

CAUGHT IN THE MIDDLE: THE NEED FOR UNIFORMITY IN INTERNATIONAL CHILD CUSTODY DISPUTE CASES

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But in the real world, you couldn't . . . just split a family down the middle, mom on one side, dad [on] the other, with the child equally divided between. It was like when you ripped a piece of paper in[] two: no matter how you tried, the seams never fit exactly right again. It was what you couldn't see, those tiniest of pieces, that were lost in the severing, and their absence kept everything from being complete.

Sarah Dessen, *What Happened to Goodbye*¹

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1. Sarah Dessen, *What Happened to Goodbye Quotes*, GOODREADS, <http://www.goodreads.com/work/quotes/13014066-what-happened-to-goodbye> (last visited February 23, 2014).

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INTRODUCTION

It is undeniable that international travel has increased in recent years. This of course results in individuals of different countries, cultures, and religions forming friendships and relationships. Some of these relationships lead to marriages and in turn to the creation of families. Unfortunately, some of these marriages do not last and families break apart. The divorce rate in the United States continues to rise and the idea of shared custody is becoming more common in the United States.² Shared custody can become problematic not only when parents live in different states, but is especially difficult when the parents reside in different countries.³ This already complicated situation can become even more difficult if parents do not agree on where to raise the child and who will raise the child, which may then lead to international child abductions if no middle ground can be found.⁴

Child abductions have existed since the latter part of the twentieth century, but due to the increase of bi-cultural marriages and divorces, as well as the continued ease of international travel, international child abductions have increased

2. Lexi Maxwell, *The Disparity in Treatment of International Custody Disputes in American Courts: A Post-September 11th Analysis*, 17 PACE INT’L L. REV. 105, 105 (2005).

3. *See id.*

4. *See id.*

in frequency.⁵ Child abduction is defined as the “unilateral removal or retention of children by parents, guardians, or close family members[;]” however, abductions by the non-custodial parent or family member make up the majority of child abductions.⁶ A parent will usually abduct their child to have control over the child in a new jurisdiction and often believes that moving the child to the new jurisdiction will be in the child’s best interest.⁷ Such decisions are frequently influenced by the abducting parent’s religious and cultural beliefs.⁸

International child abductions raise concerns for a multitude of reasons, but the greatest concern is the effect of the abduction on the child. An international child abduction results in the child losing contact not only with one parent, but also with the culture, environment, and people the child is familiar with.⁹ Additionally, the new country will often have a different language, culture, social custom, and legal system, making adjustment difficult for the child.¹⁰ Such differences, as well as a strained relationship between the separated parents, can make the decision of whether to return the child to their former country or to permit the child to remain in the new country a challenging one.

Little attention was paid to the subject of international child abduction, so several countries decided to tackle the issue, which resulted in the creation of the Hague Convention of 25

5. Smita Aiyar, *International Child Abductions Involving Non-Hague Convention States: The Need for a Uniform Approach*, 21 EMORY INT’L L. REV. 277, 277 (2007); Hague Conference of Private Int’l Law, *Outline: Hague Child Abduction Convention: The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* HCCH, 1 (July 2012), <http://www.hcch.net/upload/outline28e.pdf> [hereinafter *The 1980 Hague Convention Outline*].

6. Aiyar, *supra* note 5, at 278 (quoting PAUL R. BEAUMONT T. & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 1 (1999)).

7. *Id.*

8. *Id.*

9. *The 1980 Hague Convention Outline*, *supra* note 5, at 1.

10. *Id.*

October 1980 on the Civil Aspects of International Child Abduction (“the Hague Convention”).¹¹ The Hague Convention seeks “to protect children from the harmful effects of cross-border abductions (and wrongful retentions) by providing a procedure designed to bring about the prompt return of such children to the State of their habitual residence.”¹² This goal was reaffirmed in the Hague Convention of 1996 on the International Protection of Children, which made small subsequent changes to the Hague Convention.¹³

Although the Hague Convention and the subsequent Hague Children Conventions have accomplished much by creating a process to help return children to their habitual residence, complications and uncertainties still remain. One such unanswered question is whether or not to extend comity to the court orders and judgments of foreign courts, especially if the foreign state is a non-signatory to the Hague Convention. Presently, there is no uniform approach on this issue either internationally or domestically.¹⁴ In the United States custody determinations are made by state courts, which have resulted in a lack of uniformity across the nation.¹⁵

The purpose of this student note is to explore the extension of comity in international child custody cases. Part I of this note will discuss the Hague Convention, the International Abduction Remedies Act, and the Uniform Child-Custody Jurisdiction Enforcement Act. Part II of this note will discuss the issues arising under the Hague Convention and the International Abduction Remedies Act. Part III will discuss the common law concept of comity and the challenges of applying comity to foreign jurisdictions, especially those that are

11. Maxwell, *supra* note 2, at 105.

12. The 1980 Hague Convention Outline, *supra* note 5, at 1.

13. See Hague Conference of Private Int'l Law, *Outline: Hague Convention on Child Protection: The Hague Convention of 1996 on the International Protection of Children*, HCCH, 1 (Sept. 2008), <http://www.hcch.net/upload/outline34e.pdf> [hereinafter The 1996 Hague Convention Outline].

14. Maxwell, *supra* note 2, at 106-07.

15. *Id.*

non-signatories to the Hague Convention. Lastly, Part IV will discuss concrete examples of the extension of comity or the declination to do so in United States courts, as well as the approach taken by courts in the United Kingdom.

A. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (“the Hague Convention”) concluded on October 25, 1980.¹⁶ The Hague Convention entered into force on December 1, 1983.¹⁷ As of December 14, 2012, the Hague Convention had 89 Contracting States.¹⁸ The Hague Convention has two objectives: “(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.”¹⁹ The Hague Convention is also based on three presumptions: (1) that other than in “exceptional circumstances, the wrongful removal or retention of a child” is not in the child’s best interest; (2) that the return of the child is in the child’s best interest to ensure contact with both parents and to promote stability; (3) and that any custody issues are heard and decided by the most appropriate court.²⁰ The Hague Convention explicitly states that the return of wrongfully retained or removed children is

16. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89, available at <http://www.hcch.net/upload/conventions/txt28en.pdf> [hereinafter The Hague Convention].

17. *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Status Table*, Hcch, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last visited Oct. 23, 2013).

18. *Id.*

19. The Hague Convention, *supra* note 16, art. 1.

20. The 1980 Hague Convention Outline, *supra* note 5, at 1.

preferred.²¹ The Hague Convention also serves the purpose of deterrence. The return order is intended to help prevent child abductions, to return things to the way they were before the abduction, and to prevent parents from benefitting from wrongful removal or retention.²²

The Hague Convention explains that it applies to “any child who was habitually resident in a Contracting State immediately before any breach of custody or access.”²³ Therefore, the Hague Convention applies not only to custody rights, but also to visitation rights.²⁴ Originally, the Hague Convention applied only to children under the age of sixteen.²⁵ This age limit was later raised to eighteen by the 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 (hereinafter “the 1996 Hague Convention”).²⁶ The United States became a signatory of this Convention on October 10, 2010.²⁷ The 1996 Hague Convention also added language to permit a Contracting State to request to hear a case if doing so would be in the child’s best interest or if the Contracting State has a substantial connection with the child.²⁸

21. The Hague Convention, *supra* note 16, art. 12.

22. The 1980 Hague Convention Outline, *supra* note 5, at 1.

23. The Hague Convention, *supra* note 16, art. 4.

24. *Id.* art. 5.

25. *Id.* art. 4.

26. The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, art. 2, Oct. 19, 1996 (entered into force Dec. 1, 2002), <http://www.hcch.net/upload/conventions/txt34en.pdf> [hereinafter The 1996 Hague Convention].

27. *Status Table: 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, http://www.hcch.net/index_en.php?act=conventions.status&cid=70 (last visited Oct. 23, 2013).

28. The 1996 Hague Convention, *supra* note 26, arts. 8, 11.

To enforce its provisions, the Hague Convention requires each Contracting State to select a Central Authority.²⁹ Each of the Central Authorities is to cooperate with not only the Central Authorities of other Contracting States, but also with the authorities within the respective Contracting States to ensure the return of wrongfully retained or removed children and to achieve the goals of the Hague Convention.³⁰ The Hague Convention directs “any person, institution or other body claiming that a child has been removed or retained in breach of custody rights” to apply for the return of the child to the Central Authority of the child’s habitual residence or any other Central Authority that can assist in the child’s return.³¹ However, such an applicant is not restricted from applying directly to the Contracting State’s judicial or administrative authorities whether or not they do so under the Hague Convention.³²

In order to secure the return of the child, the applicant must establish the following requirements under Article 3 of the Hague Convention: (1) the child was a habitual resident of another State; (2) the removal or retention of the child was a breach of custody rights under the laws of the other State; and (3) that when the wrongful removal or retention occurred, the applicant was exercising their custody rights over the child.³³

Even if the applicant can establish these requirements, the Central Authority may still choose to refuse to order the return of the child in certain circumstances.³⁴ Article 12 allows the child to remain in the Contracting State if the application for return of the child was made one year after the wrongful removal or retention and if the child has settled into their new home in the Contracting State.³⁵ Article 13 permits the child to remain in the Contracting State if the applicant was not exercising their

29. The Hague Convention, *supra* note 16, art. 6.

30. *Id.* art. 7.

31. *Id.* art. 29.

32. *Id.* art. 8.

33. The Hague Convention Outline, *supra* note 5, at 2.

34. *Id.*

35. The Hague Convention, *supra* note 16, art. 12.

custody rights at the time of the wrongful removal or retention or “consented to or subsequently acquiesced” to the removal to or retention of the child in the Contracting State.³⁶ Article 13 also permits the child to remain in the Contracting State if there is “grave risk” that the return of the child “would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”³⁷ Furthermore, Article 13 permits the child to remain in the Contracting State if the child has reached “an age and degree of maturity” at which the child’s wishes can be taken into account.³⁸ Lastly, Article 20 permits the child to remain in the Contracting State if returning the child would violate the Contracting State’s “fundamental principles . . . relating to the protection of human rights and fundamental freedoms.”³⁹ However, per Article 18, the Hague Convention does not restrict a judicial or administrative authority from ordering the return of the child.⁴⁰

In the event that the return of the child to the State of habitual residence is ordered, the Hague Convention clearly states that such a return order is not a custody determination.⁴¹ Therefore a return order is unrelated to any underlying child custody issues and does not affect the merits of any child custody case.⁴² If Contracting States are dissatisfied with certain aspects of the Hague Convention, Article 36 permits Contracting States to contract around the requirements of the Hague Convention.⁴³

36. *Id.* art. 13.

37. *Id.*

38. *Id.*

39. *Id.* art. 20.

40. *Id.* art. 18.

41. The 1980 Hague Convention Outline, *supra* note 5, at 1.

42. The Hague Convention, *supra* note 16, art. 19.

43. *Id.* art. 36.

B. The International Child Abduction Remedies

On April 29, 1988 the United States ratified the Hague Convention and became a Contracting State.⁴⁴ On the same day, Congress also passed the International Abduction Remedies Act (“ICARA”) to implement the Hague Convention.⁴⁵ ICARA is based on the following presumptions, which are similar to the presumptions of the Hague Convention: (1) wrongfully removing or retaining children is “harmful to their well-being;” (2) individuals should not be permitted to gain from their wrongful actions; (3) international wrongful removal or retention of children is increasing and international cooperation is necessary to solve the issue; and (4) the Hague Convention is a complete treaty to deal with the problem of international child abduction and retention as well as to deter these wrongful actions.⁴⁶

ICARA gives the President the authority to designate a federal government agency as the Central Authority required by the Hague Convention.⁴⁷ The current central authority is the U.S. Department of Justice, Civil Division, Office of International Judicial Assistance.⁴⁸ ICARA also grants state and federal courts “concurrent original jurisdiction of actions arising under the [Hague] Convention.”⁴⁹ Additionally, ICARA sets the burden of proof for actions arising under the Hague Convention.⁵⁰ For the applicant petitioning for the return of the child or for rights of access, the burden of proof is by a

44. Tracy Bateman Farrell, Annotation, *Construction and Application of Grave Risk of Harm Exception in Hague Convention on the Civil Aspects of International Child Abduction as Implemented in International Child Abduction Remedies Act*, 42 U.S.C.A. § 11603(e)(2)(A), 56 A.L.R. Fed. 2d 163, § 2 (2011).

45. *Id.*

46. International Child Abduction Remedies Act, 42 U.S.C.A. § 11601(a) (1988) [hereinafter ICARA].

47. *Id.* at § 11602(9).

48. HCCH, *Authorities*, Oct. 3, 2013, http://www.hcch.net/index_en.php?act=authorities.details&aid=279.

49. ICARA, *supra* note 46, at § 11603(a).

50. *Id.* at § 11603(e).

preponderance of the evidence.⁵¹ For the individual opposing the petition for the return of the child, there are two different burden of proof standards. If the exception falls under Article 13(b) (the grave risk exception) or Article 20 (the protection of human rights and fundamental freedoms exception) of the Hague Convention, then the burden of proof rises to by clear and convincing evidence.⁵²

Section 11603(g) of ICARA is the “full faith and credit” clause.⁵³ This section explains that “full faith and credit” requires States to respect orders for the return or denial of return.⁵⁴ However, “States” has historically been interpreted to mean U.S. states and not foreign States.⁵⁵ Furthermore, “as a general matter, ‘judgments rendered in a foreign nation are not entitled to the protection of full faith and credit.’”⁵⁶ However, U.S. courts will usually extend comity to foreign decrees.⁵⁷ This deference is limited because the decision to extend comity often requires analysis of the foreign judicial system’s fairness.⁵⁸

C. The Uniform Child Custody Jurisdiction and Enforcement Act

The Uniform Child-Custody Jurisdiction Enforcement Act (“UCCJEA”) was promulgated by the Uniform Law Commissioners (“ULC”), also known as National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 1997.⁵⁹

51. *Id.* at § 11603(e)(1).

52. *Id.* at § 11603(e)(2).

53. *Id.* at § 11603(g).

54. *Id.*

55. *Diorinou v. Mezitis*, 237 F.3d 133, 142 (2d Cir. 2001).

56. *Id.* at 142 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. b (1971)).

57. *Diorinou*, 237 F.3d at 142.

58. *Id.* at 143.

59. Unif. Law Comm’n, *Child Custody Jurisdiction and Enforcement Act Summary*, <http://www.uniformlaws.org/ActSummary.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited Ap. 6, 2013) [hereinafter *Child Custody Jurisdiction Act*]; Unif. Law Comm’n, *About the ULC*, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the>

The purpose of UCCJEA was to replace and to improve the Uniform Child Custody Jurisdiction Act (“UCCJA”), which was promulgated in 1968.⁶⁰ The UCCJA was promulgated to prevent parents from abducting their children and forum shopping to achieve the custody verdict most favorable to them.⁶¹ Although the UCCJA was a step in the right direction, its effectiveness was hindered by several limitations. The UCCJA did not address issues arising if multiple states had jurisdiction nor did the UCCJA establish enforcement procedures.⁶² Additionally, when states passed the UCCJA, most states made modifications to the Act, which then resulted in a lack of uniformity across the various jurisdictions.⁶³

To deal with these problems, UCL promulgated the UCCJEA. As of this writing, the UCCJEA has been adopted by all fifty states, the District of Columbia, the U.S. Virgin Islands, and Guam.⁶⁴ The UCCJEA is divided into two components: jurisdiction, which is discussed in Articles 1 and 2, and enforcement, which is discussed in Article 3.⁶⁵ The UCCJEA applies to custody and visitation cases arising out of “divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence.”⁶⁶ The UCCJEA does not apply to child support or adoption cases.⁶⁷ Specifically, the UCCJEA regulates U.S. courts’ jurisdiction to issue “permanent, temporary, initial, and modification orders” regarding child custody.⁶⁸ Furthermore,

%20ULC (last visited Apr. 6, 2013)[hereinafter About ULC].

60. Child Custody Jurisdiction Act *supra* note 59.

61. Patricia M. Hoff, *The Uniform Child-Custody and Enforcement Act*, OJJP: Juvenile Justice Bulletin, 2 (Dec. 2001), <https://www.ncjrs.gov/pdffiles1/ojdp/189181.pdf> [hereinafter OJJDP Bulletin].

62. *Id.*

63. *Id.*

64. About ULC, *supra* note 59.

65. Uniform Child Custody Jurisdiction and Enforcement Act, WASH. REV. CODE ANN. §§ 26.27.011-121, 201-291 (West 1997).

66. OJJDP Bulletin, *supra* note 61, at 4.

67. *Id.*

68. *Id.* at 5.

Article 105 of the UCCJEA explains that for purposes of the UCCJEA, U.S. courts are to treat a foreign State as a sister state.⁶⁹ Furthermore, the UCCJEA requires that child custody determinations made by foreign States in conformity with the UCCJEA must be recognized and enforced as mandated in Article 3.⁷⁰ However, if the child custody law of the foreign State contradicts the state's fundamental human right principles as laid out in Article 20 of the Hague Convention, then the UCCJEA does not apply.⁷¹

The UCCJEA grants initial jurisdiction in five instances: home state jurisdiction; significant connection jurisdiction; more appropriate forum jurisdiction; vacuum jurisdiction; and temporary emergency jurisdiction.⁷² First, a court will have home state jurisdiction if the court is located in the child's home state or is located in the state that was the child's home state within the six months following the commencement of the child custody proceedings.⁷³ A court will have significant connection jurisdiction if the child does not have a home state or if the home state refuses to exercise jurisdiction.⁷⁴ If both the child's home state and the significant connection state(s) refuse to exercise jurisdiction because another more appropriate forum exists, then that state will have more appropriate forum jurisdiction.⁷⁵ If no court can be found to satisfy home state jurisdiction, significant connection jurisdiction, or more appropriate forum jurisdiction requirements, then an alternate court may step in and assume vacuum jurisdiction.⁷⁶ Lastly, courts may assume temporary emergency jurisdiction if the child was abandoned or if the child, its sibling, or its parent has suffered "or is threatened with

69. Uniform Child Custody Jurisdiction and Enforcement Act §26.27.051(1).

70. *Id.* at § 26.27.051(2).

71. *Id.* at § 26.27.051(3).

72. *Id.* at § 26.27.201(1).

73. OJJDP Bulletin, *supra* note 61, at 5.

74. *Id.*

75. Uniform Child Custody Jurisdiction and Enforcement Act, § 26.27.201(1)(c).

76. *Id.* at § 26.27.201(1)(d).

mistreatment or abuse.”⁷⁷ Courts are permitted to exercise temporary emergency jurisdiction even if proceedings have begun in another state.⁷⁸

Additionally, the orders of a court with temporary emergency jurisdiction may become permanent. If there are no prior custody orders enforceable under the UCCJEA and no proceedings have begun in a court with jurisdiction, then the temporary emergency custody order becomes permanent once the issuing state becomes the child’s home state.⁷⁹ If there is a previous custody order and there is a custody proceeding in a court with jurisdiction, then the temporary emergency custody order remains in effect until the court with jurisdiction issues a custody order within the specified time period.⁸⁰ If there is only a custody proceeding in a court with jurisdiction, then the temporary emergency custody order also remains in effect only until the court with jurisdiction issues a custody order within the specified time period.⁸¹ Unlike the UCCJA, the UCCJEA also includes enforcement provisions and requires state courts to recognize and enforce child-custody determinations made in substantial conformity with the jurisdictional provisions of the Act or made under factual circumstances that meet the jurisdictional standards of the Act.”⁸²

PART II

A. Issues Arising Under the Hague Convention and the UCCJEA

Although the Hague Convention has been very helpful to deal with the issues arising in international child abduction cases involving Hague Convention signatories, the Hague Convention

77. OJJDP Bulletin, *supra* note 61, at 6.

78. *Id.*

79. Uniform Child Custody Jurisdiction and Enforcement Act, § 26.27.231(2).

80. *Id.* at § 26.27.231(3).

81. *Id.*

82. OJJDP Bulletin, *supra* note 61, at 8.

does not provide guidance regarding non-signatories of the Hague Convention. The Hague Convention only applies when the States involved are signatories of the Convention.⁸³ The Hague Convention does not apply if: (1) the child's habitual residence is not a signatory of the Hague Convention; (2) one or both of the parents are citizens of a non-signatory State; or (3) the child is removed or retained in a non-signatory State, no matter if the child previously resided in a signatory State.⁸⁴ In her article, Smita Aiyar suggests that the Hague Convention should be amended to create a uniform approach to apply to situations involving non-signatories of the Hague Convention.⁸⁵

To date, the United States also has not created a uniform approach on how to deal with international child abduction cases that involve non-signatories of the Hague Convention.⁸⁶ As previously explained, in most cases, U.S. courts will treat a foreign state as a sister state when applying the UCCJEA. Therefore, if a foreign state has jurisdiction over an international custody case, U.S. courts will relinquish jurisdiction or direct that the child be returned to its home country.⁸⁷ However, if the U.S. court finds that Section 105(c), the so-called "escape clause," applies, then the U.S. court is not required to return the child to its country of habitual residence. Specifically, the escape clause explains that the UCCJEA does not apply "if the child custody law of a foreign country violates fundamental principles of human rights."⁸⁸ Unfortunately, the section does not explain what the custody laws entail or what would be considered a violation of fundamental principles of human rights.

This can create serious issues when dealing with foreign states that are not signatories to the Hague Convention; however,

83. The Hague Convention, *supra* note 16, art. 1.

84. Aiyar, *supra* note 5, at 290.

85. *Id.* at 282.

86. *Id.* at 281.

87. Uniform Child Custody Jurisdiction and Enforcement Act § 105(c) (1997).

88. *Id.*

Section 105(c) can also create issues if the foreign state is a member to the Hague Convention.⁸⁹ This is because U.S. courts must consider domestic laws in some instances to determine whether or not to issue new custody orders, modify existing orders, or whether to recognize and enforce existing orders of foreign states.⁹⁰ In such cases, U.S. courts will rely on the common law doctrine of comity.⁹¹ However, an exception to the principle of comity exists, which permits courts to ignore the concept if utilizing comity would be contrary to U.S. public policy.⁹²

The language in Section 105(c) is very similar to the language in Article 20 of the Hague Convention. As explained previously in Part I(a), Article 20 permits the child to remain in the Contracting State if returning the child would violate the Contracting State's "fundamental principles . . . relating to the protection of human rights and fundamental freedoms."⁹³ The Article 20 defense has not been used frequently in the United States and even when the defense is raised, it has been rejected by courts except on one occasion.⁹⁴ The Article 20 defense has been utilized infrequently outside of the United States and even more rarely has the defense been successful.⁹⁵

The comment to UCCJEA Section 105(c) explains that the focus should be on the foreign state's family and custody law, not on the legal system as a whole, when determining whether fundamental principles of human rights have been violated.⁹⁶ This can create tensions because the custody laws of foreign states may be influenced by principles that do violate fundamental principles of human rights such as discrimination

89. D. Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM. L. Q. 547, 551-52 (2004).

90. *Id.*

91. See discussion, *infra* Part III(a).

92. Blair, *supra* note 89, at 554.

93. The Hague Convention, *supra* note 15, art. 20.

94. Blair, *supra* note 89, at 564.

95. *Id.* at 565.

96. Uniform Child Custody Jurisdiction and Enforcement Act, § 105(c).

based on gender and restrictions on the freedom to marry.⁹⁷ Therefore, narrow interpretations of Section 105(c) of the UCCJEA can be problematic as the family or custody law itself may not violate fundamental principles of human rights, but the principles creating those laws do violate these fundamental principles of human rights.⁹⁸ An example of where such an issue could arise is the Islamic family law system. This is because some may argue that Shari'a law violates fundamental principles of human rights because Shari'a law discriminates based on gender and religion.⁹⁹

B. Shari'a Custody Law As a Barrier to the Extension of Comity?

Many countries choose not to become signatories of the Hague Convention because they want to retain jurisdiction of child custody cases and do not want to be subjected to a required return of the child to the country of the child's habitual residence.¹⁰⁰ This conflict of international custody disputes involving the Hague Convention signatories and non-signatories is especially prevalent in Islamic countries because U.S. custody laws are very different from Shari'a custody laws.¹⁰¹ At the time of this writing, no foreign states with an Islamic family law system are signatories to the Hague Convention.¹⁰²

“Since the seventh century, ‘Islam has been not just a religion, but a complete code for living, combining the spiritual and the temporal, and seeking to regulate not only the individual's relationship with God, but all human social

97. Blair, *supra* note 89, at 571.

98. *Id.* at 571-72.

99. See discussion, *supra* Part II(b).

100. Thomas Foley, Note, *Extending Comity to Foreign Decrees in International Custody Disputes Between Parents in the United States and Islamic Nations*, 41 FAM. CT. REV. 257, 261 (2003).

101. *Id.*

102. HCCH, *Status Table: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last visited Oct. 23, 2013).

relationships.”¹⁰³ Shari’a law “refers to the historical formulations of Islamic religious law, including a universal system of law and ethics purporting to regulate all aspects of Muslim’s public and private life.”¹⁰⁴ Shari’a law is an integral part of family law in Islamic legal systems and “states that ‘[r]eligious and social values dictate the answers to questions of upbringing, parental authority. . . .’”¹⁰⁵ Although Shari’a law varies in the individual Islamic countries, these fundamental principles are firmly entrenched in the Shari’a law value system.¹⁰⁶

Under Sharia’a law the father has “ultimate legal custody of his children,” however, the mother retains physical custody of the children “‘during their years of dependency,’ which is age seven for boys and age nine for girls.”¹⁰⁷ In addition to the value placed on the gender of the parents, another important facet is religious upbringing.¹⁰⁸ All Islamic sects require the child to be raised Muslim.¹⁰⁹ Shari’a law varies greatly among the Muslim nations; however, to a large extent Shari’a law is the same across all Muslim nations.¹¹⁰ For example, Shari’a law custody determinations are similar in Egypt, Iran, Jordan, Lebanon, Pakistan, Saudi Arabia, the United Arab Emirates, and Yemen because all religious and Shari’a courts require children to be raised Muslim, grant presumptive custody to the mother during the age of dependency, and determine the mother’s fitness to have custody using similar criteria.¹¹¹ For example, even if the mother has custody of the child, many Islamic countries prohibit

103. Foley, *supra* note 100, at 259 (quoting JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 1 (1986)).

104. *Id.* at 260.

105. Aiyar, *supra* note 5, at 291 (quoting Lara Cardin, Comment, *The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-signatory Nations: Getting to Square One*, 20 *HOUSE. J. INT’L. L.* 141, 157 (1996)).

106. Blair, *supra* note 89, at 570.

107. Foley, *supra* note 100, at 260-61.

108. *Id.* at 261.

109. *Id.*

110. *Id.* at 260.

111. *Id.* at 264.

her from “moving any substantial distance from the father without the father’s permission.”¹¹²

Although both U.S. courts and courts of Islamic nations consider what is in the child’s best interest to make custody determinations, these courts make this determination in very different ways. U.S. custody law focuses on the child’s needs and the ability and willingness of the parents to meet the child’s needs.¹¹³ This means considering factors such as: the parents’ wishes; the child’s wishes; the relationship between the parents, the child, siblings, “and other significant persons;” continuity for the child; “the child’s adjustment to home, school, and community;” the child’s “health, safety, and welfare;” as well as the “the mental and physical health of all individuals involved.”¹¹⁴

Islamic custody law on the other hand focuses on Islamic social and religious values to make custody determinations.¹¹⁵ Islamic courts turn to Shari’a law, which is based on Islamic scriptures and teachings, to determine family law cases.¹¹⁶ Shari’a law places utmost importance on the religious upbringing of the child and believes that it is in the child’s best interest to be raised Muslim, while U.S. custody law places little emphasis on the religious upbringing of the child.¹¹⁷ Additionally, under Shari’a law the father has ultimate custody of children, contrasted with the Western idea that fathers and mothers have equal parental rights.¹¹⁸ Therefore, Shari’a is in direct contradiction with ideas of U.S. jurisprudence, which does not place much weight or emphasis on the religious upbringing of the child.¹¹⁹ U.S. custody law and Islam custody law focus on different factors to determine what is in the best interest of the

112. Blair, *supra* note 89, at 571.

113. Foley, *supra* note 100, at 258.

114. *Id.* at 259.

115. *Id.* at 258.

116. *Id.* at 259.

117. Aiyar, *supra* note 5, at 292-93.

118. *Id.*

119. *Id.* at 292.

child, therefore, U.S. custody law and Islamic custody law are often at odds with one another.

These distinct and important differences explain why Islamic countries are resistant to signing the Hague Convention, as the Convention directly contradicts with the Islamic legal systems and religious beliefs. The Hague Convention focuses solely on jurisdiction based on the habitual residence of the child, whereas Shari'a law places utmost importance on the gender of the parents, as well as the religious upbringing of the child.¹²⁰ This presents an enormous conflict between the Hague Convention and Shari'a law. These differences then raise the question whether comity should be extended to court decisions that are based on Shari'a law because Shari'a law arguably violates Article 20 of the Hague Convention. One could argue that because Shari'a law discriminates based on gender and religion by preferring the paternal parent and the Muslim religion, Sharia law violates the principles of fundamental human rights of Article 20 of the Hague Convention.¹²¹ Therefore the UCCJEA does not apply and arguably comity should not be extended to such court decisions.¹²²

PART III

A. Comity

Section 105 of the UCCJEA encourages U.S. courts to practice a concept called "comity."¹²³ Black's Law Dictionary defines comity as "[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving especially mutual recognition of legislative, executive, and

120. *Id.* at 292-93.

121. *Id.*

122. Uniform Child Custody Jurisdiction and Enforcement Act, WASH. REV. CODE ANN § 26.27.051(3) (1997).

123. *Id.* at § 26.27.421.

judicial acts.”¹²⁴ In *Hilton v. Guyot*, the U.S. Supreme Court further explained that

[c]omity in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.¹²⁵

Internationally, states seem to have come to the consensus that foreign custody orders should be enforced and respected to ensure consistency and stability.¹²⁶

A majority of U.S. state and federal courts have recognized foreign decrees even when the foreign state does not reciprocally recognize U.S. orders.¹²⁷ In *Diorinou v. Mezitis* the Second Circuit explained that U.S. courts apply the principle of comity in at least three contexts: (1) if the U.S. court must determine if it has jurisdiction if litigation is pending or available in a foreign State; (2) if the U.S. court must determine if it should enforce a foreign decree; and (3) if the U.S. court must determine if it should respect and enforce the decree of a foreign State.¹²⁸ This gives U.S. courts leeway to determine if they should or should not extend comity to court orders of foreign States.

B. Difficulties in Extending Comity to the Court Orders of Foreign Jurisdictions

As explained previously, Section 105 of the UCCJEA states the U.S. state courts are to treat foreign States as sister states

124. BLACK'S LAW DICTIONARY (9th ed. 2009), available at WestlawNext.

125. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

126. *Foley*, *supra* note 100, at 263.

127. *Id.*

128. *Diorinou v. Mezitis*, 237 F.3d 133, 139 (2d Cir. 2001).

rather than foreign states for purposes of Articles 1 and 2 of the UCCJEA.¹²⁹ Furthermore, Section 105(c) of the UCCJEA states that the UCCJEA does not apply if the child custody laws of the foreign state violate fundamental principles of human rights.¹³⁰ Unfortunately, the UCCJEA does not define or describe what constitutes fundamental principles of human rights.

In regard to non-signatories of the Hague Convention, the comment to Section 105 explains that courts are to consider only the non-signatory state's child custody laws, rather than the non-signatory state's legal system as a whole.¹³¹ The comment does not specifically state which child custody related laws would violate the fundamental principles of human rights, however, the comment to Section 105 does clarify that Section 105(c) should only be utilized in "the most egregious cases."¹³²

C. Extending Comity to Non-Signatories of the Hague Convention

Following the approach set forth in UCCJEA Section 105 and its comments, creates an unequal balance of power in international child custody disputes. If the foreign state involved in the dispute is a non-signatory state, then the U.S. courts will treat the foreign state as though the foreign state were a sister state and order the child to return to the country of its habitual residence regardless of any defenses or exceptions that may exist under the Hague Convention, or the U.S. court will exercise comity and enforce the child custody order of the foreign State.¹³³ This creates an inequality because the parent from the Hague Convention member state will not be permitted to raise Hague Convention defenses or exceptions, which will then grant an advantage to the parent living in the non-signatory State.¹³⁴

129. See discussion, *supra* Part II(a).

130. *Id.*

131. Aiyar, *supra* note 5, at 308.

132. *Id.* at 309.

133. *Id.* at 309-10.

134. *Id.* at 309.

Additionally, the UCCJEA does not differentiate between foreign states. This can create issues when dealing with foreign states that are non-signatories of the Hague Convention because the parent in the non-signatory State has an additional remedy.¹³⁵ For example, if the parent in the non-signatory state filed an application for the return of the child under the Hague Convention and the application is denied, the parent can then turn to the non-signatory state's courts instead.¹³⁶ If the applicant parent filed custody proceedings in the foreign state of which the child was a habitual resident, either before the child was wrongfully removed or retained or within six months of the wrongful removal or retention, then the applicant parent can use Section 105 of the UCCJEA to require the U.S. court to order the return of the child or the enforcement of the existing child custody order of the non-signatory foreign state.¹³⁷ This would defeat the purpose of the Hague Convention because the U.S. court may have found a grave risk or other exception that would bar the return of the child, but as long as the custody laws of the non-signatory state do not violate fundamental principles of human rights, Section 105(c) of the UCCJEA, requires the return of the child.¹³⁸ Thereby, Section 105(c) of the UCCJEA can be utilized to defeat the purpose of the Hague Convention.

The argument then becomes that Section 105(c) needs to be altered to reflect and protect the principles of the Hague Convention. Such a change would help protect children and parents from being removed to a foreign jurisdiction that would constitute a grave risk or if other exceptions to return of the child under the Hague Convention apply.¹³⁹ Although the principle of comity was applied fairly uniformly in the United States, Lexi Maxwell suggests that since September 11, 2001, U.S. courts have grown leery of relinquishing jurisdiction of international child custody cases to non-signatories of the Hague

135. Blair, *supra* note 89, at 579.

136. *Id.*

137. *Id.* at 579-80.

138. *Id.* at 580.

139. *Id.* at 579-81.

Convention.¹⁴⁰ She suggests that although U.S. courts had developed a pattern of keeping jurisdiction of cases that do not fall under the Hague Convention, this trend has increased in recent years.¹⁴¹ This trend reflects U.S. courts' concerns that children will be removed to non-signatory states that are not required to follow U.S. court orders or the Hague Convention requirements, resulting in the courts of the non-signatory State issuing custody orders contrary to the existing U.S. court orders.¹⁴² There is no uniformity in how U.S. courts deal with this issue even when dealing with signatories of the Hague Convention. The traditional approach has been to value comity over the best interest of the child.

PART IV

A. Examples of United States Courts Extending Comity to Foreign Court Orders

Traditionally, U.S. courts have highly respected the decisions of other jurisdictions and usually extended comity. For example, in *Diorinou v. Mezitis*, the Second Circuit held that the Greek courts were entitled to comity.¹⁴³ In a very convoluted set of facts, Nicolas Mezitis, a U.S. citizen, ("Mezitis") and Marina Mezitis Diorinou, a Greek citizen, ("Diorinou") were married in New York where their two children were born and raised.¹⁴⁴ During a visit to Greece with their children, Mezitis and Diorinou, returned to New York separately, but left their children in Greece.¹⁴⁵ Diorinou returned to Greece and reunited with her children.¹⁴⁶ Mezitis then filed for divorce and custody of the children in the New York Supreme Court and Diorinou

140. Maxwell, *supra* note 2, at 121.

141. *Id.*

142. *Id.* at 122.

143. *Diorinou v. Mezitis*, 237 F.3d 133, 135 (2d Cir. 2001).

144. *Id.*

145. *Id.* at 136.

146. *Id.*

filed for temporary custody of the children in the Court of First Instance of Athens.¹⁴⁷ The Court of First Instance of Athens provisionally awards Diorinou custody of the children.¹⁴⁸ Mezitis also filed an ICARA suit in the Southern District of New York, as well as a Hague Convention petition for the return of the children to New York.¹⁴⁹ During this time, Diorinou petitioned the Court of First Instance of Athens for permanent custody; however, the court postponed on Diorinou's petition until a final judgment was entered on the Greek Hague Convention petition.¹⁵⁰ After the dismissal of the Greek Hague Convention petition was affirmed by the Court of Appeals of Thessaloniki, the Court of First Instance of Athens awarded Diorinou custody of the children.¹⁵¹

After losing his appeal of this decision, Mezitis removed the children back to New York without Diorinou's permission and Diorinou then also filed an ICARA lawsuit.¹⁵² The Greek trial court found that Diorinou's retention of the children in Greece was not wrongful and this decision was affirmed by the Greek appellate and supreme court.¹⁵³ The Second Circuit explained that this decision was entitled to a lot of deference, but the degree of deference had to be determined by considering the determinations made by the Greek courts.¹⁵⁴ Although the Second Circuit questioned several of the Greek courts' determinations and was concerned by conflicting custody orders from New York and Greek courts, the Second Circuit decided that deference and extension of comity was appropriate.¹⁵⁵

Similarly, in *Hosain v. Malik*, the Court of Special Appeals in Maryland affirmed the trial court decision to extend comity to

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 136-37.

151. *Id.* at 137.

152. *Id.* at 136-38.

153. *Id.* at 143.

154. *Id.*

155. *Id.* at 145-46.

Pakistani court orders.¹⁵⁶ *Hosain* (name change due to the mother's subsequent remarriage) followed *Malik v. Malik*.¹⁵⁷ In *Malik*, the child was born and raised in Pakistan to parents of Pakistani citizenship.¹⁵⁸ After some time, the mother and child moved out of the couple's home and the father subsequently sued for custody.¹⁵⁹

Upon learning of the custody suit, the mother took the child and moved to the United States without the father's consent.¹⁶⁰ The father was subsequently awarded custody by the Pakistani court and he managed to locate the mother and child in Maryland and a lawsuit ensued.¹⁶¹ The Maryland trial court determined that the Pakistani court was not entitled to comity and awarded temporary custody to the mother, which the father then appealed.¹⁶² The Court of Special Appeals of Maryland reversed and remanded the case, holding that the trial court was not required to enforce an existing Pakistani child custody order, only if (1) the Pakistani court did not apply the best interest of the child standard or (2) the Pakistani child custody order was issued pursuant to substantive, evidentiary, or procedural law that was so contrary to Maryland public policy that it undermines confidence in the Pakistani child custody order.¹⁶³

On remand following the *Malik* decision, the trial court found that the Pakistani court did apply the best interest of the child standard and that comity should be extended to the Pakistani court orders.¹⁶⁴ The Court of Special Appeals of Maryland affirmed, adding that in applying the best interest of the child standard, the Pakistani court was entitled to apply Pakistani custom even though such custom included paternal preference.¹⁶⁵

156. *Hosain v. Malik*, 671 A.2d 988, 990 (Md. Ct. Spec. App. 1996).

157. *Id.*

158. *Malik v. Malik*, 638 A.2d 1184, 1185 (Md. Ct. Spec. App. 1994).

159. *Id.*

160. *Id.*

161. *Id.* at 1185-86.

162. *Id.* at 1186.

163. *Id.* at 1191.

164. *Hosain v. Malik*, 671 A.2d 988, 990 (Md. Ct. Spec. App. 1996).

165. *Id.* at 1003-04 (citing *Malik*, 638 A.2d at 1184).

“If the only difference between the custody laws of Maryland and Pakistan is that Pakistani courts apply a paternal preference the way Maryland once applied the maternal preference, the Pakistani order is entitled to comity.”¹⁶⁶ Furthermore, although the court seemed to disagree with Pakistani order, stating “were we standing in the shoes of the Pakistani judge, we might have given greater or lesser weight to the various factors at issue, thereby reaching a different conclusion,” the court still extended comity to the Pakistani court order.¹⁶⁷

In both of these cases, the U.S. courts decided to defer to the foreign court to determine what was in the child’s best interest. In *Diorinou*, the court barely mentioned the child’s best interest and simply extended comity to the Greek courts.¹⁶⁸ In *Malik*, the Maryland court stated that the child’s best interest was at the heart of the case, but still the court chose to defer to the Pakistani court and extend comity, even though the Maryland court seemed to disagree with some of the determinations made by the Pakistani court.¹⁶⁹ The Maryland court could have made the argument that because the Pakistani court gave parental preference, the court order was discriminatory based on gender and therefore contrary to the public policy of the United States, which would then permit the Maryland court to refuse to extend comity, yet the court declined to do so and chose to extend comity to the Pakistani court.

B. Examples of United States Courts Declining to Extend Comity to Foreign Courts

Although the practice of U.S. courts seemed to be to extend comity to foreign jurisdictions, there has been a trend to place the child’s best interest over the legal concept of comity.¹⁷⁰ In *Van Driessche v. Ohio-Eseyeoboh*, the United States District

166. Hosain, 671 A.2d at 1004 (quoting *Malik*, 638 A.2d at 1184).

167. *Id.* at 1003.

168. *Diorinou v. Mezitis*, 237 F.3d 133, 145-46 (2d Cir. 2001).

169. *Hosain*, 671 A.2d at 1002-03.

170. Aiyar, *supra* note 5, at 312.

Court for the Southern District of Texas determined that the full faith and credit clause of the ICARA did not apply and that comity should not be extended to the Belgian court orders. In *Van Driessche*, Ohio Eseyeoboh, the mother of the child and a Nigerian citizen, met the child's father, Van Driessche, a Belgian citizen, in Nigeria.¹⁷¹ The couple agreed that the child should be born in the United States and after the birth of the child, the family moved back to Belgium.¹⁷² However, the marriage deteriorated and Ohio Eseyeoboh moved back to the United States and a Belgian court determined that Van Driessche had parental rights and awarded him "exclusive parental authority."¹⁷³

However, in the custody suit that followed in Texas, the district court concluded that it would not grant comity because there were no other outstanding Hague petitions and because the full faith and credit clause did not apply because Belgium is a foreign state rather than a domestic state.¹⁷⁴ The court then ignored the Belgian court order and determined that (1) Van Driessche had no case because his Hague petition for the return of his daughter was untimely, (2) he was unable to overcome Eseyeoboh's defenses for wrongful removal, and (3) his daughter was now settled in the United States.¹⁷⁵ Therefore the court found it to be in the child's best interest to remain in the United States and denied Van Driessche's Hague petition despite the existing Belgian custody order.¹⁷⁶

In *Innes v. Carrascosa*, the Superior Court of New Jersey declined to extend comity to a Spanish custody order.¹⁷⁷ Innes, a U.S. citizen and father of the child, married Carrascosa, a Spanish citizen and mother of the child, in March 1999 and the following year, their daughter, Victoria, was born in the United

171. *Driessche v. Ohio-Esezeoboh*, 466 F.Supp. 2d 828, 834 (2006).

172. *Id.* at 834-35.

173. *Id.* at 837-38.

174. *Id.* at 843.

175. *Id.* at 854.

176. *Id.* at 855.

177. *Innes v. Carrascosa*, 918 A.2d 686, 710 (N.J. Super. Ct. App. Div. 2007).

States where the family resided.¹⁷⁸ Four years later, Carrascosa and Innes separated and in 2005 Carrascosa took Victoria to Spain in violation of Innes and Carrascosa's parenting agreement.¹⁷⁹ A whirlwind of custody and divorce claims followed, resulting in Carrascosa's imprisonment in a New Jersey jail and Spanish courts finding that Carrascosa had not wrongfully removed Victoria to Spain, thereby implicitly awarding Carrascosa temporary custody of Victoria.¹⁸⁰ The Superior Court of New Jersey refused to extend comity to the Spanish court's decision because the decision was made in violation of New Jersey law and the Hague Convention.¹⁸¹ Specifically, the Hague Convention required New Jersey law to be applied as New Jersey was Victoria's habitual residence and the Spanish courts applied Spanish law instead.¹⁸² Furthermore, the Spanish court's decision contravened New Jersey public policy because New Jersey's public policy is that it is in the best interests of the child for both parents to share custody absent a finding that doing so would not be in the child's best interest.¹⁸³ Therefore, the court affirmed the decision of the trial court and declined to extend comity and ordered the return of Victoria to the United States.¹⁸⁴

In these two cases, the U.S. courts did not defer to foreign courts to make the determination of the child's best interest. Instead the courts chose to make the best interest determination themselves and declined to extend comity to the foreign courts.

C. The United Kingdom's Approach to the Extension of Comity

The United Kingdom has taken the approach of valuing the best interest of the child above the principle of conformity.

178. *Id.* at 461-62.

179. *Id.* at 462-63.

180. *Id.* at 463-80.

181. *Id.* at 489-90.

182. *Id.* at 490.

183. *Id.* at 491.

184. *Id.* at 491, 501.

Similar to the U.S., the U.K. traditionally utilized international comity in international custody cases if non-signatories of the Hague Convention were involved.¹⁸⁵ However, in 2005, the U.K. House of Lords in the case of *Re J.* decided that when British courts have jurisdiction over an international custody case involving non-signatories to the Hague Convention, the “welfare principles,” rather than the Hague Convention will apply.¹⁸⁶ Therefore, the protections of the Hague Convention do not automatically apply to non-signatories to the Hague Convention.

Under the idea of the welfare principles, the U.K. courts have decided that although conformity and observance of foreign court orders are important, they do not outrank the best interests of the child involved.¹⁸⁷ Additionally, the *Re J.* court pointed out that by failing to sign the Hague Convention, non-signatories are not entitled to automatically receive the benefits of the Hague Convention.¹⁸⁸ Therefore, the best interest of the child is the most important concern in cases involving non-signatory States. The *in Re J.* court added that “[i]f an abducted child was returned to his habitual residence, it was because ‘it is in his best interests to do so, not because the welfare principle has been superseded by some other consideration.’”¹⁸⁹ The House of Lords is the court of highest jurisdiction in the U.K. and therefore this ruling means that U.K. courts are prohibited from automatically applying the Hague Convention to cases involving non-signatory states.¹⁹⁰ Instead, the U.K. courts are to place the most weight on the child’s best interests and apply “the welfare principle.”¹⁹¹

185. Aiyar, *supra* note 5, at 300-02.

186. *Id.* at 306.

187. *Id.* at 302-03.

188. *Id.* at 305-06.

189. *Id.* at 306.

190. *Id.*

191. *Id.*

CONCLUSION

In recent years the ease of travel has increased international travel and bi-cultural marriages. Unfortunately, these marriages can also result in parents disagreeing about where to raise their children and some parents take the drastic measure of wrongfully removing or retaining their children in foreign countries. The Hague Convention was put into place to help deal with the complicated issue of international child abduction. Specifically, the purpose of the Hague Convention is to “restore [the] pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court.”¹⁹² Although the Hague Convention has helped create a process for returning children to their habitual residence, the Hague Convention does not discuss how this process is affected by the involvement of non-signatories of the Hague Convention.

Thus far, the United States has not created a uniform approach on whether to extend comity to the decisions of foreign courts, especially those that are non-signatories of the Hague Convention. Although the prior trend seemed to be to respect decisions of foreign States, thereby warranting an extension of comity, many U.S. courts are choosing to determine what is in the best interest of the child rather than simply extending comity to foreign States. This applies not only to non-signatories, but also to signatories of the Hague Convention. However, there is still no uniformity in the application of these trends. Therefore, it is important for the U.S. legislature and the U.S. courts to work together to create uniformity in such decisions and to prevent unjust results in international child custody cases.

One approach is to encourage the U.S. legislature to rewrite Section 105(c) to make the section more similar to the Hague Convention.¹⁹³ Doing so would help ensure domestic and international uniformity, as well as give U.S. courts more factors to consider when rendering decisions in international child custody and Hague Convention cases. Although revising

192. *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 (6th Cir. 1996).

193. *Blair*, *supra* note 89, at 578-79.

UCCJEA Section 105(c) to be similar or the same as the Hague Convention would solve some of the issues created by Section 105(c), different issues could arise. One of these concerns is that U.S. courts would begin commandeering child custody cases or refuse to issue a return order even if it is not in the child's best interest to do so.¹⁹⁴

Alternatively, the United States could also utilize a principle similar to the one employed in the United Kingdom to help ensure uniformity. The United Kingdom utilizes the welfare principles and similarly, the United States could create a set of factors for U.S. courts to consider to determine what is in the best interest of the child before determining whether or not comity should be extended to court orders of foreign States. Although the risk still exists that U.S. courts may try to retain as many international child custody cases as possible, having a set of factors in place would hold U.S. courts accountable and help prevent unnecessary retention of international child custody cases.

Despite the importance of respecting foreign decrees, it is important not to lose sight of the most important factor in international child custody cases – the welfare of the child involved. The decisions made by courts in such cases will have a lasting and powerful impact on the child and therefore the child's best interest should take precedence over any other considerations.

194. Aiyar, *supra* note 5, at 317-18.

