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International Application of the UCCJEA: Scruntinizing the Escape Clause

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I. Introduction

Should a custody decree from Qatar be entitled to the same treatment by United States courts as a custody decree from Kansas? Should "extended home state status" confer prioritized jurisdiction on the courts of Somalia to the same extent that such status would give priority to the courts of South Dakota? These are the questions that faced the drafters of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) when they debated the language of Section 105, which regulates the international application of the Act. These same questions now confront the courts that must apply that Act in international custody disputes.

In most situations, Section 105 would answer these questions in the affirmative. Whether making determinations regarding their own authority to exercise jurisdiction or deciding issues of recognition and enforcement, in the vast majority of cases U.S. courts are directed by Section 105 to treat all foreign nations as sister states when applying the UCCJEA's stringent standards. This approach promotes predictability and comity concerns, and in most cases in which it has been applied thus far, it has worked well. Strict standards reduce the incidence of child-snatching and international

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forum shopping, and foster stability for children caught in the strife of a transnational custody dispute. Moreover, affording foreign orders the same treatment guaranteed to domestic orders enhances the likelihood of reciprocal recognition and enforcement of U.S. orders by foreign courts, promotes respect for foreign cultures, and reduces the opportunity for ethnocentrism in our courts.

The drafters of Section 105 recognized, however, that there might be circumstances under which equivalent treatment would not be warranted. The Section therefore contains an escape clause, providing that the Act need not be applied if the "child custody law of the foreign country violates fundamental principles of human rights." This article suggests that courts must not be overly restrictive in their interpretation of this "escape clause," because the absence of any viable ground for exception could have troubling consequences in cases involving domestic violence and child abuse. U.S. courts contemplating a deferral of jurisdiction to a foreign court or enforcement of a foreign order must not be deprived of the flexibility necessary to protect the human rights of victims of domestic violence and child abuse, nor should judges attempting to protect such victims be forced to misapply the jurisdictional standards to achieve that end, thereby creating precedent that undermines the uniformity necessary for domestic application of the UCCJEA. Moreover, the UCCJEA was drafted to complement the Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention),[1] and must be interpreted in a manner that does not circumvent the protections afforded in that treaty.

Part Two of this article will survey the various sources of law in U.S. courts that impact choice of forum, recognition, and enforcement in international custody disputes. This section begins with a brief explanation of the Hague Abduction Convention, for readers unfamiliar with the history and structure of this important treaty, and explains the separate roles played by the Convention and U.S. jurisdictional statutes in transnational custody actions in U.S. courts. Part Two next explores the application of the common law doctrine of comity and the Uniform Child Custody Jurisdiction Act (UCCJA), predecessor to the UCCJEA, in international custody proceedings. This overview provides important insight regarding the legal backdrop confronting the drafters of the UCCJEA, but also provides additional foundation for the arguments in Part Four favoring an interpretation of Section 105 that can provide flexibility in compelling circumstances. Part Two concludes with a brief examination of the history of the UCCJEA and its current legislative status.

1. Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, Hague Conf. Priv. Int'l L. Collection of Conventions (1951-1996) at 265.

Part Three will focus specifically on UCCJEA Section 105, which controls the international application of the Act. Following examination of the language and legislative history of Section 105, Part Three presents three aspects of the provision that could be interpreted expansively or restrictively.

Part Four explores the arguments for expansive interpretation of the "escape clause," in those circumstances when to do otherwise would create a credible risk of harm to a parent or child involved in the dispute or violate other important fundamental rights of the child or a disputant. In addition to discussing recent cases that suggest contexts in which such an interpretation might be necessary, Part Four will examine scenarios in which the UCCJEA could otherwise undermine defenses in the Hague Abduction Convention, as well as provisions of that Convention that support a more expansive interpretation in compelling circumstances.

II. The Legal Landscape for Transnational Custody Disputes in U.S. Courts

The significance and complexity of Section 105 of the UCCJEA can best be appreciated only after examining the broader scope of treaty obligations and domestic law that predated the development of the Act, and influenced its formulation.

A. The Hague Abduction Convention: What It Does and Does Not Do

The United States has been a party to the Convention on the Civil Aspects of Child Abduction since 1988.[2] Those who have not yet engaged in international practice might assume that this treaty alone resolves jurisdiction and enforcement issues for most international custody disputes that find their way into U.S. courts. Such is not the case. The primary function of the Hague Abduction Convention is to provide a process through which a left-behind parent or other legal custodian may seek the prompt return of a child who has been wrongfully removed to or retained in another country.[3] Convention procedures can often facilitate a voluntary return of the child, and also provide a process to secure an order of return from an administrative or judicial tribunal in the country where the child is located. In the United States, a proceeding seeking an order of return under the

2. The Hague Abduction Convention entered into force for the United States on July 1, 1988. Implementing legislation for the Convention is the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 *et seq.* (2002).

3. *See* Hague Abduction Convention, *supra* note 1, at art.1.

Convention may be adjudicated in either a state or a federal court, in "the place where the child is located at the time the petition is filed."[4]

A petitioner seeking an order of return must establish that (1) the child has been wrongfully removed from or retained outside of the country of the child's habitual residence,[5] (2) in breach of the petitioner's rights of custody, and (3) the petitioner was exercising those rights at the time of removal.[6] The petitioner's rights of custody need not be created by a prior order, but can also arise by operation of law in the child's country of habitual residence, and would include the rights of parental authority and obligation typically attributed to both parents in most countries prior to the institution of any court or administrative custody proceedings.[7] Even if the petitioner establishes the grounds for an order of return, the order may still be denied if the respondent can prove any of the following defenses:

(1) the existence of a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;[8]
(2) the child objects to return and is of sufficient age and maturity to appropriately consider the objection;[9]
(3) the petitioner was not actually exercising custody rights at the time of removal or retention, or had consented or subsequently acquiesced to the removal or retention;[10]
(4) more than a year has elapsed from the date of the wrongful removal or retention until the commencement of the judicial proceeding seeking an order of return, and the child is now settled in the new environment;[11] or
(5) the return would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms (the Article 20 defense).[12]

4. ICARA, 42 U.S.C. § 11603(a) (2002). Petitions filed in state courts may, of course, be removed to federal court, if the respondent files a timely notice of removal. *See, e.g.,* Gonzalez v. Gutierrez, 311 F.3d 942, 947 (9th Cir. 2002).

5. The "habitual residence" of a child is not determined with reference to the child's nationality, legal domicile, or a specific duration or time frame, but rather is regarded as a factual determination of the place where the child is normally resident, apart from a temporary absence, with a "settled purpose." *See, e.g.,* Silverman v. Silverman, 338 F.3d 886, 898 (8th Cir. 2003); Mozes v. Mozes, 239 F.3d 1067, 1070-74 (9th Cir. 2001). Because the child's residence is to some extent dependent upon the parents' intent, determinations regarding a child's habitual residence can at times be complex when the parents do not share the same views regarding a child's change of location. *Id.*

6. Hague Abduction Convention, *supra* note 1, at art. 3.

7. *E.g.,* Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000) (father of out-of-wedlock child had rights of custody under Mexican doctrine of "patria potestas"); Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996) (removal of child by mother from Germany, where the family had been living, violated father's custody rights under German law giving both parents equal de jure custody of the child).

8. Hague Abduction Convention, *supra* note 1, at art. 13(b).

9. *Id.* at art. 13.

10. *Id.* at art. 13(a).

11. *Id.* at art. 12.

12. *Id.* at art. 20.

In the United States, the grave risk of harm and Article 20 defenses must be established by clear and convincing evidence.[13]

It is certainly true that a successful application to a U.S. court seeking a return order under the Hague Convention will often circumvent the need for U.S. courts to determine related issues regarding jurisdiction and enforcement under other domestic law, such as the UCCJEA, that might otherwise arise. This is because Article 16 of the Hague Abduction Convention prohibits a nation that has received notice of a wrongful removal or retention from deciding the merits of a custody dispute until such time as its courts have decided that the child is not required to be returned under the Convention. When a child is returned to the child's country of habitual residence following successful Convention proceedings, custody is typically litigated in that nation and issues of jurisdiction or enforcement thereafter are not frequently contested in U.S. courts.

Nevertheless, many custody disputes in U.S. courts that implicate foreign courts or orders are not resolved in this manner. Most often this is because the Hague Abduction Convention is not in effect between the United States and the other nation involved in the particular custody dispute. As of June 2004, only seventy-four countries, fewer than half the nations of the world, were parties to the Convention.[14] Moreover, as of June 2004, the Convention had only entered into force between the United States and fifty-three of those nations.[15] This is because contracting nations to the Convention are not required to accept the accession of nations that are not members of the Hague Conference,[16] and the United States has not yet accepted the accession of many nations that are currently parties to the Convention.

Even when custody proceedings do involve nations for which the Hague Abduction Convention is in force with the United States, there are still many situations in which U.S. courts must look to domestic law to deter-

13. ICARA, 42 U.S.C. § 11603(e) (2002).

14. *See* Hague Conference on Private International Law, *Status Sheet Convention #28, at* http://www.hcch.net/e/status/abdshte.html for a list of parties to the Hague Abduction Convention that is updated daily.

15. *See* U.S. Dep't of State, *Hague Convention of 25 October, 1980, on the Civil Aspects of International Child Abduction, Party Countries and Effective Dates with United States, at* http://www.travel.state.gov/hague_list.html, which is periodically updated.

16. The Hague Conference on Private International Law is an intergovernmental organization whose primary purpose is to negotiate and draft multilateral conventions in a variety of fields. The Hague Abduction Convention is one of over thirty conventions drafted and adopted under the auspices of the Hague Conference. The United States is one of over sixty nations that are currently members of the Hague Conference. Article 38 of the Hague Abduction Convention permits nations that are not members of the Hague Conference to become parties to the Convention by accession. However, the accession is effective only between the acceding state and other contracting states that have formally declared their acceptance of the accession.

mine whether they have authority to issue an original or modified custody or visitation order, or whether they must recognize and enforce an order issued by the tribunals of another country. For example, following rejection of an application for a return order (because the country to which return was requested was not the child's habitual residence, the removal or retention was not wrongful, or one of the defenses was applicable), either the same or a different U.S. court may thereafter need to determine if it has jurisdiction to issue or modify a custody order, if it must defer to proceedings pending in another nation, or if it must enforce another nation's order.[17] When a child has been removed from the United States, a left-behind parent might ask a U.S. court for an initial or modified custody order, while a Hague proceeding is pending in the nation to which the child has been taken, after that nation refuses to return the child, or after the child has been returned to the United States through a Hague proceeding.[18] Sometimes a U.S. court is asked to adjudicate custody or enforce a foreign order concerning a child who has been brought from another Hague nation to the United States, when no Hague proceeding has been filed in the United States, either because the removal was not contested or because the left-behind parent did not seek a return order under the Convention.[19] In some cases, U.S. courts have adjudicated a Convention application and issues of jurisdiction or enforcement under domestic law simultaneously,[20] or utilized

17. *See, e.g.*, Gonzalez v. Gutierrez, No. D040063, 2003 WL 22236051 (Cal. Ct. App. Sept. 30, 2003) (UCCJEA action regarding enforcement and modification of visitation order following unsuccessful Hague petition for return in federal court); Appel v. Appel (*In re* C.A.M.A.), 103 Wash. App. 1032 (2000) (court may exercise jurisdiction under UCCJA following determination that retention of child in Washington was not wrongful under the Hague Abduction Convention).

18. *See, e.g.*, Stock v. Stock, 677 So. 2d 1341 (Fla. Dist. Ct. App. 1996) (finding that Florida court must apply simultaneous proceedings rule after Swiss court denied father's Hague petition and custody proceedings were pending in both nations); Arnold v. Harari, 772 N.Y.S.2d 727 (App. Div. 2004) (jurisdiction under UCCJEA deemed proper in proceeding filed after children were voluntarily returned following a year's absence in Israel, considered to be "temporary" by the court, and adjudicated after children were again returned from Israel in response to a Hague petition); Johnson v. Johnson, 493 S.E.2d 668 (Va. Ct. App. 1997) (father sought modification of Virginia decree after unsuccessfully pursuing Hague proceeding in Sweden).

19. *See, e.g.*, J.T. v. A.C., 2004 WL 1125191 (Ala. Ct. App. May 21, 2004) (Alabama court lacked jurisdiction under the UCCJEA to modify Canadian judgment, in proceeding filed by Canadian father); Zenide v. Superior Ct., 27 Cal. Rptr. 2d 703 (Ct. App. 1994) (court must decline to enforce Texas order under UCCJA, because Texas court had no jurisdiction to modify French order); Atchison v. Atchison, 664 N.W.2d 249 (Mich. Ct. App. 2003) (Michigan court had no jurisdiction under the UCCJEA to modify Canadian order, after child moved to Michigan by agreement); Dincer v. Dincer, 701 A.2d 210 (Pa. 1998) (no initial jurisdiction under the UCCJA because Belgium was the "home state").

20. *In re* Marriage of Jeffers, 992 P.2d 686 (Colo. Ct. App. 1999) (child was returned under the Convention and Colorado court declined to exercise jurisdiction under the UCCJA); *In re* Marriage of Henches, 103 Wash. App. 1019 (2000) (after both parents filed Convention applications and custody actions, court found father's removal wrongful, mother's removal not

the UCCJEA in conjunction with affording relief under the Convention.[21]

Thus, while the Hague Abduction Convention does provide an important remedy to left-behind parents in international disputes involving the wrongful removal or retention of children, it has not displaced the need for additional jurisdictional and enforcement regulation.[22] Aside from the narrow stay provisions of Article 16, the Hague Abduction Convention does not even address issues of jurisdiction in transnational custody matters, and its enforcement remedies are incomplete.[23] To fill this gap, two conventions produced by the Hague Conference specifically address jurisdiction and enforcement of custody orders: the Convention of October 5, 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors (hereinafter the 1961 Convention)[24] and the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children[25] (hereinafter the 1996 Hague

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wrongful, ordered return of children to Switzerland, and held Washington court should defer to Swiss court under the UCCJA).

21. *See* Morgan v. Morgan, 289 F.Supp.2d 1067 (N.D. Iowa 2003) (Pending resolution of a Hague petition, a federal court granted temporary injunction forbidding removal of the child from the court's jurisdiction, relying upon ICARA's provision in 42 U.S.C. § 11604 permitting measures to prevent removal permitted by state law, and UCCJEA provisions permitting a court to order a party to appear with a child before the court).

22. *See* Robert G. Spector, *International Child Custody Jurisdiction and the Uniform Child Custody Jurisdiction and Enforcement Act*, 33 N.Y.U. INT'L L. & POL'Y J. 251, 251(2000). *See also* Galante v. Summerfield, No. A100555, 2003 WL 22719322 (Cal. Ct. App. Nov. 14, 2003) ("Hague Convention has nothing to do with the merits of a custody dispute"); Edwards v. Edwards, 563 S.E. 2d 888, 894 (Ga. Ct. App. 2002) (Hague Convention governs return of children and "does not purport to resolve custody conflicts").

23. The primary remedy under the Hague Abduction Convention, an order of return, will, if awarded, ensure that the child is brought back to the child's country of habitual residence, but it is then left to the courts of that nation to take any further enforcement steps that might be needed to effectuate the terms of an existing custody decree. The Hague Abduction Convention also contains provisions in Article 21 that require contracting nations to remove, as far as possible, all obstacles to the exercise of rights of access (visitation), but does not specifically require that a return order be entered to enforce access rights. In the United States, federal courts have determined that they do not have subject matter jurisdiction over claims brought under the Convention seeking rights of access. *See, e.g.*, Teijeiro Fernandez v. Yeager, 121 F.Supp.2d 1118 (W.D. Mich. 2000); Bromley v. Bromley, 30 F.Supp.2d 857 (E.D. Pa. 1998).

24. Oct. 5, 1961, 1969 U.N.T.S. 145. As of June 2004, fourteen nations were parties to this convention. Hague Conference on Private International Law, Full Status Report Convention #10, *at* http://www.hcch.net/e/status/stat10e.html. Although it has attracted new parties as recently as 2001, the 1961 Convention has been criticized for its broad bases of jurisdiction and exceptions to recognition. Dissatisfaction with this Convention motivated efforts to create a revised jurisdiction and enforcement convention, which culminated in the drafting of the 1996 Convention. Linda Silberman, *The 1996 Hague Convention on the Protection of Children: Should the United States Join?*, 34 FAM. L.Q. 239, 243-44 (2000).

25. Oct. 19, 1996, 35 I.L.M. 1391, Hague Conf. Priv. Int'l L. Collection of Conventions (1951-1996) at 357. As of June 2004, nine nations were parties to the 1996 Hague Protection

Protection Convention). The 1996 Hague Protection Convention was designed to replace the earlier 1961 Convention, and to work in harmony with the Hague Abduction Convention. The United States is not a party to either the 1961 Convention or the 1996 Hague Protection Convention, however. Therefore, U.S. courts must look to domestic law to resolve the jurisdiction and enforcement issues that are not addressed by the Hague Abduction Convention.

B. Comity and Its Public Policy Exception

For over a century, U.S. courts have recognized and enforced foreign judgments under the common law doctrine of comity. Comity has been described as "neither a matter of absolute obligation . . . nor of mere courtesy and good will," but rather as "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."[26] The doctrine of comity encompasses not only the recognition and enforcement of foreign judgments, but is also used as a basis to consider whether to proceed with litigation properly within the jurisdiction of U.S. courts, or to defer to a foreign tribunal in which litigation is pending or available.[27] U.S. courts have applied the doctrine in both contexts in international custody proceedings.[28]

A long-recognized exception to the doctrine, however, is that comity will not be afforded when it would be contrary to the strong public policy of the forum.[29] Applying this exception in the context of custody proceedings, a Maryland intermediate appellate court in *Malik v. Malik*[30] held that under principles of comity, the court must enforce a Pakistani custody order unless the Pakistani court (1) either did not apply the best interest of the child standard, or (2) arrived at its decision applying a law (whether substantive, evidentiary, or procedural) so contrary to Maryland public policy as to undermine confidence in the outcome of the Pakistani trial.[31]

Convention, which entered into force on January 1, 2002. Hague Conference of International Law, Full Status Report Convention #34, *at* http://www.hcch.net/e/status/ stat34e.html.

26. *E.g.*, Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (1987).

27. Diorinou v. Mezitis, 237 F.3d 133, 139-40 (2d Cir. 2001).

28. *E.g.*, Hosain v. Malik, 671 A.2d 988 (Md. Ct. Spec. App. 1996) (enforcement of foreign order); Ivaldi v. Ivaldi, 672 A.2d 1226 (N.J. Super. Ct. App. Div. 1996), *rev'd* 685 A.2d 1319 (N.J. 1996) (intermediate court deferred to foreign court on grounds of comity).

29. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971) ("No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum").

30. 638 A.2d 1184 (Md. Ct. Spec. App. 1994).

31. *Id.* at 1190-91.

Relying upon *Malik,* a Washington intermediate appellate court in *Noordin v. Abdulla (In re Custody of R)*[32] similarly concluded that even if a foreign court had jurisdiction to enter a custody decree, the Washington court could deny enforcement if it determined that the foreign proceedings were conducted in a manner contrary to Washington state law and public policy, which favored custody decisions based upon the "best interests of the child." A decade earlier a Florida intermediate appellate court, in *Al-Fassi v. Al-Fassi,*[33] also concluded that comity did not require recognition of a Bahamian custody decree, finding the Bahamian decree offensive to public policy because the Bahamian court had failed to consider several of the factors that Florida courts are required by statute to consider in reaching a best-interest determination.[34]

Malik and *Noordin* could be read to suggest that even if a state's jurisdictional statute mandates enforcement of a foreign decree, the public policy exception to the doctrine of comity would permit a state court to deny enforcement. Neither case squarely so held.[35] In fact, such a proposition would be extremely questionable, as in most states, when there is a direct conflict between a statute and common law, the statute controls.[36] *Al-Fassi* clearly does not support a conclusion that comity could trump a statutory directive, for in that case the Florida court had first determined

32. 947 P.2d 745, 759-62 (Wash. Ct. App. 1997).

33. 433 So. 2d 664 (Fla. Dist. Ct. App. 1983).

34. *Id.* at 668. Specifically, the court found that the Bahamian court had not considered: "(1) [the] length of time the children lived in a stable environment and the desirability of maintaining continuity; (2) education of the children; (3) psychological stability of the parents based on competent evidence; and (4) physical health of the parents." In addition to determining that comity did not require recognition, the court also determined that the UCCJA did not mandate recognition of the Bahamian decree, and that the UCCJA permitted Florida to modify the decree because the Bahamian court did not have subject matter jurisdiction or jurisdiction over the parties in accordance with UCCJA standards.

35. Though language in each case might suggest this proposition, the context in which the exception arose does not support it. In *Malik,* the court did not explicitly treat the public policy exception to the doctrine of comity as an exception to the enforcement requirements of the UCCJA, because the court's discussion of the UCCJA appears to have misconstrued language in § 8(b) to permit the court to deny enforcement in order to serve the child's interests. Malik, 638 A.2d at 1190-91. Moreover, on remand, the trial court in fact did enforce the Pakistani decree, finding no strong public policy warranted denial of comity. That decision was subsequently upheld in Hosain v. Malik, 671 A.2d 988 (Md. St. Spec. App. 1996). In *Noordin* as well the court did not specifically find that, absent the public policy exception to comity, the UCCJA would in fact mandate enforcement in that particular case. Instead, the court interpreted Washington's version of its UCCJA to permit consideration of the foreign court's substantive law. In addition, jurisdictional deficiencies in the foreign court that issued the order rendered the validity of that particular order questionable on separate grounds. *Noordin,* 947 P.2d at 758-62.

36. *E.g.,* McCabe Petroleum Corp. v. Easement & Right-of-Way Across Township, 87 P.3d 479, 484 (Mont. 2004); Lavin v. Jordan, 16 S.W.3d 362, 369 (Tenn. 2000); Jenkins v. Percival, 962 P.2d 796, 802 (Utah 1998).

that the UCCJA did *not* mandate recognition of the Bahamian decree, and was then examining comity only in the context of whether that doctrine would alternatively mandate recognition of the foreign decree. The ruling of the New Jersey Supreme Court in *Ivaldi v. Ivaldi,*[37] which examined the use of comity in another context, lends further support to the notion that comity cannot be used to circumvent a statutory provision. The higher court explicitly concluded that the intermediate appellate court's decision to defer the custody case to a Moroccan court was improperly based on the doctrine of comity, and should instead have been decided under the UCCJA's forum non conveniens provisions.[38]

Therefore, it seems doubtful that the common law doctrine of comity can itself serve to function as an "escape clause" from the strictures of the UCCJEA, when it is applied in transnational custody disputes in U.S. courts. Nevertheless, it is relevant, as the construction of Section 105 of the UCCJEA is considered later in this article, to recall that the doctrine of comity, applied generally by U.S. courts for over a century as the basis for recognition of foreign judgments, incorporates an exception permitting denial of enforcement for reasons of strong public policy, and that some courts have deemed consideration of this exception to be appropriate in the context of custody proceedings.

C. International Application of the Uniform Child Custody Jurisdiction Act

The Uniform Child Custody Jurisdiction Act, adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1968, was the first successful attempt in the United States to create uniform state statutes governing jurisdiction and enforcement in both interstate and international custody disputes. The Act limits the bases that may be used by state courts to exercise initial and modification jurisdiction, resolves conflicts in the event of simultaneous proceedings, codifies forum non conveniens, restricts modification of orders from other states and nations, and provides for recognition and enforcement of domestic

37. 685 A.2d 1319 (N.J. 1996).

38. *Id.* at 1326. It should be noted that there is also language in *Ivaldi* that might support a contrary view. *Ivaldi* focused on whether a New Jersey trial court should exercise jurisdiction over an initial custody proceeding or defer to a court in Morocco in which a pending action had been previously filed. In dicta, the New Jersey Supreme Court noted, without elaboration, that at a later time a New Jersey court could refuse to enforce the Moroccan decree if it determined that the Shari'a court did not apply the best interests test. The court did not link that discussion to a discussion of comity as a separate doctrine, however, and relied in support for this statement upon an earlier case, Ali v. Ali, 652 A.2d 253 (N.J. Super. Ct. Ch. Div. 1994) discussed *infra*, in which the UCCJA and comity were merged together in the same analysis, rather than being treated distinctly. *Ivaldi,* 658 A.2d at 1327.

and foreign custody orders. Although for many years the UCCJA was in force in every U.S. state, it has now been widely superseded by the UCCJEA, and by June 2004, was in effect in only fourteen states.[39]

Application of the UCCJA in transnational custody disputes has been somewhat problematic. Section 23 of the Act, which governs its international application, provides:

> The general policies of this act extend to the international arena. The provisions of this act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations, if reasonable notice and opportunity to be heard were given to all affected persons.[40]

Although many courts have applied the UCCJA in a straightforward manner in international custody disputes,[41] some courts have read Section 23 to require only enforcement of foreign custody orders and have refused to treat foreign nations as states for purposes of determining jurisdiction.[42] Four states, Missouri, New Mexico, Ohio, and South Dakota, omitted Section 23 altogether when they enacted the UCCJA.[43]

In several cases, state courts have interpreted the UCCJA to permit them to deny enforcement to foreign orders if the foreign court did not consider or apply the "best interests of the child" standard. In *Tataragasi v. Tataragasi*[44] a trial court took emergency jurisdiction in a custody proceeding filed by an American mother who brought her two children back to the United States from Turkey, following years of beatings and abuse by the father toward the mother and the female child. The North Carolina

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39. National Conference of Commissioners on Uniform State Laws, *A Few Facts About the Uniform Child Custody Jurisdiction and Enforcement Act,* at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uccjea.asp.

40. UNIF. CHILD CUSTODY JURISDICTION ACT § 23, 9 Part 1A U.L.A. 639 (1999).

41. *E.g.,* Zenide v. Superior Ct., 27 Cal. Rptr. 2d 703 (Ct. App. 1994) (modification); Turner v. Frowein, 752 A.2d 955 (Conn. 2000) (Dutch temporary order not entitled to recognition because it was rendered inoperative when Dutch divorce proceeding was withdrawn); Stock v. Stock, 677 So. 2d 1341 (Fla. Ct. App.1996) (simultaneous proceedings); Edwards v. Edwards, 563 S.E. 2d 888, 894 (Ga. Ct. App. 2002) (enforcement required); Klont v. Klont, 342 N.W.2d 549 (Mich. Ct. App. 1984) (simultaneous proceedings and enforcement); Maqsudi v. Maqsudi, 830 A.2d 929 (N.J. Super. Ct. 2002) (enforcement denied due to lack of notice); Dincer v. Dincer, 701 A.2d 210 (Pa. 1998) (initial jurisdiction).

42. *See* Goldstein v. Goldstein, 494 S.E.2d 745 (Ga. Ct. App. 1998); McDaniel v. McDaniel, 693 N.Y.S.2d 778 (Ct. App. 1999); Ivaldi v. Ivaldi, 672 A.2d 1226 (N.J. 1996), *rev'd on this ground,* 685 A.2d 1319 (1996); *In re* Marriage of Medill, 40 P.3d 1087, 1092 (Or. Ct. App. 2002). *Cf.* Koons v. Koons, 615 N.Y.S.2d 852 (Sup. Ct. 1994) (foreign nation not a state for purposes of forum non conveniens and simultaneous proceedings provisions of UCCJA); Horiba v. Horiba, 950 P.2d 340 (Or. Ct. App. 1997) (same).

43. UCCJA, *supra* note 40 at 640 (1999).

44. 477 S.E.2d 239 (N.C. Ct. App. 1996), *rev. denied,* 485 S.E.2d 309 (N.C. 1997).

intermediate appellate court affirmed the lower court's refusal to defer to a pending Turkish proceeding, finding that the foreign court's exercise of jurisdiction was not "in conformity" with the UCCJA because the Turkish court's order did not discuss the best interests of the child, but instead focused on "the defendant's position and status in the community, the importance of Islam, circumcision and defendant's place in society."[45]

Similarly, a Minnesota intermediate appellate court, in *Abu-Dalbouh v. Abu-Dalbouh,*[46] determined that the Minnesota court need not defer to a Jordanian custody proceeding, even if it had been filed first in time (which the court determined it had *not*), because the simultaneous proceedings statute, UCCJA § 6, does not require deference to a court that is not exercising jurisdiction "in conformity with" the UCCJA. The mother and three children had fled Jordan, with the help of the U.S. Embassy, following numerous instances of both spousal and child abuse on the father's part, and secretly relocated in Minnesota, where she filed custody proceedings after residing for six-and-a-half months. With little description in the opinion about what the Jordanian court had in fact done, the court determined that the Jordanian proceeding would not be entitled to deference under the UCCJA because there was "no evidence the Jordanian court considered the best interests of the child, thereby failing to conform to the UCCJA."[47]

Another example of this approach to the UCCJA is *Ali v. Ali,*[48] in which a New Jersey trial court refused to recognize a custody order from a Shari'a court in Gaza on several alternate grounds, one of which was the determination by the court that the Gaza decision was based on an irrebuttable presumption that a father was automatically entitled to custody of a boy over seven, and therefore incompatible with New Jersey's "best interests" standard. *Ali* was subsequently cited approvingly in *Ivaldi* by the New Jersey Supreme Court, which suggested that if a Moroccan court subsequently failed to consider the child's best interests, New Jersey could refuse to enforce the Moroccan decree.[49] More recently, the Louisiana Supreme Court held in *Amin v. Bakhaty*[50] that a U.S. court could determine that Egypt should not be considered a state under the UCCJA, because to do so under the facts and circumstances of the case would not be in the best interests of the child.

45. 477 S.E. 2d at 246.
46. 547 N.W.2d 700 (1996).
47. 547 N.W.2d at 704-05.
48. 652 A.2d 253 (N.J. Super. Ct. Ch. Div. 1994).
49. *Ivaldi,* 685 A.2d at 1327.
50. 798 So. 2d 75, 83-86 (La. 2001).

In several other UCCJA opinions, courts expressed the view, explicitly or implicitly, that they had the authority under the UCCJA to refuse enforcement or otherwise disregard foreign custody orders if the court determined that the foreign court had not applied a "best interests" standard. In each of these cases, however, the courts did recognize the foreign order, finding that the foreign tribunal had in fact considered the child's best interests,[51] in one case despite allegations of grandparent sexual abuse.[52]

While the results in some of the cases that circumvent UCCJA restrictions seem appropriate, the statutory interpretations these courts have devised to achieve them are of questionable validity. The construction by the courts in *Tataragasi*[53] and *Abu-Dalbouh*[54] of UCCJA's simultaneous proceedings provision in Section 6, incorporating substantive law standards as a basis to find that a foreign jurisdiction did not exercise jurisdiction "substantially in conformity with" the UCCJA, is clearly inconsistent with both the text and legislative history, which clarify that jurisdiction need not be yielded to a court that does "not have *jurisdiction* under the criteria of" the Act.[55] Other cases[56] that adopt the "best interest" standard rationale to avoid the nonmodification, recognition, and enforcement requirements of the UCCJA have incorrectly relied upon the "best interest" language in UCCJA's unclean hands provision in Section 8(b), another interpretation that is inconsistent with the legislative history of the UCCJA[57] and has since been rejected by other courts in a domestic context.[58] In *Ali* the court appeared to rely upon a combination of the language in UCCJA Section 23 referring to "legal institutions similar in nature" and a failure to differentiate

51. *In re* Marriage of Malak, 227 Cal. Rptr. 841, 847-48 (Ct. App. 1986) (Lebanese decree must be enforced, where record shows Lebanese Shari'a court did consider best interests of the children); Malik v. Malik, 638 A.2d 1184, 1190 (Md. Ct. Spec. App. 1994) (UCCJA, as well as comity, permitted court to consider if Pakistani court has applied the best interests standard); Custody of a Minor (No. 3), 468 N.E.2d 251, 255 (Mass. 1984) (finding that foreign substantive and procedural law must be "reasonably comparable," and that an Australian order can be enforced because the order encompassed the "best interest of the child" standard); Hovav v. Hovav, 458 A.2d 972, 974-75 (Pa. Super. Ct. 1983) (Israeli decree must be enforced and not modified, absent evidence of conditions physically or emotionally harmful to the children in the custodial household).

52. Com. *ex rel.* Zaubi v. Zaubi, 423 A.2d 333, 342-46. (Pa. 1981).

53. 477 S.E.2d at 246.

54. 547 N.W.2d at 704-05.

55. UCCJA, § 23, cmt., 9 Part 1A U.L.A. 475 (1999) (emphasis added).

56. *See Malik,* 638 A.2d at 1190; Com. *ex rel.* Zaubi v. Zaubi, 423 A.2d at 335-36. *See also Hovav,* 458 A.2d at 974-75 (relying upon *Zaubi*); *Malak,* 227 Cal. Rptr. at 848 (relying upon *Horav*).

57. *See* UCCJA, 8 cmt., *supra* note 40 at 527 (1999), which clarifies that Subsection (b) cannot even come into operation unless the court has the power to modify under UCCJA § 14.

58. *See In re* Custody of Ross, 630 P.2d 353 (Or. 1981), overruling *In re* Marriage of Settle, 556 P.2d 962, 967-73 (Or. 1976).

between the doctrine of comity and the UCCJA to justify its incorporation of substantive law.[59]

Section 23, which governs the international application of the UCCJA, contains no explicit "escape clause" that would permit courts to avoid the requirements of the UCCJA in compelling circumstances. The absence of a viable "escape clause" thus may have pressured the courts to fashion their own "public policy" exception through "creative" statutory construction. Though these interpretations of various UCCJA provisions are of questionable validity in terms of statutory construction, cases like *Tataragasi* and *Abu-Dalbouh* illustrate the need for a viable escape clause, and the pressure to misconstrue jurisdictional statutes when no viable escape clause exists.

D. The Uniform Child Custody Jurisdiction and Enforcement Act

In 1997, NCCUSL adopted a new act, the Uniform Child Custody Jurisdiction and Enforcement Act, to replace the UCCJA. Similar in structure to its predecessor, the UCCJEA revised its jurisdictional standards to conform to the Parental Kidnapping Prevention Act (PKPA),[60] a federal full faith and credit statute enacted in 1980. The UCCJEA also added specific procedures for enforcement of custody orders, and provides clearer standards for the assumption of initial and modification jurisdiction, in an effort to eliminate inconsistencies in case law that had developed as the UCCJA had been interpreted in fifty states.

The UCCJEA has already been enacted in over thirty-five states, and legislation proposing its adoption is pending in several more.[61] Within a few years, the UCCJEA should govern the exercise of jurisdiction in international custody actions and the recognition and enforcement of foreign orders in all or the vast majority of U.S. courts.

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59. 652 A.2d at 258. *Ivaldi* appeared to rely upon *Ali,* 658 A.2d at 1327, and *Amin* relied upon *Ivaldi* and *Malak.* 798 So. 2d at 84. This same construction of the phrase, "legal institutions similar in nature," was the basis for the Washington appellate court's conclusion in *Noordin,* discussed *supra* at notes 32-35 and accompanying text, that the UCCJA permitted consideration of a foreign court's substantive law as a basis for denying enforcement.

60. 28 U.S.C. § 1738A (2002). The PKPA establishes requirements for the exercise of custody jurisdiction which, if satisfied, entitle state custody orders to recognition and enforcement, and restrict their modification, by other U.S. states as a matter of federal law. The PKPA does not address jurisdictional conflicts between a state court and a foreign court, or the enforcement of foreign orders.

61. As of June 2004, 39 states and the District of Columbia had enacted the UCCJEA, and legislation was pending in eight additional states and the Virgin Islands. National Conference of Commissioners on Uniform State Laws, *A Few Facts About the Uniform Child Custody Jurisdiction and Enforcement Act, at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uccjea.asp.

III. The Inscrutable "Escape Clause" of Section 105

Section 105, which addresses the international application of the UCCJEA, rectifies many of the deficiencies and ambiguities of Section 23 of the UCCJA. The text, which thus far has been incorporated without substantial change by all states enacting the UCCJEA,[62] provides:

> (a) A court of this State shall treat a foreign country as if it were a State of the United States for the purpose of applying [Articles] 1 and 2.
> (b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced under [Article] 3.
> (c) A court of this State need not apply this [Act] if the child custody law of a foreign country violates fundamental principles of human rights.[63]

Unlike UCCJA Section 23, Section 105(a) of the UCCJEA clearly mandates that for purposes of determining both initial and modification jurisdiction in custody matters, U.S. courts must treat a foreign nation as if it were a U.S. state. Section 105(b) eliminates the phrase "legal institutions similar in nature" utilized in Section 23, and instead requires U.S. courts to recognize and enforce child custody determinations made "under factual circumstances in substantial conformity" with UCCJEA *jurisdictional* standards, thus precluding broad incorporation of substantive law within the UCCJEA's enforcement mandate. Moreover, by its reference to UCCJEA standards, Section 105(b) continues to incorporate the directive of UCCJA Section 23 that the due process requirements of notice[64] and opportunity to be heard[65] are prerequisites to enforcement. In most of the international cases in which the UCCJEA has been invoked to date, its application has been straightforward and noncontroversial.[66]

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62. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 105, 9 Part 1A U.L.A. 75 (Supp. 2004-2005) [hereinafter UCCJEA] reports no states that have omitted Section 105, and only six states—Arizona, Hawaii, Montana, Nevada, North Dakota, and Utah—that have made changes to the official text. With one exception, these have been only minor grammatical changes. The one exception is the deletion by Montana and Utah of the phrase in subsection (b), "Except as otherwise provided in subsection (c)." As is discussed *infra*, this deletion should not alter the intended application of the "escape clause." This Supplement was published in May 2004, and therefore does not reflect any changes that may be included in legislation enacted in the 2004 legislative term or thereafter.

63. UCCJEA, § 105, Part 1A U.L.A. at 662.

64. *See In re* Adoption of Christian A., No. B165754, 2004 WL 729071 (Cal. Ct. App. April 6, 2004) (enforcement denied due to lack of notice).

65. UCCJEA § 106 provides that child custody determinations bind individuals who have received notice and who have been given an opportunity to be heard. UCCJEA § 106, 9 Part 1A U.L.A. at 663.

66. For application of the UCCJEA to initial determinations of jurisdiction in international cases, *see, e.g.*, Greenhough v. Goforth, 126 S.W.3d 345, (Ark. 2003); *In re* Marriage of Holder, No. 257274, 2002 WL 443397 (Cal. Ct. App. March 20, 2002); Arnold v. Harari, 772 N.Y.S.2d

Requiring that the tribunals of every nation in the world be treated identically to courts of sister states without exception, however, affords U.S. courts no flexibility to take into account compelling differences in procedural or substantive standards for child custody determinations, or the radically different political, legal, or social environments in which those standards might be applied in an international context. Recognizing the need to permit deviation from the strictures of the UCCJEA's jurisdiction and enforcement standards in some international disputes, UCCJEA Section 105, unlike the UCCJA, does contain an "escape clause." Subsection (c) permits U.S. courts to refrain from applying UCCJEA standards in international custody matters if "the child custody law of a foreign country violates fundamental principles of human rights."

The language of Section 105(c) presents several interpretive issues to courts that must apply it. The first, and most easily resolved, concerns its scope. More complex are determinations regarding the circumstances in which it may justifiably be employed. What do "fundamental principles of human rights" encompass, and how broadly may the term "child custody law" be construed?

A. Scope of Section 105(c)

The construction of Section 105 could be construed to suggest that the exception set forth in subsection (c) applies only to the recognition and enforcement of foreign custody orders pursuant to Article 3. The argument for such a construction would be that only Section 105(b), which addresses recognition and enforcement under Article 3, contains the phrase, "Except as provided in subsection (c). . . ." Section 105(a), which addresses the application of Articles 1 and 2 to jurisdictional determinations by U.S. courts in international disputes, contains no similar language. Were this construction to be accepted, it could deprive U.S. courts of any means of circumventing the provisions of Article 2 requiring deference to the jurisdiction of a foreign court that qualifies as the extended, or "left-behind

727 (App. Div. 2004); *In re* Calderon-Garza, 81 S.W.3d 899 (Tex. Ct. App. 2002); *In re* McCoy, 52 S.W.3d 297 (Tex. App. 2001). *Cf.* Strout v. Campbell, 864 So. 2d 1275 (Fla. Ct. App. 2004) (ICARA does not divest Florida court of jurisdiction when Germany refuses Hague order of return and awards custody of abducted children to mother).

For application of the UCCJEA to modification proceedings in international cases, *see, e.g.*, J.T. v. A.C., No. 2030297, 2004 WL 1125191 (Ala. Civ. App. May 21, 2004); Graham v. Graham, No. FA9265185, 2002 WL 241493 (Conn. Super. Ct. Feb. 6, 2002); Atchison v. Atchison, 664 N.W.2d 249 (Mich. Ct. App. 2003); Hector G. v. Josefina P., 771 N.Y.S.2d 316 (N.Y. Sup. Ct. 2003); *In re* Marriage of Medill, 40 P.3d 1087 (Or. Ct. App. 2002).

For cases in which the UCCJEA was used in proceedings to enforce foreign orders, *see, e.g.*, Morgan v. Morgan, 289 F. Supp.2d 1067 (N.D. Iowa 2003) (temporary restraining order); Galante v. Summerfield, No. A100555, 2003 WL 22719322 (Cal. Ct. App. Nov. 14, 2003).

parent" home state, or that would have continuing, exclusive jurisdiction under the UCCJEA, regardless of the compelling risk of harm to a child or parent that might otherwise merit consideration. At least two states, Montana and Utah, perhaps perceiving a risk of such an argument, have deleted the phrase "Except as provided in subsection (c)" from their codification of Section 105.[67]

Fortunately, this narrow construction of the scope of Section 105(c) is unwarranted. The language of Section 105(c) begins: "A court of this State need not apply this [Act]," rather than "Article 3 of this Act," thus indicating that 105(c) is, in fact, intended to apply to *all* applications of the UCCJEA in international custody proceedings. Moreover, the Comment of the drafting committee accompanying the Section, which discusses the circumstances under which a court may refuse to apply the UCCJEA, makes no reference to the clause at the beginning of Section 105(b), and gives no indication that any such limitation on the application of subsection (c) was intended.[68] In addition, Professor Robert Spector, who served as Reporter for the Committee that prepared the Uniform Child Custody Jurisdiction and Enforcement Act, confirmed his recollection that the Committee intended subsection (c) to stand alone, and be an exception to the Act's application.[69] The broader construction of the scope of the escape clause is also the most logical, for if enforcement of a foreign order was denied based on a violation of fundamental principles of human rights, it would make no sense to then conclude that a U.S. court was precluded from exercising jurisdiction over any aspect of the matter. Although no reported cases have raised this issue, the conclusion that Section 105(c) applies to the international application of the entire UCCJEA is clearly the most appropriate interpretation.

B. Standards of Section 105(c)

Far more difficult to define are the circumstances under which Section 105(c) may be used to thwart application of UCCJEA standards in international cases. The official Comment to Section 105 suggests that the basis for the exception, *i.e.,* a violation of "fundamental principles of human rights," is the "same concept found in Section 20 of the Hague Convention on the Civil Aspects of International Child Abduction," which permits a return order to be denied if it "would not be permitted by

67. *See supra* note 62.

68. UCCJEA § 105 cmt., 9 Part 1A U.L.A. at 662

69. E-mail from Robert Spector, Glen R. Watson Centennial Chair and Professor of Law, University of Oklahoma College of Law, to Marianne Blair, Professor of Law, University of Tulsa College of Law (June 22, 2003) (on file with author).

the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." The Comment observes that the UCCJEA "takes no position on what laws relating to child custody would violate fundamental freedoms, and goes on to suggest that this traditional principle is "invoked only in the most egregious cases."[70]

Taken at face value, it would not be difficult to construct an argument that the exception in Section 105(c) must be construed so narrowly as to render it totally ineffective. The Comment's linkage between the exception and Article 20 could easily be construed as a death knell. The Hague Abduction Convention's Article 20 defense has been infrequently attempted in U.S. courts, and on those rare occasions when it has been raised, with one possible exception,[71] it has been rejected.[72] The U.S. Department of State, in its 1986 Legal Analysis of the Hague Abduction Convention,[73] and several U.S. courts subsequently, have stated that Article 20 is to be "restrictively applied . . . on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process."[74] Outside

70. UCCJEA, § 105 cmt., *supra* note 68.

71. The *Aldinger* opinion suggests that Article 20 was recognized as a defense to the issuance of a return order by the Supreme Court of Puerto Rico in *de los Rios Carmosa v. Melendez Rosa*, RE-95-20,1996 WL 940333, 141 D.P.R. 282 (Puerto Rico 1996). Currently, no official translation is available. Professor Merle Weiner has obtained an unofficial translation of the opinion, and reports that two of the six judges who voted to deny an order of return to Mexico officially grounded their opinions in Article 13(b), but that an Article 20 analysis occurred *sub rosa,* based on the grave risk of harm faced by the child, as well as the mother, from domestic violence. The decision is discussed at length in this issue, in Merle H. Weiner, *Using Article 20*, 38 FAM. L.Q. 583, n. 145 (2004).

72. *See* Aldinger v. Segler, 263 F.Supp.2d 284, 290 (D. Puerto Rico 2003) (allegations of violent behavior between parties did not include abuse of children and were not of sufficient intensity); Mendez Lynch v. Mendez Lynch, 220 F.Supp.2d 1347, 1366 (M.D. Fla. 2002) (political and economic instability in Argentina insufficient); Hazbun Escaf v. Rodriquez, 200 F.Supp.2d 603, 614 (E.D. Va. 2002) (risk of abduction in Columbia minimal); Fabri v. Pritikin-Fabri, 221 F.Supp.2d 859, 873 (N.D. Ill. 2001) (return order would not infringe mother's right to travel or privacy rights in her family relationships with U.S. family members); March v. Levine, 136 F.Supp.2d 831 (M.D. Tenn. 2000), *aff'd* 249 F.3d 462 (6th Cir. 2001) (death threats to grandparents, threats to others, and suspicion of grandparents that father had murdered mother, absent evidence of harm to children, not sufficient basis); Freier v. Freier, 969 F. Supp. 436, 443-44 (E.D. Mich. 1996) (potential impact of return order on mother's or child's right to travel not sufficient); Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 851 (Ky. Ct. App. 1999) (actions of Greek authorities in restraining departure of mother and child insufficient); Ciotola v. Fiocca, 684 N.E.2d 763, 769-70 (Ohio C.P. 1997) (general argument that Hague Convention violates child's rights to due process and equal protection not sufficient); Caro v. Sher, 687 A.2d 354, 358-62 (N.J. Super. Ct. Ch. Div. 1996) (delay in adjudicating mother's motion to leave Spain not sufficient).

73. Dep't of State, *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10494, 10510 (March 26, 1986).

74. Aldinger v. Segler, 263 F.Supp.2d at 290; Hazbun Escaf v. Rodriquez, 200 F.Supp.2d at 614.

of the United States as well, the Article 20 defense has been rarely utilized and largely unsuccessful.[75]

Application of Section 105(c) is further obstructed by the additional restriction that the violation of fundamental principles of human rights must be the product of the "child custody law" of the foreign country. Does this mean that facially the law must violate fundamental principles of human rights, or would if be sufficient if application of the law in a particular case or context would result in the violation of the fundamental principles of human rights? The Comment's reflection on this issue also reflects a somewhat conservative approach to application of Section 105(c), stating that "the court's scrutiny should be on the child custody law of the foreign country and not on the other aspects of the other legal system."

The commentary to Section 105(c) reflects the drafters' concern that the provision not become the basis for magnifying every difference between the U.S. legal system and that of a foreign nation to virtually stymie effective application of the UCCJEA in international cases. On the other hand, the drafters' choice to include an escape clause, something that was not explicitly included in the UCCJA, indicates their awareness that international cases would arise in which UCCJEA application would be inappropriate. To date, there has been little discussion in published cases defining the parameters for application of Section 105(c).[76] In the only

75. NIGEL LOWE, MARK EVERALL, & MICHAEL NICHOLLS, INTERNATIONAL MOVEMENT OF CHILDREN 369-71(2004). The authors report on one Spanish case in which an Article 20 defense was successfully invoked because the court understood that a return would end all contact with the mother and result in a decision based not on the child's best interests but punitive concerns, but conclude that otherwise, Article 20 is rarely applied worldwide. The United Kingdom and Finland have never implemented Article 20, attempts to apply it in Canada, Australia, and Ireland have been unsuccessful, and a statistical analysis conducted by Professor Lowe of applications made under the Hague Abduction Convention in 1999 reported no refusals based on Article 20. *Id* at 370. *See also* PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 172-76 (1999) (reports on a French case in which the principles of Article 20 were successfully invoked based on a freedom of movement argument, but concludes that overall Article 20 has faded without a trace. *Id.* at 172); Merle Weiner, *Strengthening Article 20,* ___ U.S.F. L. REV. ___ (forthcoming 2004).

76. Three California appellate cases imply that Section 105(c) was raised in the trial court. In *Galante v. Summerfield,* No. A100555, 2003 WL 22719322 (Cal. Ct. App. Nov. 14, 2003), a California appellate court hinted that Section 105(c) had been unsuccessfully raised at the trial level, but held that the issue of whether "the child custody laws of Zimbabwe violate fundamental principles of human rights" was not before the court, because father had failed to seek enforcement of the Zimbabwe order that was actually in effect. In *Gonzalez v. Gutierrez,* No. D040063, 2003 WL 22236051, n. 5 (Cal. Ct. App. 2003 Sept. 30, 2003), the trial court found Section 105(c) inapplicable due to evidence that Mexican child custody law violated fundamental principles of human rights, but the case was decided on appeal on other grounds. In *In re Adoption of Christian A.,* No. B165754, 2004 WL 729071 (Cal. Ct. App. April 6, 2004), the adoption by relatives of two children, whose parents had been murdered in their presence in Guatemala, was contested by other relatives in Guatemala, who contended that they had a guardianship order from a Guatemalan court. The record suggested that the murders were polit-

case in which Section 105(c) appears to have been explicitly raised on appeal, the appellate court refused to address the issue because it was not properly raised in the court below.[77] Nevertheless, some of the international cases in which both the UCCJA and the UCCJEA have been applied suggest contexts in which Section 105(c) might usefully be employed. The following section argues that when application of the UCCJEA would create a credible risk to the safety of a child or parent, or seeks enforcement of an order obtained as a result of that risk, Section 105 (c) should be interpreted to provide a potential remedy.

IV. The Case for a Viable Section 105(c)

The desire to escape domestic abuse or to ensure a safe environment for their children is a significant factor in the decision of many parents who bring their children to the United States.[78] Although it cannot be claimed that the legal system in the United States has reached perfection in its ability to provide protection, the significant advances that have been made in recent decades to respond to the needs of abused spouses and children,[79]

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ically motivated, and a different Guatemalan court had ordered that the children not be returned to Guatemala for a period of six months to ensure their safety. The California trial court had refused to recognize or enforce the Guatemalan guardianship order on the grounds that the relatives in the United States had not been given proper notice, and that there was no evidence presented to the California court to indicate that the guardianship proceedings had "addressed any issue with respect to the children's safety," nor that those issues had even been presented to the Guatemalan court. The trial court's decision was affirmed on the lack of notice issue, and the issue regarding failure to address the children's safety was not discussed by the appellate court as a ground for its decision. In addition, in *In re* Nada R.,108 Cal. Rptr. 2d 493 (Ct. App. 2001), discussed *infra*, Section 105(c) was raised by the mother in the trial court on remand, but the arguments were directed primarily toward procedural due process defects. Mother's Trial Brief, at 9-10, July 23, 2001, Case No. DP002824; DP002825, Superior Court of Orange County, California,

77. *In re* Y.M.A., 111 S.W.3d 790, 791-92 (Tex. App. 2003) (court enforced Egyptian decree despite father's argument that an irrebutable presumption under Egyptian law giving custody of a male child to mother until the age of ten violated the standards of human rights, finding that father had failed to preserve the error for review because he did not specifically make the argument below that the basis for his contention was the Texas Equal Rights Amendment).

78. *See* Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 275 (2002) (In seven of the nine U.S. Court of Appeals cases interpreting the Hague Abduction Convention between July 2000 and January 2001, women abductors alleged they were victims of domestic violence); *Cf.* REUNITE, *The Outcomes for Children Returned Following an Abduction* 20-21 (Sept. 2003), *at* http://www.reunite.org/WEBSITEREPORT.doc (five out of eleven abductors interviewed in Europe suggested abuse of a child or parent by the left-behind parent motivated the abduction).

79. *See* Katherine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 26-35 (2002) (summarizing substantive and procedural reforms in U.S. state law benefitting victims of domestic

combined with the insulation of geographic separation, offer an important safeguard to this vulnerable population. Although the legal systems of many other countries also afford protection, this is not universally true. When strict adherence to UCCJEA standards in an international context would create a significant risk of harm to a child or to a parent who seeks custody rights, it is critical that Section 105(c) not be interpreted so restrictively as to deny U.S courts the flexibility to circumvent its application. Expansive interpretation in this limited context avoids dilution of the UCCJEA's standards in domestic cases, and enables the UCCJEA to work in harmony with the Hague Abduction Convention.

A. A More Expansive View of Section 105(c) to Accommodate Compelling Circumstances

Though it must be conceded that the boundaries for deviation from the strictures of the UCCJEA cannot be defined with precision, several cases illustrate contexts in which Section 105(c) could appropriately be interpreted to provide a viable remedy. Some of these cases involve parents who have brought children to the United States before any court proceeding was initiated in their home country, while others examine post-decree enforcement issues.

One such case is *In re Nada R.*,[80] in which a California intermediate appellate court assessed the exercise of emergency jurisdiction over children whose custody had been awarded to their father by a Saudi Arabian court. The mother, a permanent resident of the United States, married the father, a Saudi Arabian student, in the United States. After the birth of their first child in California, the family moved to Saudi Arabia, where a second daughter was born. Domestic violence between the parents prior to their move had resulted in two arrests of the father and one guilty plea in the United States, and the mother testified that while in Saudi Arabia the father had frequently hit her and on one occasion had given their child, then age five, a loaded gun to hold to her mother's head. Although the mother testified the father had fallen down stairs carrying one child while intoxicated, she asserted she had never seen him physically hurt either child prior to their separation. When the girls were ages six and three, the mother left Saudi Arabia and moved to California, later testifying she left the girls with their father because she believed she could not obtain an exit visa for them from the Saudi Arabian government.

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violence and concluding that "[t]he most significant development in custody law in the past five to ten years is an increasing legal protection for parents and their children from domestic violence." *Id.* at 26).

80. 108 Cal. Rptr. 2d 493 (Ct. App. 2001).

After her departure, the father obtained a divorce and custody of the girls from a Saudi Arabian court. The mother was not sent notice of either decree until after they were obtained. For the next five years, the mother had contact with the girls through phone calls and several two-week visits with the girls in Dubai, United Arab Emirates, where the father would bring the girls to meet her. In March 2000, he invited the mother to join them during a ten-day visit to Orlando, Florida. When an argument ensued between the parents at the end of the visit and Nada, then age eleven, sided with her mother, the father became enraged. The child and mother testified that he punched and clawed the child, and threw her on the bed. Police, who were called by the mother, observed injuries on Nada and arrested the father. The mother returned to California with the girls the next day and sought a restraining order in California courts against the father. Allegations in her petition alerted the Orange County Social Services Agency, which took the girls into protective custody, filed a dependency action, and released the girls into their mother's care. The father challenged the California court's jurisdiction.

In the course of the investigation, both girls expressed fear of their father, and stated he drank a lot and drove with them while intoxicated. The oldest child stated she would kill herself if returned to her father's care, and subsequently revealed that she had been sexually abused in Saudi Arabia by two family drivers and a cousin. The father denied these allegations, and testified he had never before been told of the assaults. Although there was conflict in the testimony about the extent of the sexual abuse, the trial court regarded Nada's testimony as reliable and found "by clear and convincing evidence the child [Nada] will be exposed to the risk of serious physical, emotional harm if released to the father."[81] The trial court subsequently ruled the children dependent, exercising temporary emergency jurisdiction under the UCCJEA.

The appellate court found that the trial court had properly exercised emergency jurisdiction. While agreeing that under the UCCJEA emergency jurisdiction must be short term and limited, the appellate court held that "an emergency can exist so long as the reasons underlying the dependency exist." Because the trial court had determined that returning the girls to their father would "place them at substantial risk of harm," and that no subsequent facts suggested that the risk was no longer present, the appellate court affirmed that the trial court "should be afforded jurisdiction to prevent such harm."[82] The appellate court also determined that the

81. Mother's Trial Brief, July 23, 2001, No. DP002824; DP002825, Superior Court of Orange County, California, quoting the record of earlier trial court proceedings (RT 500-502).

82. *Id.* at 500.

trial court was required by the UCCJEA to immediately communicate with the Saudi Arabian court, if it had issued an enforceable custody order, and remanded the case to determine if proper notice of the original custody proceeding had been given to the mother.

On remand, the trial court did communicate with the Saudi tribunal and confirmed that the original custody decree had been entered without notice to the mother.[83] Because the decree did not comport with the standards of the UCCJEA, the trial court then determined that it was not required to honor the Saudi Arabian decree, and that jurisdiction with the California court was appropriate. The girls have remained with their mother.[84]

So, all's well that ends well, and how does this case illustrate a need for application of Section 105(c)? First, Saudi Arabia was the girls' home state at the time the Saudi order was entered. If the mother had been afforded notice and an opportunity to be heard in the Saudi proceeding, the Saudi custody order would have been entitled to enforcement. The UCCJEA could at best have afforded a California court temporary jurisdiction to issue an order of limited duration under Section 204, and directed the mother to seek a modification from the Saudi tribunal. Because the father continued to reside in Saudi Arabia, California would have been prohibited from modifying the Saudi order by UCCJEA Section 203, unless a Saudi Arabian tribunal found it no longer had significant connection to the children or deferred to the California court on forum non conveniens grounds.

Second, even if the original Saudi Arabian order was invalid, the father could have initiated another custody proceeding within Saudi Arabia within six months of the girls' departure from Saudi Arabia. Because the father still resided in Saudi Arabia, it would have been afforded "extended home state" priority, and after issuing a temporary emergency jurisdiction order, California would again have been required to defer to the Saudi Arabian tribunal, under UCCJEA Section 204. In the actual case, the father did not initiate any further proceedings in the Saudi Arabian court until the girls had resided in California for a year and a half. Thus, had the facts been slightly different, the UCCJEA would have left California little recourse but to direct final resolution of the custody matter back to the Saudi courts.

83. E-mail from Sheryl Edgar, attorney for the father, to Marianne Blair (June 23, 2003) (on file with author).

84. One of the mother's attorneys, Cynthia Loo, reports that on remand, the trial court determined that no notice was afforded the mother in the Saudi proceeding. Subsequently, a family law court took the matter over and she believed that the mother was awarded sole legal and physical custody. She had spoken with the mother as recently as December 2002, and the mother and children were doing well. E-mail from Cynthia Loo to Marianne Blair (June 23, 2003) (on file with author).

Would ultimate resolution of this custody issue by Saudi Arabian courts have necessarily been an undesirable outcome? After all, the evidence regarding many of the allegations was in Saudi Arabia. Moreover, the appellate court opinion suggests that the father was refused permission to present witnesses by telephone, which could have impeded his ability to present his case in California. Obviously one's response to this question would benefit from sophisticated expertise in Saudi Arabian custody law and practice, an expertise this author does not claim to possess. Nevertheless, some general sources regarding Saudi and Islamic family law suggest cause for some concern about how this matter might have been resolved.

Saudi Arabian law is based on Islamic Law, Shari'a, but there is a tremendous diversity among Islamic countries and the different schools of Islam regarding the specific tenets of family law doctrine. The U.S. Department of State confirms that minor children may not leave Saudi Arabia, even if they are U.S. citizens, without their father's permission.[85] In Saudi Arabia's Shari'a courts there is a maternal preference favoring physical custody of daughters with their mothers, although the U.S. State Department reports that this preference exists only until a daughter is seven.[86] Saudi courts generally do not award custody to non-Saudi women. Shari'a courts also emphasize the best interests of the child,[87] although those interests may be assessed differently than in an American court. A primary concern of the Shari'a courts is that a child be raised in the Islamic faith. Even a mother who is an Arab Muslim will not receive custody unless she is residing in Saudi Arabia,[88] and if a mother leaves the country, as most non-Saudi women are forced to do after divorce,[89] the father is entitled to custody.[90]

85. U.S. Dep't of State, Consular Information Sheet, Saudi Arabia, http://travel.state.gov/saudi.html.

86. U.S. Dep't of State, *International Parental Child Abduction*, *at* http://travel.state.gov/abduction_saudi.html. However, other sources have reported that after a divorce, girls typically remain with their mothers, usually in the home of their mother's father, until the time of the daughter's own marriage. Islamic Family Law (ed. Rohit Chopra), *at* http://els41.law.emory/edu/ifl/index2.html.

87. Muddassir H. Siddiqui, *Conflicting Laws for Children of Mixed Marriages* (July 1, 2003), *at* http://www.international-divorce.com/customhtml.1.

88. U.S. Dep't of State, *supra* note 86.

89. Siddiqui, *supra* note 87 (reporting that American women almost invariably leave Saudi Arabia upon divorce from a Saudi man. Visa limitations preclude non-Saudis from living in the country without a Saudi sponsor, and upon divorce the wife typically loses her sponsor, her ex-husband. In addition, Saudi law does not provide alimony, and job opportunities for women are very limited. Thus financially it becomes very difficult to stay.)

90. U.S. Dep't of State, *supra* note 86. *See also* World Net Daily, *American Coerced into Signing Kids Away,* June 19, 2003, *at* http://worldnetdaily.com/news/article.asp? ARTICLE_ID=33163 (American adult daughter of Saudi father, who took refuge in American consulate with her two children, was told she would not be permitted to leave Saudi Arabia by Saudi government officials unless she signed papers waiving all rights of custody).

In this regard, Saudi Arabia is like many Islamic countries, which prohibit a custodial mother from moving any substantial distance from the father without the father's permission.[91] Moreover, Saudi women who remarry non-Muslims (Maria, the mother in *Nada*, remarried some time after she had left Saudi Arabia), or reside in the home of nonrelatives, forfeit the right to custody.[92]

Had notice been provided to the mother in *Nada R.*, or had the father initiated another proceeding in Saudi Arabia within six months of the girls' departure, so that the standards of the UCCJEA provided California no other alternatives, how might Section 105(c) have been applied to this scenario? Certainly the norms referenced above, to the extent that they accurately portray Saudi Arabian custody law, could be specifically challenged on several grounds as violations of fundamental principles of human rights, as they restrict freedom to marry, protected not only by the U.S. Constitution,[93] but also by international law,[94] and discriminate on the basis of gender.[95] Even absent those restrictions, however, if examination of the custody regulation of a foreign nation, either facially *or* in its application in a particular case, reveals that adjudication in a foreign forum or enforcement of a foreign order through application of normal UCCJEA standards would create a significant risk to the safety of a child, Section 105(c) could justifiably be triggered on the basis that the right of children to measures of protection is so widely recognized by international human rights treaties[96] that it indisputably falls within any definition of

91. JAMAL J. NASIR, THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION 12-29 (1990).

92. U.S. Dep't of State, *supra* note 86.

93. *See* Zablocki v. Redhail, 434 U.S. 374 (1978).

94. *E.g.*, International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171, art. 23 (The United States ratified this Convention on June 8, 1992. One could attempt to argue that the restrictions on leaving the country violate the freedom to travel. Orders not to take children out of the forum nation are commonly issued in many countries, however, and arguments that they violate the right to travel have thus far not been successful in Article 20 cases. *See supra* note 72.

95. Gender discrimination is, of course, prohibited by the Equal Protection Clause of the Fifth and Fourteenth Amendments of the United States Constitution, unless substantially related to an important state interest, *see, e.g.*, United States v. Virginia, 518 U.S. 516 (1996); most U.S. state constitutions; and international law. *See, e.g.*, ICCPR, *supra* note 94, art. 2 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as sex. . . .") (Over 140 nations are party to this Convention); Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (Over 170 nations are parties to this Convention).

96. *See, e.g.*, ICCPR, *supra* note 94, art. 24 ("Every child shall have . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the State"); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S.3, art. 3 ("States Parties undertake to ensure the child such protection and care as is necessary for his or

"fundamental principles of human rights" envisioned for Section 105(c).

Another case that illustrates a potential context for application of Section 105(c) is *Gonzalez v. Gutierrez*.[97] Following years of physical, emotional, and sexual abuse from her husband, Rosa Gutierrez obtained a divorce in Mexico, pursuant to which she was awarded sole custody of the children, and her husband received rights of visitation. Although she filed for a fault-based divorce, she ultimately agreed to a consent divorce, thinking it would offer more immediate protection. The divorce agreement contained a *ne exeat* clause prohibiting her from taking the children out of the country without the permission of Arce Gonzalez, her former husband.

Unfortunately, the abuse did not end with the separation or the divorce, despite the attempts of Ms. Gutierrez to gain assistance from local police, the Red Cross, and the Human Rights Office in Mexico. Ultimately, to escape the frequent assaults that continued at pick-up times for visitation, Ms. Gutierrez fled Mexico in February 2001, giving up a rent-free family home and a job in accounting, in which she has a degree, to move to a small apartment in San Diego, near her sister, and support herself through low-paid employment in a plastics factory.[98] She applied for political asylum for herself and the children on the basis that she was a victim of domestic violence. Although this is a difficult ground on which to successfully apply for asylum,[99] the immigration judge found that Ms. Gutierrez proved that she was persecuted based on her membership in a particular social group (female Mexican victims of domestic violence) and that she was unable to obtain protection in her own country, and she and the children were ultimately granted asylum.[100]

Soon after the family's departure from Mexico, Mr. Gonzalez sought a return order under the Hague Abduction Convention. Ultimately, in August 2002, the Ninth Circuit denied this request, holding that neither *ne exeat* clauses nor the doctrine of *patria potestas* afford rights of custody to parents who have only visitation rights under a decree of divorce, and therefore the removal was not wrongful, as that term is defined in the Convention.[101]

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her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures") [Over 190 nations are parties to this Convention].

97. No. D040063, 2003 WL 22236051 (Cal. Ct. App. Sept. 30, 2003).

98. Appellant's Opening Brief, Gonzalez v. Gutierrez, No. D040063, Cal. Ct. App., at 3, *available on Westlaw* at 2003 WL 22236051.

99. *See* Merle Weiner, *Strengthening Article 20, supra* nn. 75, 85-87 and accompanying text.

100. No. D040063, 2003 WL 22236051, at 4 (Cal. Ct. App. Sept. 30, 2003).

101. Gonzalez v. Gutierrez, 311 F.3d 942 (9th Cir. 2002). The Mexican legal concept of *patria potestas* derives from Roman law conferring power over the family upon the father. In *Whallon v. Lynn*, 230 F.3d 450, 456-59 (1st Cir. 2000), it was described as a source for exercise of authority by both parents, encompassing obligations for the child's protection, guardianship, and education.

While this appeal was pending, Ms. Gutierrez agreed to supervised visitation for Mr. Gonzalez in the U.S., but refused unsupervised visitation for fear that Mr. Gonzalez would simply take the children back to Mexico, jeopardizing their asylum application and preventing her from seeing them without the risk of further abuse. In January 2002, Mr. Gutierrez sought enforcement of his visitation rights under the UCCJEA in California state court. Subsequently, Ms. Gonzalez offered visitation conditioned upon an order that the children could not be removed from the United States, and the posting of a bond. The trial court ultimately determined, after communication that the Mexican court would not cede jurisdiction to a U.S. court, and therefore denied Ms. Gutierrez's requested conditions, reasoning that they would be impermissible modifications.

By the time this decision reached the intermediate appellate court, the Ninth Circuit had issued its decision denying the Hague Convention return order, and Ms. Gutierrez had been granted political asylum. Finding that the court must be mindful of "the importance of delineating the order in such a way that it does not undermine the grant of asylum and the denial of relief under the Hague Convention," the appellate court reversed the determination that the proposed restrictions would constitute an impermissible modification under the UCCJEA, holding instead that the UCCJEA permits enforcing courts to utilize state enforcement remedies, and that *ne exeat* orders and bonds were authorized by California state law. Moreover, the conditions effectuated the Mexican decree's award of sole custody to the mother.[102]

Again, while the court and the parties ultimately resolved this particular case without Section 105(c), a slight change in the facts or legal context could easily have resulted in a different resolution. Had the father been awarded some form of joint custody, the California appellate court might have viewed the restrictions it ultimately sanctioned as an impermissible modification. Moreover, the inability of a mother to obtain supervised visitation enormously magnifies the risk that the children will be taken out of the U.S. and not returned. Obviously, the circumstances and personalities involved in each case are different, but the nonmodification provisions of the UCCJEA significantly reduce the court's discretion to respond to those perceived risks, when it is deemed appropriate, and to impose needed safeguards. When the UCCJEA cannot otherwise be interpreted to provide needed protections, Section 105(c) can and should be utilized to protect a parent who has been the victim of severe domestic abuse.

102. No. D040063, 2003 WL 22236051, at 8 (Cal. Ct. App. Sept. 30, 2003). Although the case was remanded for further proceedings in the trial court, neither party pursued the matter further in the lower courts. The mother has retained custody, and the father periodically visits, with exchanges taking place at a local police station. Telephone interview with Rosa Kasusky, attorney for Ms. Gutierrez (May 26, 2004).

How can the situation of a parent, such as Ms. Gutierrez, trigger a finding that the child custody law of the foreign country violates fundamental principles of human rights? After all, Ms. Gutierrez was awarded custody in an agreed decree. The trial court, in fact, found Section 105(c) inapplicable because "there was no evidence that the child custody law of Mexico violates fundamental principles of human rights."[103] The trial court's observation, however, is unduly narrow. When enforcement of a foreign order would seriously jeopardize the safety of a parent, examination of child custody law must go beyond the statutory or common law norms to look at the context in which custody determinations are made. In the case of Ms. Gutierrez, experience had shown that the legal system of Mexico had been unable to provide her protection, despite numerous attempts that she had made to obtain it[104] and, in fact, in her case, the threat was so severe that it had been recognized by another U.S. court as the basis for a grant of asylum. Had the father chosen to use unsupervised visitation to transport the children back to Mexico and retain them, Ms. Gutierrez would have been faced with the untenable choice of returning to a highly dangerous environment or forfeiting custody and contact with her children.[105] Such a choice deprives a parent of the fundamental rights to life, security of person, and freedom from torture protected in numerous human rights conventions and declarations.[106]

103. *Id.* at 4, n. 5.

104. While in Ms. Gutierrez's case, her position was supported by the findings in her immigration case, a grant of political asylum is not a necessary prerequisite to establishing the inability of a foreign nation to provide protection. In addition to the history in the individual case, information on the general situation of victims of domestic violence in the foreign nation would be relevant. For example, the U.S. Dep't of State Country Report on Human Rights Practices for Mexico was utilized by counsel for the mother to demonstrate the inability of the judicial system to provide sufficient protection. The Appellant's Opening Brief, *supra* note 98, cites a discussion in the U.S. Dep't of State Country Reports on Human Rights Practices, released by the Bureau of Democracy, Human Rights, and Labor, March 4, 2002, *available at* http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8320.htm, regarding the difficulties victims face in the Mexican judicial system and the recent press report that of the 13,822 victims who had sought assistance from the Mexican Federal District Attorney General's Center on Intra-Family Violence, only 16 cases had been prosecuted. Case law might also supply a source of information. For example, de los Reyes v. Melendez, *supra* note 71, reports the determination of two judges of a Puerto Rican court that returning a child to Mexico would be intolerable and a violation of fundamental principles of human rights because of Mexico's insufficient response to domestic violence.

105. This dilemma is examined in far greater depth and detail in Professor Weiner's excellent article, *Using Article 20*, *supra* note 71.

106. ICCPR, *supra* note 94, art. 2 (imposes duty to take measures to give effect to other rights in Covenant), art.6 (right to life), art. 7 (right not to be subjected to torture or to cruel, inhuman, or degrading treatment); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, art. 2 (Each party is required "to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction"); art. 3 (prohibiting return of an individual to a nation "where there are substantial grounds for believing that he would be in danger of being subjected to torture"); Declaration on the Elimination of Violence

In *Using Article 20,*[107] found in this issue of *Family Law Quarterly,* Professor Merle Weiner provides a thorough and nuanced examination of both the international instruments and domestic law that underly the proposition that forcing a victim of domestic violence to choose between her safety and her children violates "fundamental principles of human rights." Her analysis is relevant to her own thesis regarding Article 20, and also supports the use of Section 105(c) to afford protection to parents as well as children who are victims of domestic violence.

The cases of *Tataragasi* and *Abu-Dalbouh,* discussed earlier[108] in the context of the UCCJA, provide further examples of compelling circumstances that might necessitate use of Section 105(c). In both cases, mothers fled with their children to the U.S. to escape severe spousal and child abuse, in one instance with the assistance of the U.S. Embassy. In both cases, the family had been residing in foreign nations for over six months. In such situations, if the left-behind parents filed proceedings within six months of the children's departure, strict adherence to UCCJEA standards would require deference to the foreign courts and enforcement of any temporary or permanent orders the fathers had obtained. Section 105(c) should be interpreted in a manner that would permit courts in initial proceedings such as these to avoid the jurisdictional and enforcement mandates of the UCCJEA if the evidence establishes that the safety of a parent or child would be seriously jeopardized by application of the custody law of the foreign nation, or by returning to litigate in the foreign nation, if the legal system in which the child custody matter was litigated could not provide adequate protection.

Another UCCJA case, *Hosain v. Malik,*[109] suggests a different context in which Section 105(c) might be appropriately considered. When a Pakistani couple separated and the mother moved to her own father's home with her young daughter, her husband appeared at the grandparent's home drunk, threatened the mother's life, and threatened to take the child, causing the child considerable distress. Within the next several months, the mother immigrated to the U.S. on a student visa, bringing the child with her. Shortly thereafter she began living with another man whom she subsequently married, following the birth of a son. Sometime after the mother's departure from Pakistan, her first husband commenced divorce and custody proceedings. The mother received notice and was represented in the proceedings by counsel and her own father, who presented a written

Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/RES/48/104 (1993).

107. *Supra* note 71.

108. *See supra* notes 44-47 and accompanying text.

109. 671 A.2d 988 (Md. Ct. Spec. App. 1996).

statement on her behalf, but the mother was unable to appear. She asserted that if she had returned to Pakistan to participate in the proceedings, she would have been arrested for adultery (as she had entered the second relationship and was pregnant by the time of the custody trial). If convicted under Pakistani criminal law, her penalty could be public whipping or death by stoning. After the child's father obtained his custody order and located the mother and child in Maryland, two years later, he sought enforcement of the order under the UCCJA in a Maryland court. Applying both the UCCJA and doctrines of comity, the Maryland appellate courts found that they could deny enforcement for public policy reasons,[110] but, in a divided opinion, decided that Pakistani law was not so repugnant to Maryland law as to merit such a course. The majority placed little emphasis on the inability of the mother to participate in the Pakistani proceeding, noting testimony that no woman had actually been stoned for adultery in fifty years.

Though the case presents many complex issues that are beyond the scope of this article, the choice confronting the mother, *i.e.,* to forfeit custody or risk public whipping or a death sentence by participating in the custody trial, merits consideration as a different type of trigger for application of Section 105(c). The Maryland court clearly underestimated the harsh consequences that would have befallen the mother for returning to litigate. As recently as 2002, a young rape victim was sentenced to death by stoning in Pakistan for the "crime" of adultery, and although her conviction was ultimately overturned in the glare of international attention after both she and her infant had been incarcerated for many months,[111] many more women are currently in jail for adultery. Offenders as young as age fifteen have been sentenced to whipping for the crime, and the sentence can be as much as 100 lashes.[112] Using a narrow construction of Section 105(c), one could argue that the criminal system is not part of the "child custody law" of the foreign nation. Like the Maryland court, such a construction would

110. *See* discussion of Malik v. Malik, 638 A.2d 1184 (Md. Ct. Spec. App. 1994), the decision of the appellate court the first time the case went up on appeal to the intermediate appellate court, *supra* notes 30-32 and accompanying text.

111. *See* Hannah Block Kohat, *Blaming the Victim, Can a Raped Woman Be Stoned for Adultery, In Pakistan, It's Possible,* TIME ASIA, Monday May 20, 2002, *at* http://www.time.com/time/asia/magazine/article/0,13673,501020527-238673,00.html; Zafar Abbas, *Pakistan Stoning Sentence Overturned,* BBC News, June 6, 2002, *available at* http://news.bbc.co.uk/1/hi/world/south_asia/2029020.stm.

112. In June 2004, the media reported that many other rape victims were currently in jail in Pakistan for adultery. The fifteen-year-old was convicted in 1983 of illegal fornication, after filing a complaint against her uncle and his son for rape, which resulted in her pregnancy. The judge reduced her sentence from 100 lashes to 10 as a result of her young age. Juliette Terzieff, *In Pakistan, Those Who Cry Rape Face Jail,* WOMEN'S E-NEWS, June 4, 2004, *at* http:// www.womensenews.org/article.cfm/dyn/aid/1835/context/cover.

overlook the reality that such harsh consequences for participation in the custody proceeding produce an order entered without benefit of one parent's evidence, which in this case would have supported the mother's accusations of serious substance abuse and threats by the father. A custody decree obtained by such a proceeding violates the fundamental principles of human rights of both the mother, who was effectively denied her opportunity to present evidence by an inhumane criminal justice system, and the child, whose welfare could not be accurately assessed as a result of that system.[113]

B. Undermining Domestic Uniformity

When Section 105(c) is not utilized to provide a viable remedy in compelling circumstances, trial and appellate courts are then pressured to "creatively" interpret the UCCJEA in order to accomplish a result they deem just. *Nada R.*[114] provides an excellent example of this phenomena.

At the time that it rendered its opinion in *Nada R.*, the appellate court did not have an adequate record to determine whether the mother had received notice in the original Saudi Arabian proceeding. The appellate court therefore tried to ensure protection for the children by ruling that emergency jurisdiction could exist as long as the reasons underlying the dependency existed. As long as the risk was present, the court held, the trial court was afforded jurisdiction to prevent such harm.[115] This novel construction is not consistent with UCCJEA Section 204(c), which requires that when a previous custody determination has been made and is entitled to enforcement under the Act, the temporary order of jurisdiction may be effective only for such period as is necessary for a proceeding to be commenced in the forum that issued the prior order. The temporary order must by its own terms contain a date for its expiration, and must expire automatically on that date even if no other proceeding has been commenced. Section 204 does not provide a basis for long-term modification, which was the implication of *Nada R.*

Following *Nada R.*, litigants in both domestic and international proceedings attempted to rely upon its generous definition of emergency jurisdiction. California appellate courts were then forced to backpedal. A

113. The argument presented here is not that every custody adjudication made in the absence of a parent who has been charged with a crime is therefore suspect. The heinous nature of the punishment, in reference to the nature of the crime, justifiably distinguish the punishment faced by the mother in *Hosain* from the typical criminal sanctions for child abduction that are commonly at issue in many international custody cases.

114. *See* discussion of *Nada R.*, 108 Cal. Rptr. 2d 493 (Ct. App. 2001), notes 80-94 and accompanying text.

115. *Id.* at 8.

year later in *In re C.T.*,[116] when another litigant alleging sexual abuse of her children in Arkansas argued that *Nada R.* permitted California to assert modification jurisdiction on an emergency basis for an indefinite period of time, the same appellate court was forced to distinguish *Nada R.* by asserting that in *Nada* the court properly assumed jurisdiction because "there was no evidence a Saudi Arabian court would address the problems disclosed by the children."[117] The court in *C.T.* virtually conceded that it had created an exception to the UCCJEA that did not, in fact, exist and held that California could not assume emergency jurisdiction to attain modification jurisdiction for an indefinite period of time.[118] Similarly, when a trial court entered temporary emergency jurisdiction in *Galante v. Summerfield*[119] to stay enforcement of a custody order from Zimbabwe, based on alleged abuse (which the appellate court found unsubstantiated) and political uprisings in Zimbabwe, another California appellate court found emergency jurisdiction must be of limited duration, again distinguishing *Nada R.* with a finding that the Zimbabwe court was in a position to decide if the children were at risk upon their return.

Erroneous constructions of the UCCJEA in international cases run the risk of creating precedent that could undermine the uniform application of the Act in domestic cases. Rather than dismantle a carefully constructed system designed to regulate interstate custody enforcement among states with relatively similar legal systems and cultural expectations, in order to address international adjudications by foreign nations with markedly dissimilar legal, cultural, and/or social systems, it makes more sense to vitalize Section 105(c) so that it can respond to compelling circumstances when necessary.

C. Consistency with the Hague Abduction Convention

The UCCJEA was drafted to work harmoniously with the Hague Abduction Convention.[120] A viable Section 105(c) is necessary to achieve that goal.

The absence of a viable Section 105(c) threatens to undermine the carefully constructed balance created by the Hague Abduction Convention,

116. 121 Cal. Rptr. 2d 897, 908-09 (Ct. App. 2002).

117. *Id.* at 908.

118. *Id.* In *C.T.*, by contrast, an Arkansas court was willing to address the allegations of sexual abuse and would recognize the temporary order placing the child with the mother pending resolution of the Arkansas proceedings.

119. No. A100555, 2003 WL 22719322 , at 9 (Cal. Ct. App. Nov. 14, 2003).

120. Section 302 of the UCCJEA specifically provides that states may use the Act's enforcement remedies to enforce return orders made under the Convention. UCCJEA, *supra* note 62, at 690, § 302, 9 Part 1A U.L.A. at 690.

which mandates certain prerequisites for entitlement to a return order, and creates some narrow defenses, as described above in Part I.A.[121] The Article 13(b) defense, grave risk of harm to the child, is particularly relevant to many of the contexts for application of Section 105(c) that we have been examining. The First Circuit has recently held that a history of domestic violence toward a parent and other siblings, and an abuser's pattern of ignoring domestic protection orders, constituted grounds under Article 13(b) for refusal to return a child to Ireland.[122] In another case, U.S. courts determined that return could be refused on the basis of Article 13(b) when there was significant evidence of sexual abuse by one parent that was not adequately addressed by governmental authorities in Sweden, prior to the children's removal from Sweden by the other parent.[123] "Grave risk of harm" is not easily established in U.S. courts. Article 13(b) has been interpreted restrictively, as "serious risk" is deemed insufficient, and the defense may be utilized only when there is clear and convincing evidence that there is grave risk that return would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation. Thus, the defense is successfully asserted only in compelling circumstances.

Absent a viable Section 105(c), the UCCJEA creates the opportunity for a parent left behind in a foreign nation to get a second bite at the apple, even if his or her Hague request for return is denied on the basis of an Article 13(b) defense. Suppose that the left-behind parent has obtained a custody order in the home nation, either in a proceeding prior to a child's removal or in a proceeding filed within six months of the child's removal from the home country. Even if return is refused in a Hague Abduction Convention proceeding, the left-behind parent can seek enforcement of his or her foreign custody order under the UCCJEA.[124] Grave risk of harm is not a defense to enforcement of an order under the UCCJEA. Though *res judicata* might in some instances potentially block subsequent assertions of the UCCJEA, successful assertion of that defense will depend on the

121. *See supra* notes 5-13 and accompanying text.

122. Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000).

123. Danaipour v. McLarey, 286 F.3d 1 (1st Cir. 2002).

124. This reality has already been recognized by litigants and courts. In Gonzalez v. Gutierrez, counsel for the father repeatedly told Ms. Gutierrez that even if she was successful in defending against the father's petition for return under the Hague Abduction Convention, it would be irrelevant because the father "would then simply file another action in family court pursuant to the UCCJEA and win." Appellant's Opening Brief, *supra* note 98, at 6. In Galante v. Summerfield, No. A100555, 2003 WL 22719322, at 8 (Cal. Ct. App. Nov. 14, 2003), an unusual case in which mother attempted to assert Hague Abduction Convention defenses in a UCCJEA proceeding even though father had brought no previous Hague proceeding, the court observed that "An order of the California court enforcing . . .[the Zimbabwe] order is unaffected by the Hague Convention."

claim preclusion doctrine of the state and the procedural posture of the two proceedings.[125] When a U.S. court in a Hague proceeding has determined that a child would be at grave risk of harm if returned to a foreign nation, Section 105(c) could appropriately be invoked to avert a return otherwise compelled by the UCCJEA, for the reason that such return would violate the child's fundamental right to protection.[126]

The linkage between Section 105(c) and Article 20 of the Hague Abduction Convention may provide further support for utilizing Section 105(c) in those cases in which application of UCCJEA standards would otherwise force a victim of domestic violence to choose between sacrificing her chance to maintain a relationship with her children and jeopardizing her life or physical safety by returning to the nation in which her abuser resides. Recent research by Professor Merle Weiner into the legislative history of Article 20 suggests that its narrow construction in the Reporter's notes and subsequently by courts and the U.S. Department of State has been unwarranted.[127] She argues convincingly in *Using Article 20*, (see page 583) that courts should permit Article 20 to be effectively employed to deny return orders in such cases.[128] Section 105(c), which also invokes protection of fundamental principles of human rights as its underlying rationale, should be interpreted to similarly provide protection under such circumstances.

Further insight into the appropriate interaction between the Hague Abduction Convention and Section 105(c) might be gained from examining the "escape" clause of the 1996 Hague Protection Convention,[129] the convention drafted by the Hague Conference to regulate custody jurisdiction and enforcement issues in a manner that would be consistent with its Abduction Convention. Article 23 of the 1996 Hague Protection Convention provides that recognition to another nation's order may be refused if "such recognition is manifestly contrary to public policy of the requested state, taking into account the best interests of the child . . . ." The New Jersey Supreme Court, recognizing the tie between the two conventions, cited Article 23 in support of its conclusion that in the appropriate

125. In Gonzalez v. Gutierrez, No. D040063, 2003 WL 22236051 (Cal. Ct. App. Sept. 30, 2003), the California intermediate appellate court rejected Ms. Gutierrez's claim preclusion defense, finding that the father's Hague Convention proceeding sought return of his children, to redress the primary right to prevent them from leaving Mexico, whereas the UCCJEA proceeding sought enforcement of visitation, which addressed a different primary right. *Cf.* Holder v. Holder, 305 F.3d 854 (9th Cir. 2002) (Hague Convention proceeding is not precluded by earlier state court custody proceeding).

126. *See supra* note 96 and accompanying text.

127. Weiner, *Strengthening Article 20, supra* note 75.

128. Weiner, *Using Article 20, supra* note 71.

129. *Supra* note 25.

case, enforcement of a foreign order could be denied under the UCCJA.[130] The 1996 Hague Protection Convention thus recognizes that compelling circumstances threatening the safety of a child or parent can justifiably support denial of enforcement while remaining faithful to the overall scheme for implementation of the Hague Abduction Convention.

V. Conclusion

In most international custody disputes, Section 105(c) was not intended to provide a broad exception to the rigorous standards of the UCCJEA. When the safety of a child or parent would be jeopardized by deferral of jurisdiction to a foreign tribunal or enforcement of a foreign order, however, or when, as in *Hosain,* a parent has been effectively prevented from participating in the foreign proceeding by the threat of severe injury, Section 105(c) should be interpreted to circumvent application of the UCCJEA's stringent jurisdictional and enforcement provisions.

Applying Section 105(c) to provide U.S. courts with this necessary discretion to protect children and their parents is consistent with the recognition of courts previously applying the doctrine of comity and the UCCJA that such compelling circumstances justify exceptions to deferral, recognition, and enforcement in international custody disputes. A viable interpretation of Section 105 also harmonizes application of the UCCJEA and the Hague Abduction Convention, and avoids use of the UCCJEA to undercut protections afforded in that treaty. U.S. courts should not be forced to misapply the jurisdictional and enforcement standards of the UCCJEA in order to provide protection and justice, thereby undermining domestic application of the Act. Instead, Section 105(c) should appropriately be utilized on behalf of victims of child and domestic abuse in compelling circumstances, to ensure that the UCCJEA does not otherwise operate to impair their fundamental rights to safety and protection.

130. Ivaldi v. Ivaldi, 685 A.2d 1319, 1327-28 (N.J. 1996).