch.net/upload/concl28sc5_e.pdf [hereinafter Conclusions and Recommendations of the Fifth Meeting].

122. *Id.*

123. *Id.*

124. See generally Transfrontier Access, *supra* note 111.

125. See Judicial Studies and Technical Assistance, *supra* note 96, at Annex B. Support services include diagnostic visits, advice and consultation, and judicial seminars which were began on a country-by-country basis and progressed to regional initiatives. *Id.*

126. Hague Conference on Private International Law, Post-Convention Work, Regional Developments and the Need for a Systemic Programme of Training, at 3 (March 6, 2006), available at http://www.hcch.net/upload/wop/genaff_pd06e2006.pdf.

127. *Id.* at 3-4. There are three primary reasons for this development: "(1) Hague Conventions (particularly those involving judicial and administrative cooperation) are practical working instruments which, for their effective operation, require careful implementation at national level. In the absence of an international body to provide

In recent years, the number of newly acceding Member States coupled with the demand for training and educational resources has taxed the Permanent Bureau's capacity to respond.¹²⁸ Even though the Permanent Bureau endeavors to coordinate its training efforts with a variety of governmental and non-governmental agencies, there remain unmet needs.¹²⁹ Solutions identified by the Conference include more systematic training programs, additional financial resources and personnel, and the creation of an international training institute.¹³⁰ In 2007, the Hague Conference International Centre for Judicial Studies and Technical Assistance was established on the premises of the Permanent Bureau.¹³¹ The Hague training centre is a consolidation of services to provide administrative and logistical support on specific Conventions and regional developments.¹³² This is designed to reduce the overall burden on the Conference while streamlining the availability of high quality resources at a reduced cost.¹³³ While the Institute will serve to further the Conference's mission, it will not be a panacea to the longstanding issues presented in the Americas.

Many experts recognize the need for international cooperation to assist newly acceding States to fulfill their obligations under the Convention. In this vein, it would be helpful to organize semi-

authoritative interpretations of, or to enforce obligations under, the Hague Conventions, continuing efforts are needed to ensure their consistent interpretation and efficient functioning within the state parties. (2) As the circle of HCCH Member States and non-Member parties to Conventions expands, more and more of the newly interested States come without the know-how gained through involvement in the negotiation process. Capacity building may be needed to help such States absorb, implement and correctly apply these instruments. (This is not to say that the "established" Hague States do not also sometimes require such support.) (3) Many of the Hague Conventions depend for their success on the development of close cooperation between States Parties, as well as on the building of mutual confidence and trust between judiciaries and administrative bodies in the different countries. Nothing contributes more to the growth of this cooperation and trust than a firm understanding that Convention obligations will be promptly and efficiently discharged by States parties. It is for this reason too that the Member States of the HCCH have accepted that it is in their interests for Convention supports to be provided also to non-Member States which are Parties to the Hague Conventions."

128. *Id.* at 4.

129. *Id.*

130. Hague Conference on Private International Law, Meeting of American International Child Abduction Expert Judges, Buenos Aires (Sept. 19 2007), available at <http://www.hcch.net/upload/iap28.pdf> [hereinafter Expert Judges].

131. See Judicial Studies and Technical Assistance, *supra* note 96.

132. *Id.* at Annex B Part II.

133. Hague Conference on Private International Law, Proposal for a Hague International Legal Training Institute (March. 6, 2003), available at http://www.hcch.net/upload/wop/genaff_pd06e.pdf.

nars and meetings to enable Central Authorities of different countries to meet, to share their experiences and to work collaboratively.¹³⁴ The Conclusions and Recommendations of the Fifth Special Commission in 2006 recognized the value of exchanging information, trainings, networking, and the use of technology to hold regional meetings.¹³⁵ The Fifth Special Commission also reaffirmed that priority should be given to develop good practices in transborder contact and access cases which otherwise receive inconsistent and often insignificant protection under the Convention.¹³⁶

Training opportunities and cooperation across international borders is of great value and strategic importance to create networks that can work together as required under the Convention.¹³⁷ One practice that has been extremely valuable is the identification of liaison judges in respective Member States to work with a local network of judges.¹³⁸ These judicial networks foster trust and facilitate judicial expertise between various jurisdictions.¹³⁹ This approach is one concrete example of how Member States may better enforce their obligations under the Convention through network collaboration.¹⁴⁰

The Hague Conference has also attempted to advance the work of the Convention through the use of new technologies. The Hague Conference launched the International Child Abduction Database (INCADAT), an electronic database hosted at the Hague Conference website which summarizes and categorizes judicial decisions interpreting the Abduction Convention.¹⁴¹ The database makes available significant case summaries of judicial and

134. See Conclusions and Recommendations of the Fifth Meeting, *supra* note 121, at 24.

135. *Id.* at 4.

136. *Id.* at 10-11.

137. See Convention on the Civil Aspects of International Child Abduction, *supra* note 42, at 47.

138. See generally Expert Judges, *supra* note 130; See also Merle H. Weiner, *Half-truths, Mistakes, and Embarrassments: The United States goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 2008 UTAH L. REV. 221, 249 (noting that liaison judges are particularly important to ensuring the safe return of the child and the accompanying parent).

139. See Expert Judges, *supra* note 130, at 6.

140. Hague Conference on Private International Law, Enforcement of Orders Made Under the 1980 Convention - Towards Principles of Good Practice, (October 2006), available at http://hcch.e-vision.nl/upload/wop/abd_pd07e2006.pdf [hereinafter Enforcement of Orders].

141. Hague Conference on Private International Law, The International Child Abduction Database Guide for Correspondents (prepared by Peter McEleavy, Aude

authoritative decisions to facilitate the goal of consistent interpretation.¹⁴² The Hague Conference also launched The Judges' Newsletter on International Child Protection, which circulates to more than 100 judges worldwide.¹⁴³ INCADAT and the Judges' Newsletter both support consistent interpretation of the Abduction Convention and the spread of best practices.¹⁴⁴

New software has also been developed to streamline the record keeping function of Central Authorities while enhancing data collection capabilities. The iChild software is case management software designed to help Central Authorities more easily track and manage cases. INCASTAT will help track statistical information generated by Abduction cases.¹⁴⁵ The Permanent Bureau strongly endorsed these technical developments as a means to increase consistency, speed, and cost-effectiveness of cooperation.¹⁴⁶ Using modern technology permits immediate and direct communication, which expedites resolution of issues arising under the Convention.¹⁴⁷

Although the Conference has incorporated technological advances into operation of the Abduction Convention and focused attention on needs in Latin America, the region continues to struggle with implementation and operation issues. At the 2007 Second Meeting of Governmental Experts of Latin American Member States, workgroups identified ongoing regional problems that include: the lack of translation services, the lack of inter-institutional support within jurisdictions, limited access to technology, the absence of relevant training programs, and the lack of academic doctrine on child abduction in the Americas.¹⁴⁸ The iden-

Fiorini, Marion Ely, Hague Permanent Bureau Publication), available at http://www.hcch.net/upload/incadat_guide.pdf.

142. *Id.* at 2. INCADAT is a resource guide available for use by Central Authorities, judges, legal practitioners, researchers, and others. *Id.*

143. Post Convention Work Report *supra* note 93, at Annex B (ii).

144. See Judicial Studies and Technical Assistance, *supra* note 96, at 17 n.15.

145. Hague Conference on Private International Law, Information Document (July 10 2002), available at http://hcch.e-vision.nl/upload/abd2002_pd10e.pdf. (INCASTAT is an electronic database established at the Hague Conference which that provides statistical data collected by the Conference on child abductions).

146. See Conclusions and Recommendations of the Fifth Meeting, *supra* note 121, at 26.

147. See Expert Judges, *supra* note 130, at 8 (noting that modern technologies are particularly relevant when judges are required to communicate with other national judges to resolve issues arising under the convention).

148. Hague Conference on Private International Law, General Problems Identified at the Roundtable, Second Meeting of Government Experts, Inter-American Program of Cooperation for the Prevention and Remedy of Cases of International Abduction of

tified remedies included ongoing professional training, the establishment of a group of trainers to move around the continent to provide advisory services, efforts to establish specialized teaching centers to generate academic doctrine in the region, and regional strategies to promote amicable case resolution.¹⁴⁹

B. The Society

The proposal to create a new legal society in the Western Hemisphere to support operation of the Hague Abduction Convention is premised on a collaborative model of regional participation. It would require system operatives from across the Americas to work more closely on all aspects of the Convention in order to generate better case outcomes for families. This network would also work to address the challenges posed in transborder access cases arising in both signatory and non-signatory countries in the hemisphere. The society would be an amalgam of volunteers consisting of law enforcement personnel, mediators, mental health professionals, governmental and non-governmental administrators, legal practitioners, and judges from countries in the Western Hemisphere. This multidisciplinary approach would enrich membership diversity by bringing together professionals from different legal, social, and cultural backgrounds. This association would be known as the Legal Society of the Americas Supporting the Hague Abduction Convention.

The Society's core mission would be dedicated to promoting the overall objectives of the Convention through professional development of system operatives, support of best practices in cases arising under the Convention, and protecting access rights in transborder visitation disputes. This mission is designed to protect children internationally by advancing understanding and operation of the Convention through education, training, experience, and collaboration. The Society would focus on developing a sustainable and effective association in the Americas through collaborative relationships and the provision of support services.

Support services would be delivered in person as well as through electronic means. The internet provides new opportunities for synchronous communications, advanced learning platforms, and immediate access to critical research materials. The use of this technology offers tremendous promise for network

Children by one of their Parents, Palacio San Martin, Buenos Aires, Republic of Argentina (Sep. 19-21 2007), available at http://www.hcch.net/upload/iap28_2.pdf.

149. *Id.*

building and collaborative relationships that would otherwise be cost-prohibitive due to geography. Technology can supplement traditional in-person support services by permitting Society members from different countries to work closely and communicate frequently in a cost-effective manner across great distances.

Membership in the Association would be open to those interested in or who routinely deal with Hague Abduction cases and transborder access cases. Members would have the opportunity to work directly with counterparts in the region on Convention issues through collaborative working and training groups. Members would also be able to participate in person and electronically in trainings, have access to resource materials, and collaborate with Convention experts and professionals across the domestic relations spectrum. This network would work to penetrate social, cultural, and legal barriers to case outcomes.

The Society may very well borrow from the design and function of a voluntary bar association. These associations play an important role in meeting the social, professional, and educational needs of the legal profession. The American Bar Association (ABA) is the largest voluntary professional association in the world with more than 400,000 members.¹⁵⁰ The ABA provides professional services including continuing legal education courses and materials, programs to assist lawyers and judges in their work, and initiatives to improve the legal system.¹⁵¹ Core values of the ABA mission include "serving the public and the profession by promoting justice, professional excellence and respect for the law."¹⁵² The ABA has both financial and political clout to support its diverse

150. American Bar Association, *History of the American Bar Association* (2008), www.abanet.org/about/history.html (last visited Oct. 5, 2008). The ABA was founded on August 21, 1878 in Saratoga Springs, New York by 100 lawyers from 21 states. *Id.*

151. *Id.*

152. *Id.* The ABA has established 11 goals in support of its mission: (1). To promote improvements in the American system of justice.; (2). To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition.; (3). To provide ongoing leadership in improving the law to serve the challenging needs of society.; (4). To increase public understanding of and respect for the law, the legal process, and the role of the legal profession.; (5). To achieve the highest standards of professionalism.; (6). To serve as the national representative of the legal profession.; (7). To provide benefits, programs and services which promote professional growth and enhance the quality of life of the members.; (8). To advance the rule of law.; (9). To promote full and equal participation in the legal profession by minorities, women, and persons with disabilities.; (10). To preserve and enhance the ideals of the legal profession as a common calling and its dedication to public service.; (11). To preserve the independence of the legal profession and the judiciary as fundamental to a free society. *Id.*

programs offered to a national and international audience.¹⁵³ The ABA Rule of Law Initiatives in Latin America have provided significant training and support services in the region.¹⁵⁴

The U.S.- Mexico Bar Association founded in 1994 offers a model of international collaboration initially bringing together legal professionals throughout Texas and Mexican border states.¹⁵⁵ Overwhelming interest in the association promoted expansion, the association is now lead by a bi-national board of directors consisting of representative from Mexico and the U.S.¹⁵⁶ The purpose of the Association is to develop understanding of the respective legal systems and cultural differences of the two nations, and to exchange information on legal issues affecting their common interest, while promoting the development of infrastructure to resolve controversies without respect to political standing.¹⁵⁷ The association is open to attorneys and law students from throughout Mexico and the U.S. Each section has both a U.S. Chair and a Mexican Chair. The Inter-American Bar Association has identified as one criterion of its objectives and purposes “to guarantee the peoples of the hemisphere the free exercise of their civil and political rights under democratic principles.”¹⁵⁸

The American Inns of Court provides a model of workgroup

153. *Id.* This financial clout includes funding for ABA Charities that benefit and support the legal profession such as the American Bar Endowment (ABE), the Fund for Justice and Education (FJE), and the American Bar Foundation (ABF). The Fund for Justice alone provides more than \$40 million in support annually to ABA public service and educational projects. *Id.*

154. One recent example can be found in the ABA support of Ecuador as it transitions from an inquisitorial to adversarial trial system. In May 2007 the ABA hosted four nationwide conferences to provide basic orientation on how to manage criminal cases in an accusatorial system, which was targeted to include 400 prosecutors, 136 judges and 1500 National Police Officers. See American Bar Association News, www.abanet.org/rol/new/news-equador-crim-procedures.shtml (last visited Oct. 5, 2008).

155. The Mexican border states included Chihuahua, Tamaulipas, Nuevo Leon and Coahuila. The association quickly spread beyond the boarder area is now open to lawyers throughout the U.S and Mexico. In Mexico the association has come to be known as the Barra de Abogados Mexico-Estados Unidos. The U.S.-Mexico Bar Association, <http://www.usmexicobar.org> (last visited Oct. 5, 2008) The Mexican border states include Chihuahua, Tamaulipas, Nuevo Leon and Coahuila. The association quickly spread beyond the boarder area is now open to lawyers throughout the U.S and Mexico. *Id.*

156. *Id.*

157. *Id.*

158. Inter-American Bar Association, Objectives & Purposes, <http://www.iaba.org/ObjectivesPurposes.htm> (last visited Oct. 5 2008) (noting that many of the stated objectives focus on supportive measures for judicial and administrative systems of justice in the Americas).

collaboration and mentor relationships. Members work side-by-side with the most experienced judges and attorneys in their community.¹⁵⁹ Each less experienced member is paired with a more experienced attorney or judge who acts as a mentor to foster and encourage professional development.¹⁶⁰ Utilizing a mentor relationship resembles the “twinning” concept of pairing newer Central Authorities with previously established ones.¹⁶¹ A new legal society with working group representatives located in Member States across the Western Hemisphere provides real opportunities for collaboration, understanding, and professional growth. Adding mentor relationships will be valuable to representative from new Member States as well those that struggle with Convention compliance.

Creating a platform to support operation of the Abduction Convention through regional collaboration will expand the overall support network. Offering more training opportunities more frequently would permit greater access to system operatives in Member States.¹⁶² Programs ranging from straightforward national training programs to the organization of regional and international seminars with broader developmental objectives are important for new contracting states but may also be helpful in established Hague states.¹⁶³ The results of the Special Commissions meetings overwhelmingly support development of the Society.¹⁶⁴ The justification for focusing Society membership in the

159. The American Inns of Court helps lawyers and judges rise to higher level of excellence, professionalism, and ethical awareness. American Inns of Court, www.innsofcourt.org (last visited Oct. 5 2008).

160. *Id.*

161. *Id.*

162. *See* Enforcement of Orders, *supra* note 140.

163. *See* Judicial Studies and Technical Assistance, *supra* note 96, at 50 (explaining that the work of the Hague Conference is carried out globally by Member States and supported internationally, regionally, and nationally, through a variety of training efforts).

164. *See, e.g.* the American Society of International Law, Hague Conference on Private International Law: Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 29 I.L.M. 220, (1980).; *see also* American Society of International Law, Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on Civil Aspects of International Child Abduction (January 18-21, 1993), Permanent Bureau of the Hague Conference, 33 I.L.M. 225, 229-31 (1994); Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on Civil Aspects of International Child Abduction (March 17-21, 1997), Permanent Bureau of the Hague Conference, available at <http://hcch.e-vision.nl/upload/abduc97e.pdf>. *See generally* Hague Conference on Private International Law, Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague

Western Hemisphere is based on the demonstrated need and desire for more support services in Latin American Member States and the evaluative performance results detailed in the Annual Country Compliance Reports generated by the State Department.

V. CONCLUSION

The Hague Permanent Bureau has made significant investments of time and resources to support the implementation and operation of the Hague Abduction Convention around the world. These efforts have been intensified in Latin America in an effort to support effective implementation and operation of the Convention. Governmental and non-governmental organizations have also invested significant resources to support the Convention operation in this region. Even with this significant infusion of support, there remain unmet needs and demands for regional and national training in Latin America. Latin American Member States continue to struggle to comply with their respective obligations under the Convention. The United States has significant expertise in both the Convention operation and the establishment and support of a reliable and competent Central Authority.¹⁶⁵ In the Western Hemisphere, there are numerous experts on the Abduction Convention with significant practical expertise on its operation and objectives. Creating a network under one Society to provide training and technical support to countries of the Western Hemisphere supplements the important work of the Hague Conference and furthers goals of the Convention. The Society can advance its agenda through collaboration and education with members spread across the Western Hemisphere. Although the Society would focus its work regionally, the diverse background of its membership will be a constant reminder of the international interests at stake. The Society will be able to educate, train, and expand competence on issues arising under the Abduction Convention. In collaboration with regional members, the Society can explore mediation initiatives to arrange and protect access rights in transborder cases. Working together, members will be able to

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Conclusions and Recommendations of the Fourth Special Commission Meeting to Review the Operation of the Hague Convention on Civil Aspects of International Child Abduction (March 22-28, 2001), Permanent Bureau of the Hague Conference (April 2001), available at http://hcch.e-vision.nl/upload/concl28sc4_e.pdf.

165. See The Operation, *supra* note 49, at 4 (suggesting that the US receives more applications under the Abduction Convention than any other Member State).

learn firsthand the challenges presented in the legal, social, and cultural diversity of Western Hemisphere.