

TESTING THE BOUNDARIES: DOES US ASYLUM LAW SATISFY THE REFUGEE CONVENTION?

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Introduction	752
I. The International Scheme of Refugee Protection	755
A. The UDHR, Refugee Convention, and 1967 Protocol	755
B. Subsequent Protective Measures Expanding the Definition of Refugee Under Regional Agreements	759
C. Challenges Arising from the US Interpretation of the Refugee Definition	760
1. Procedural Issues.....	761
2. Reality of Violence on the Ground	763
II: Historical Background of Soviet Jewish Persecution.....	766
III: Historical Background of Salvadoran Refugees	769
IV: Comparison.....	772
A: How Did the Situations Differ?.....	772
1. Soviet Jews.....	772
2. Salvadoran Campesinos	777
V. Conclusion.....	779

INTRODUCTION

There are major gaps in the international framework for refugee protection that nation-states exploit in order to avoid meeting what they consider to be burdensome international obligations. The United States is a key example of a nation that fails to meet its international obligation to treat all individuals seeking asylum equally, in accordance with the 1951 Convention Relating to the Status of Refugees (the Refugee Convention) and the 1967 Protocol to the Convention.¹ The United States has

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¹ See generally Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention Relating to the Status of Refugees], available at <http://www.refworld.org/docid/3bc01b964.html>; Protocol Relating to the Status of Refugees,

historically applied different criteria for determining refugee status for different waves of asylum-seekers of various races, ethnicities, and national origins. At times, the United States' policy towards asylum seekers has provided admissions criteria more favorable than those established in the Convention Relating to the Status of Refugees. However, in different contexts, the United States has declined to extend the same degree of protection to asylum-seekers. By picking and choosing which groups of asylum applicants are labeled as *prima facie* refugees, while requiring individualized determinations of refugee status for other groups, the United States flouts the international refugee protection framework. This paper seeks to evaluate the reasons for this disparity by comparing the cases of two waves of asylum-seekers to the United States: that of Jews fleeing religious suppression in the Soviet Union and of Salvadorans fleeing the Salvadoran Civil War. By evaluating two historical examples of US policy toward different waves of asylum-seekers, this paper will highlight issues of compliance and weaknesses in the global governance regime for refugee protection.

Specifically, this paper seeks to explore and respond to the following questions: What is the international standard for refugee protection? Why do certain groups receive unequal treatment and what mechanisms can be employed to ensure a more uniform application of existing international refugee laws? And, perhaps most importantly, does the Refugee Convention need to be expanded to provide a clearer definition of "refugees" or to include specific protections for asylum-seekers, in order to curb illegal practices on the parts of states?

The application of inconsistent criteria for different waves of asylum applicants has created vast imbalances in the system for global governance of refugee protection and imposed disproportionate burdens on developing nations. The current reality runs directly counter to the Refugee Convention's stated goal of international cooperation.² More broadly speaking, the application of inconsistent criteria for refugee determination within nations not only undermines the efficacy of the asylum application process, but also neuters the rights for refugee protection established in the 1951 Convention.

This is a particularly timely topic as the civil war in Syria continues to drive masses of people into neighboring developing

Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Protocol Relating to the Status of Refugees], available at <http://www.refworld.org/docid/3ae6b3ae4.html>.

² Convention Relating to the Status of Refugees, *supra* note 1, at 150.

nations.³ At the time of this writing, the number of Syrian refugees has exceeded two million individuals, over half of whom are children.⁴ Over ninety-seven percent of Syria's refugees are hosted by countries in the immediate surrounding region, driving some of these countries toward the edge of an economic and social collapse.⁵ More generally, at the opening session of its governing Executive Committee's annual meeting, at the start of October 2013, the Office of the United Nations High Commissioner for Refugees (UNHCR) declared that the combination of an unparalleled emergency in Syria and persistence of prolonged conflict around the globe has made resettlement or repatriation even more difficult to achieve, leaving eighty percent of the world's refugee population in developing countries.⁶ This represents a ten percent increase from a decade ago.⁷

In Part I, this paper will explore the nature of the protections for refugees and asylum-seekers established under international law and some of the issues with present-day US interpretations of the law. Part II will examine the historical background of Soviet Jewish persecution. Part III will explore the historical context of Salvadoran refugees, fleeing from their civil war. In Part IV, I will compare these cases and demonstrate that the United States enacted a refugee framework more inclusive than that of the Refugee Convention for Soviet Jews, while actively seeking to downplay the status of individuals fleeing the Salvadoran crisis. Finally, this paper will conclude that a new Protocol to the Refugee Convention should be adopted to create a more inclusive and specific definition of refugee status, similar to the ones adopted by regional entities in Africa and Latin America. These measures must be taken to reduce the unequal treatment of groups emerging from different countries and types of conflict.

³ *Number of Syrian Refugees Tops 2 Million Mark with More on the Way*, UNHCR (Sept. 3, 2013) <http://www.unhcr.org/522495669.html>.

⁴ *Id.*

⁵ *Id.*

⁶ *UNHCR Says it is 'Stretched to the Limit' by the Rising Number of Refugees*, UNHCR (Oct. 1, 2013) <http://www.unhcr.org/524ae6179.html>.

⁷ *Id.*

I. THE INTERNATIONAL SCHEME OF REFUGEE PROTECTION

A. THE UDHR, REFUGEE CONVENTION, AND 1967 PROTOCOL

The individual right to “seek and enjoy in other countries asylum from persecution” is one of the foundations of international human rights law, crystallized in article 14 of the Universal Declaration on Human Rights.⁸ The centerpiece of international refugee protection is the 1951 Refugee Convention.⁹ The Convention originally arose as an internationally coordinated response to the displacement of millions of refugees in post-World War II Europe; however, it did not take effect until 1954.¹⁰ In 1967, the adoption of an additional Protocol Relating to the Status of Refugees expanded the scope of the Convention temporally and geographically to include any situation occurring after and outside of the context of World War II Europe.¹¹ The United States never signed the original convention, but it did sign on to the 1967 Protocol, which incorporated articles 2-34 of the original convention and preserved the definition of a refugee from article 1 of that document.¹²

Article 1 of the Convention defines a refugee as an individual who:

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹³

The Convention also defines when refugee status ceases¹⁴ and when a person may not be considered a refugee.¹⁵ However, the Convention does not make clear how to apply the key terms of “well-founded fear” and

⁸ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

⁹ Convention Relating to the Status of Refugees, *supra* note 1.

¹⁰ See UNHCR, Convention and Protocol Relating to the Status of Refugees (Dec. 2010), 2, <http://www.unhcr.org/3b66c2aa10.html>.

¹¹ *Id.*

¹² Protocol Relating to the Status of Refugees, *supra* note 1, at 268.

¹³ Convention Relating to the Status of Refugees, *supra* note 1, at 152.

¹⁴ *Id.* at 154-56.

¹⁵ *Id.* at 156.

“persecution” in making determinations of refugee status. What type of conduct falls under *persecution*? What marks the distinction between a *well-founded* fear and an ‘unfounded’ fear? The language used here is significant as it introduces many of the terms used around the world for determining grants of asylum.

The Convention encompasses aspirational as well as binding provisions. It was drafted as the final act of a conference scheduled by a resolution of the General Assembly of the United Nations.¹⁶ The Conference produced a series of recommendations that precede the Convention; they can be read as background material for the intent of the parties who joined the convention.¹⁷ For example, the Conference made recommendations regarding the desire for continued international cooperation in order that refugees might find asylum and the possibility of resettlement.¹⁸

Resettlement is important as a long-term solution in many instances where the origin of the conflict is based on deep ethnic or religious divides. Likewise, the type of violence or persecution perpetrated may permanently mar communal relations, or the conflict may be ongoing for several years, or even decades. Because conflict can uproot countless families for an unspecified amount of time, resettlement continues to be one of the most important means of creating stability for refugees and allowing them to move on with their lives. However, it has become exceedingly difficult to find placements in countries willing to accept refugees for permanent resettlement.¹⁹ The task of resettlement becomes all the more difficult when economic conditions breed xenophobia and paranoia about foreigners driving up unemployment rates.²⁰ This is especially true in the developed world, where refugees would arguably have the best chance of successfully resettling, owing to organized social safety-net programs. In reality, the vast majority of refugees wait in limbo in camps in countries neighboring their nation of origin, waiting for conditions to change so that they may return to their homes.²¹ Return to their own country is often the most desirable outcome

¹⁶ *Id.* at 138.

¹⁷ United Nations, Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, available at <http://www.refworld.org/docid/3ae6b3a10.html>.

¹⁸ Convention Relating to the Status of Refugees, *supra* note 1, at 146-48.

¹⁹ See generally *World Refugee Day: UNHCR Report Finds 80 per cent of World's Refugees in Developing Countries*, UNHCR (June 20, 2011), <http://www.unhcr.org/4dfb66ef9.html>.

²⁰ See generally *id.*

²¹ *Id.*

for the refugees themselves, and in some ways this makes the idea of temporary camps practical. In other ways, refugee camps can represent a dangerous or simply profoundly unsatisfying living situation.²² While these camps are originally intended to be transitory, many acquire a semi-permanent status due to the drawn-out internal conflicts of the present day.²³ The semi-permanent nature of refugee camps causes turmoil and frustration amongst the host populations in turn, most of which are situated in developing countries that cannot realistically absorb an additional 500,000 or 1 million refugees into their economies.²⁴ Furthermore, refugees may find forced relocation into refugee camps orchestrated by neighboring governments and international aid organizations strips them of their agency in determining how best to move on from a conflict zone.²⁵

In its preamble, the Convention refers back to the Charter of the United Nations and the Universal Declaration of Human Rights (UDHR) to affirm the principle that human beings have “fundamental rights and freedoms without discrimination.”²⁶ The Convention indicates a desire to extend the scope of protection for refugees, and that refugees should be treated with “the widest possible exercise of these fundamental rights and freedoms.”²⁷ The preamble reiterates that international cooperation is

²² See generally Mac McClelland, *How to Build a Perfect Refugee Camp*, N.Y. TIMES (Feb. 13, 2014), http://www.nytimes.com/2014/02/16/magazine/how-to-build-a-perfect-refugee-camp.html?_r=0 (“Currently, the number of years a refugee lives in a refugee camp is, on average, 12 ‘In a noncamp setting . . . if people are able to keep themselves engaged, that provides a healthy outlook, helps establish local integration, keeps alive their skill sets if they repatriate.’ The longer a refugee resides in a camp, the harder it can become to sustain psychological well-being. But camps remain the default solution.”).

²³ See, e.g., *Bhutanese Refugees in Limbo*, THE ECONOMIST (Oct. 23, 2003), <http://www.economist.com/node/2156264>; *Palestinian Refugee Camps: A New Type of Settlement*, THE ECONOMIST (Oct. 12, 2013), <http://www.economist.com/news/middle-east-and-africa/21587846-some-palestinians-want-their-people-abandon-refugee-camps-without-demanding>; *Syrian Refugees in Turkey: Will they Ever Go Home?*, THE ECONOMIST (June 15, 2013), <http://www.economist.com/news/middle-east-and-africa/21579522-refugees-are-building-life-fighting-never-far-away-will-they>.

²⁴ See McClelland, *supra* note 22 (“‘No one is going to naturalize one million people.’”; “By the end of 2013, the Turkish government had spent \$2.5 billion on its Syrian guests, primarily in camps — a figure that has created resentment among Turks.”).

²⁵ See generally *id.* (“‘It’s hard for us,’ said Basheer Alito, the section leader who was so effusive in his praise for the camp and the Turks. ‘Inside, we’re unhappy. In my heart, it’s temporary, not permanent.’ . . . ‘Refugee camps have become the mechanism to try to control people,’ Fabos says. ‘They prevent them from interacting with your citizenry.’”).

²⁶ Convention Relating to the Status of Refugees, *supra* note 1, at 150.

²⁷ *Id.*

central to the achievement of the Convention's goals.²⁸ To that effect, article 35 of the Convention and article 2 of the Protocol call for states to agree to cooperate with the UNHCR to supervise application of the provisions of the Convention and Protocol.²⁹

The Refugee Convention charges the Office of the United Nations High Commissioner for Refugees with the task of supervising international conventions providing for the protection of refugees and recognizes that effective coordination of measures taken to deal with this problem depend upon the co-operation between States and the High Commissioner.³⁰ While a distinction between *asylum-seekers* and *refugees* exists under the international protection framework, this distinction rests largely on the ambiguous status of individual applicants for asylum on a country-by-country basis. States wishing to retain their sovereignty with respect to controlling the admission of foreigners within their borders retain the right to make determinations of refugee status. Therefore, asylum-seekers are individuals claiming to be refugees, who have not yet been granted refugee status by a receiving State. However, the UNHCR recognizes that, in practical terms, all those who cross borders during mass movements of people fall under their mandate and labels them as "*prima facie*" refugees because of the impossibility of conducting individualized determinations and the obvious causes of flight.³¹

The main obligations under international law established in the treaty involve the contracting parties' agreement 1) not to punish refugees for illegal entry to their territory,³² 2) not to expel or return, "refouler," a refugee "in any manner whatsoever" to the "frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular group or political opinion,"³³ 3) to allow refugees necessary facilities and a reasonable period within which to seek legal admission into another country.³⁴ The prohibition against refoulement is so strong it is

²⁸ *Id.*

²⁹ *Id.* at 176; Protocol Relating to the Status of Refugees, *supra* note 1, at 270.

³⁰ Convention Relating to the Status of Refugees, *supra* note 1, at 152.

³¹ *Asylum Seekers*, UNHCR, <http://www.unhcr.org/pages/49c3646c137.html> (last visited Oct. 10, 2013).

³² Convention Relating to the Status of Refugees, *supra* note 1, at 174.

³³ *Id.* at 176.

³⁴ *Id.* at 174.

considered a part of customary international law.³⁵ Later, the states parties to the 1967 Protocol asserted that “it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention”³⁶ This language is relevant to approaching two of the questions set out in this paper. Firstly, the Convention indicates that national governments that have signed onto the Convention and Protocol have an international legal obligation to make the most liberal interpretations in admitting asylum seekers as refugees because “the contracting States shall *as far as possible* facilitate the assimilation and naturalization of refugees.”³⁷ Secondly, the Convention makes clear that no refugee group should be given preferential treatment under international law.

B. SUBSEQUENT PROTECTIVE MEASURES EXPANDING THE DEFINITION OF “REFUGEE” UNDER REGIONAL AGREEMENTS

To combat the uncertainty and inconsistency that can result from individualized state-based criteria for establishing refugee status, several regional organizations have banded together to create more inclusive or more specific definitions of “refugee” in subsequent treaties and conventions. In 1969, the Organization of African Unity (OAU) adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa.³⁸ This regional agreement included more specific categories for the types of conflict that could trigger a determination of refugee status, thereby creating a more definite and objective standard for making refugee determinations, not on the basis of the individual’s affiliation with a persecuted group, but with an ongoing conflict. Their convention defines a refugee as, “any person compelled to leave his/her country owing to *external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole* of his country of origin or nationality.”³⁹

³⁵ Kate Jastram & Marilyn Achiron, *Refugee Protection: A Guide to International Refugee Law*, IPU & UNHCR, 14, (Dec. 1, 2001) [hereinafter Jastram & Achiron], available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3d4aba564&query=guide%20to%20international%20protection>.

³⁶ Protocol Relating to the Status of Refugees, *supra* note 1, at 268.

³⁷ *Id.* at 176 (emphasis added).

³⁸ Jastram, *supra* note 35, at 9.

³⁹ *Id.* (emphasis added).

Similarly, in 1984, a colloquium of Latin American government representatives and distinguished jurists adopted the Cartagena Declaration.⁴⁰ Like the OAU Convention, the Declaration created a more specific definition than the 1951 Convention's refugee definition. The Declaration's definition of refugee includes: "persons who flee their countries 'because their lives, safety or freedom have been threatened by *generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.*'"⁴¹

These specific regional definitions should theoretically lead to greater consistency in state-based refugee policies across the member states of these conventions, meaning greater refugee protection and lesser burdens on individual states. Both of these regional definitions can be interpreted as tailoring the 1951 Refugee Convention to the particular types of conflict and circumstances arising within their respective regions. This realistic acknowledgement of the conditions on the ground in these areas can lead to better outcomes for refugee populations. The OAU Convention recognizes serious public disturbances as a cause of refugee flight, whereas the Cartagena Declaration goes even further to explicitly recognize not only external aggressors, but also internal conflicts, generalized violence, and human rights violations as well, thereby expressly tying its definition to the human rights regime.

C. CHALLENGES ARISING FROM THE US INTERPRETATION OF THE REFUGEE DEFINITION

In 1980, the United States Congress committed to implementing a comprehensive refugee policy codified in the Refugee Act.⁴² This Act adopted the refugee definition from the 1951 Convention almost verbatim. However, subsequent judicial interpretation created a more stringent definition of refugee status than what is reflected in international practice. The US definition, as it is now applied, revolves around the presence of three factors: the fact of past persecution, a well-founded fear of future persecution, and a nexus of state action or failure

⁴⁰ *Id.*

⁴¹ *Id.* (emphasis added).

⁴² See The Refugee Act of 1980, 8 U.S.C. § 1101 (2006) [hereinafter The Refugee Act].

to protect on the part of the government from which an applicant originates.⁴³

The US Citizenship and Immigration Services handles asylum applications, and the administrative law process has garnered criticism for the high burden of proof placed on applicants, determinations based on credibility of the applicant, and the degree of discretion Immigration Judges exercise.⁴⁴ The resultant asylum application process is overly complex, largely ignores the discrimination marginalized groups face, and produces inconsistent results.⁴⁵ Barriers to entry include measures such as placing a high burden of proof on the individual applicant, both for asylum and for withholding of removal protection.⁴⁶ Administrative rules and regulations, as well as judicial interpretation, obscure the legislature's goals for enacting the Refugee Act.⁴⁷

1. Procedural Issues

Today, asylum seekers who travel to the United States legally may apply for relief within one year of their arrival.⁴⁸ US asylum law is formally discretionary; the Attorney General must determine whether an individual meets the definition of a refugee according to § 1101(a)(42).⁴⁹ Asylum officers interview petitioners and refer their cases to immigration court; there an Immigration Judge (IJ) conducts an evidentiary hearing and sits as the trier of fact.⁵⁰ If an applicant wishes to challenge the determination of an IJ, her case goes before the Board of

⁴³ See Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 734-35 (1998).

⁴⁴ See JAYA RAMJI-NOGALES, ANDREW I SCHOENHOLTZ, & PHILIP G. SHRAG, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* (New York University Press 2009).

⁴⁵ See Megan S. Knize, *On Being Very Afraid: Why We Need a Consistent Evidentiary Standard for Asylum Seekers*, 12 APPALACHIAN J.L. 123, 127-28 (2012).

⁴⁶ See generally Deborah E. Anker, *Law of Asylum in the United States* § 2.1 (Westlaw 2013), available at [https://a.next.westlaw.com/Document/ladc97a4b403d11e086050000837bc6dd/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://a.next.westlaw.com/Document/ladc97a4b403d11e086050000837bc6dd/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)).

⁴⁷ See generally Steinbock, *supra* note 43, at 738 ("Immigration in general, and asylum in particular, are resources for the reduction of social suffering. Refugee and asylum provisions of immigration law are the embodiment of this impulse.")

⁴⁸ The Refugee Act, *supra* note 42, § 1158(a)(2)(B).

⁴⁹ See Anker, *supra* note 46.

⁵⁰ See generally *Kotas v. I.N.S.*, 31 F.3d 847, 850 (9th Cir. 1994).

Immigration Appeals (BIA).⁵¹ From there, applicants may petition for judicial review in a court of appeals.⁵²

In this system, an applicant's success depends almost entirely on his or her credibility.⁵³ Throughout the process, the burden of proof rests on the applicant (for whom English is frequently not a primary language and who may be unfamiliar with many nuances of the process) to persuade each level of authority of his or her refugee status.⁵⁴ Refugee determinations are based largely on subjective determinations of Immigration Judges,⁵⁵ coupled with an applicant's ability to offer evidence sufficient to meet at least one of two separate, but often interconnected, grounds—past persecution and the well-founded fear of future persecution.⁵⁶ By the time a case reaches a court of appeals, deference to the trier of fact, the IJ, dictates that the appellate court can only vacate a BIA determination on the grounds of a legal error. A court of appeals cannot direct the BIA to take a particular action unless the applicant has presented proof of persecution so compelling that no reasonable fact-finder could have issued a determination to the contrary.⁵⁷ Thus, federal appellate courts cannot overrule agency determinations of refugee status, except in the most extreme cases.

The difficulty of meeting this standard lies in the fact that there are no statutory definitions for “persecution” or a “well-founded fear.”⁵⁸ US case law has explicated the meaning of a well-founded fear, which has a subjective and an objective component, requiring that there be a reasonable fear of persecution based on credible, specific, direct evidence in the record of facts.⁵⁹ Encompassed in this standard is the idea of targeting, or the requirement that the fear actually relate to individual experience and not simply general random violence against a group that the applicant belongs to.⁶⁰

While the Supreme Court of the United States has discussed the meaning of a well-founded fear in at least four cases, it has never

⁵¹ *Id.*

⁵² *Id.* at 850-51.

⁵³ See The Refugee Act, *supra* note 42, § 1158(b)(1)(B)(iii).

⁵⁴ See Anker, *supra* note 46.

⁵⁵ See generally Bridget Tainer-Parkins, *Protection from a Well-Founded Fear: Applying the Disfavored Group Analysis in Asylum Cases*, 65 WASH. & LEE L. REV. 1749, 1781 (2008).

⁵⁶ See Knize, *supra* note 45, n.7 (citing 8 C.F.R. § 208.13(b)(1)-(3) (2006)).

⁵⁷ Kotas, *supra* note 50, at 851.

⁵⁸ See Knize, *supra* note 45, at 129.

⁵⁹ Kotas, *supra* note 50, at 851-52.

⁶⁰ See Anker, *supra* note 46, § 2.4.

elaborated on the meaning of persecution in international law, so as to set a standard for the lower courts.⁶¹ As a result, almost every circuit court in the United States has developed its own interpretation of what constitutes persecution, and a definite split exists between the Ninth Circuit and at least four other circuits that have rejected the Ninth Circuit's creation of a *disfavored groups* rationale for asylum.⁶² In reality, most courts at the circuit level have adopted an "I'll know it when I see it" approach, with some conflating the targeting requirements of a well-founded fear with the bases for finding persecution.⁶³

Generally, it is clear from the outcomes of circuit court cases that persecution requires a nexus of "serious harm and failure of state protection," caused because of a difference on the part of the victim relating to one of the five acknowledged categories: race, religion, nationality, membership in a particular social group, or political opinion.⁶⁴ The *serious harm* may be the result of individualized persecution, or as the Immigration and Naturalization Service recognized in 1990, a pattern or practice of persecution against persons similarly situated to the applicant.⁶⁵ A *failure of state protection* may be in the form of state action or a state's unwillingness or inability to address acts of persecution.⁶⁶ Across the United States, however, courts essentially make determinations of what constitutes persecution on an ad hoc basis.⁶⁷

2. Reality of Violence on the Ground

The requirements that US courts have shaped in asylum cases do not seem to reflect the reality of political, social, or racial violence suffered by many asylum seekers. In particular, the rejection or failure to adopt the disfavored groups approach by the majority of federal circuits

⁶¹ See generally Steinbock, *supra* note 43, at 743-56.

⁶² See Anker, *supra* note 46, §2.12 n. 2 (citing *Kho v. Keisler*, 505 F.3d 50, 55 (1st Cir. 2007) (rejecting "disfavored group" analysis because it relieves applicants of the burden of individualized showing without requiring them to meet pattern and practice standard); *Kaharudin v. Gonzales*, 500 F.3d 619, 624-25 (7th Cir. 2007) (finding "disfavored group" an improperly lowered standard); *Lie v. Ashcroft*, 396 F.3d 530, 538 n.4 (3d Cir. 2005) (rejecting the establishment of a "disfavored group" category)); see also *Wijaya v. Gonzales*, 227 Fed. Appx. 35, 38 n.1 (2d Cir. 2007) (declining to adopt Ninth Circuit's "disfavored group" standard).

⁶³ See Anker, *supra* note 46, § 4.4 n. 17.

⁶⁴ See *id.* § 4.4 n. 3.

⁶⁵ Kotas, *supra* note 50, at 852-53.

⁶⁶ See Anker, *supra* note 46, § 4.9 n. 4.

⁶⁷ See generally Knize, *supra* note 45, at 125.

indicates an ambivalence toward victims of widespread discrimination. While the Ninth Circuit is perhaps the most forward-thinking because of its adoption of this standard, even the opinion in which the disfavored groups doctrine originated demonstrates a serious disconnect between the American justice system's understanding of persecution and the reality of racial or social violence on the ground.⁶⁸ In that case, the court stated:

There are, in contrast, more extreme situations in which members of an entire group—though perhaps not of an entire nation—are systematically persecuted. In such cases, group membership itself subjects the alien to a reasonable possibility of persecution, so that he or she will be able to satisfy the objective component of the well-founded fear standard simply by proving membership in the targeted group. As the systematic attempt to annihilate the Jews in Nazi Germany conclusively demonstrates, persecution of an entire group can render proof of individual targeting entirely superfluous. Certainly, it would not have been necessary for each individual Jew to await a personal visit to his door by Nazi storm troopers in order to show a well-founded fear of persecution. Similarly, it would be unnecessary for members of other systematically persecuted groups to show that they have been selected on an individual basis as subjects of persecution.⁶⁹

The irony of the court's reasoning here is that they were in the process of denying asylum to a petitioner who sought refuge because she was a member of the Roma minority in Hungary. The Roma have historically faced extreme persecution, including slavery and extermination, and continue to be widely discriminated against today.⁷⁰ Over the years, prejudice against the Roma has become increasingly violent, with several examples of systematic economic and social discrimination.⁷¹ Apparently, the petitioner in *Kotasz* did not provide evidence sufficient to meet the standard of proof necessary.⁷² However, this raises the

⁶⁸ *Kotasz*, *supra* note 50.

⁶⁹ *Id.* at 852.

⁷⁰ See generally Jack Greenberg, *Report on Roma Education Today: From Slavery to Segregation and Beyond*, 110 COLUM. L. REV. 919 (2010).

⁷¹ See, e.g., Lydia Gall, *Hungary's Alarming Climate of Intolerance*, HUMAN RIGHTS WATCH (Jan. 18, 2013), <http://www.hrw.org/news/2013/01/18/hungary-s-alarming-climate-intolerance>; Izza Leghtas, *Will the Summer of 2013 Be Any Different for Roma in France?*, HUMAN RIGHTS WATCH (July 16, 2013), <http://www.hrw.org/news/2013/07/16/will-summer-2013-be-any-different-roma-france>; Eric Westervelt, *Wave of Violence Strikes Eastern Europe's Gypsies*, NPR (Sept. 2, 2009, 6:00 AM), <http://www.npr.org/templates/story/story.php?storyId=112460670>.

⁷² *Kotasz*, *supra* note 50, at 854.

question—how does an asylum-seeker effectively prove that “systematic persecution” is being perpetrated against her social or ethnic group?

The Ninth Circuit cites the example of the Holocaust, but at exactly what point did Nazi persecutions become *systematic*? As noted Holocaust historian Doris Bergen writes in her comprehensive text on the period, “what could Jews in Europe know in 1942 and 1943 of the killing centers . . . even Polish Jews, at least in the early stages of the killing centers’ operations, could have problems grasping the reality of genocide.”⁷³ Furthermore, Bergen describes an incident where in the fall of 1942, Jan Karski, the first man to bring eyewitness testimony of the killing centers to the Allies, met with the highest levels of government in Washington, D.C. Karski described what was happening to the Jews of Poland to Supreme Court Justice Felix Frankfurter, and was met with total disbelief—not because Frankfurter thought he was lying, but because it was impossible to comprehend the scale of the violence.⁷⁴

From 1933 to 1938, violence against Nazi targets was not widely recognized as systematic; it happened in bursts and spurts. Stormtroopers—essentially organized hooligans—or private citizens frequently perpetrated attacks, and a political party, not the official government *per se*, was behind much of this persecution.⁷⁵ When did the persecution become systematic and who could have provided evidence of that? Can the cutoff be set at the adoption of the 1935 Nuremberg laws? Or was it in 1938 during Kristallnacht, the first time 26,000 Jewish men were arrested and sent to concentration camps just for being Jewish?⁷⁶ Would it take another Kristallnacht for members of a disfavored group to successfully prove their case for asylum?

The challenge with this inconsistency in US interpretations of refugee law lies primarily in the fact that no two conflicts are alike. In every instance of persecution, conditions leading up to violence or the adoption of oppressive tactics by a national regime will tend to differ and depend on the social, political, and historical circumstances on the ground. There are perhaps no two cases more dissimilar than that of Jewish asylum applicants from the Soviet Union and refugees fleeing the Salvadoran Civil War, both of which overlap with the adoption of the

⁷³ DORIS L. BERGEN, *WAR & GENOCIDE: A CONCISE HISTORY OF THE HOLOCAUST* 193 (2d ed. 2009).

⁷⁴ *Id.* at 205.

⁷⁵ See generally *id.* at 48.

⁷⁶ *Id.* at 86.

Refugee Act in 1980. These two case studies provide a fascinating point of comparison to demonstrate how the US government has historically chosen how to interpret and apply international refugee law to support its political goals, rather than to meet international standards of refugee protection.

II: HISTORICAL BACKGROUND OF SOVIET JEWISH PERSECUTION

From 1967 to 1989, a mass exodus of Soviet Jews took place in several waves.⁷⁷ Unlike other stories of mass migration, the Soviet Jewish case is unique as an example of a highly organized and politicized instance of refugee emigration. Soviet Jewish emigration was achieved as the result of a deliberate effort on the parts of local activists, international advocates in the United States and Israel, organized federations and Jewish aid organizations, and national governments.⁷⁸ While initial efforts were directed to pressure the Soviet government to allow Jews to emigrate and resettle in Israel for the purpose of “repatriation of their homeland,” by the mid-1970s it became clear that most Soviet Jews preferred resettlement in the United States.⁷⁹ Thus began a saga that really centered on the conflict between the “sponsored immigrant politics” of Israel, and its desire to be a country of first refuge for Soviet Jews and the American Jewish community’s devotion to the principle of “freedom of choice” for Soviet Jewish refugees to be able to settle in the country of their choosing.⁸⁰

American Jewry’s dedication to *freedom of choice* stemmed in large part from their guilt over the United States’ refusal to admit Jews fleeing Hitler’s Germany in the 1930s and 40s.⁸¹ Whereas earlier generations had feared increased anti-Semitism from pushing the German-Jewish rescue agenda, American Jews in the 1970s and 1980s felt strongly that they could not stand in the way of Soviet Jews fleeing persecution from a communist dictatorship.⁸² By the 1980s, American Jews had also gained in political prominence and become active participants in Washington; these elite leaders turned the struggle to

⁷⁷ FREDERICK A. LAZIN, *THE STRUGGLE FOR SOVIET JEWRY IN AMERICAN POLITICS: ISRAEL VERSUS THE AMERICAN JEWISH ESTABLISHMENT* 2 (2005).

⁷⁸ *See id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 2–3.

⁸¹ *Id.*

⁸² *See id.*

“free” Soviet Jewry into a national Jewish crusade.⁸³ Later in the decade, after Gorbachev’s *glasnost* policies eased the degree of repression in the Soviet Union, American Jewish community organizations would lessen their support of freedom of choice policies and begin to support direct flights to Israel for Soviet Jews.⁸⁴ Eventually, the same advocates for Soviet Jewish refugee status would agree (some would say acquiesce) to the imposition of quotas on the admission of Soviet Jewish refugees.⁸⁵

Repression against Jews in the Soviet Union originated in their lack of a national territory, which meant that they had no opportunity to preserve separate cultural rights.⁸⁶ The Soviet regime closed down and suppressed Jewish cultural and religious institutions.⁸⁷ In 1919, the government deported or placed in labor camps 3,000 Zionist leaders.⁸⁸ Stalin’s purges killed thousands of Jewish party members and exiled and systematically killed Jewish cultural, political, and religious leaders.⁸⁹ In 1932, the government instituted an internal passport system, which marked Jews as an ethnic group.⁹⁰ This had the effect of officially maintaining Jewish identity, while the regime simultaneously killed its cultural expression. Jews were not permitted to engage in religious rituals or to maintain schools or instruction in Yiddish.⁹¹ This suppression of Jewish identity went on for an additional thirty-five years, despite Stalin’s death in 1953, with waves of executions of Jewish cultural and artistic figures occurring in 1948 and 1953.⁹² Although openly violent anti-Semitism had dissipated by the 1970s, the Soviet Union remained a deeply uncomfortable place for Jews to reside in. It required Jews to assimilate culturally to succeed, while its public institutions expressed biases against them.⁹³ Nonetheless, many Soviet Jews managed to achieve a high degree of professional and economic success, openly participating in the arts, sciences, literature, etc.⁹⁴

⁸³ *Id.* at 5.

⁸⁴ *Id.* at 3.

⁸⁵ *Id.*

⁸⁶ *Id.* at 21.

⁸⁷ *Id.*

⁸⁸ *Id.* at 54 n.5.

⁸⁹ *Id.* at 21.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 22.

⁹³ *Id.*

⁹⁴ *Id.* at 23.

In the United States, Soviet Jewry was not an issue on many people's radars until the mid-1960s.⁹⁵ Starting in 1952, Israel began to work on the problem, creating the Liaison Bureau to Rescue Soviet Jewry in the Office of the Prime Minister.⁹⁶ The Israeli government's position on Soviet Jewry was that Soviet Jews were suffering persecution by being barred from the free exercise of their religion and living according to communal values.⁹⁷ Israel saw a need for Soviet Jews to return to their "homeland," where they also represented great human resource potential. Eastern European Jews were, on average, more educated and possessed more technical skills than African or Sephardic Jews.⁹⁸ Such skills were necessary for the development of Israel's infrastructure, technology, and military sectors.⁹⁹ The Liaison Bureau had a large role in the creation of the first American Jewish Conference on Soviet Jewry in 1963 and the National Conference on Soviet Jewry in 1971.¹⁰⁰ The initial gathering of the American Jewish Conference on Soviet Jewry marked the first serious effort on the part of American Jewish leadership to address the Soviet Jewry issue.¹⁰¹ In addition, existing independent Jewish organizations, such as the Hebrew Immigrant Aid Society (HIAS), began to adopt the Soviet Jewry cause. In the early-1970s, HIAS began helping Soviet Jews secure visas to the West and arranged for their resettlement in the United States in conjunction with local American Jewish federations.¹⁰² Meanwhile, some American Jewish leaders charged that there was no "special persecution" of Soviet Jews and that Israel had artificially inflated claims of Soviet Jewish persecution in order to trigger immigration to their country.¹⁰³ Only after the June 1967 Seven Day War, did a significant number of Soviet Jews begin to express their desire to repatriate what they saw as their homeland in Israel.¹⁰⁴

Ironically, through 1973, the Israeli government controlled the outflow of émigrés from the Soviet Union through Austria, with some

⁹⁵ *Id.* at 8.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 93.

⁹⁹ *See id.*

¹⁰⁰ *Id.* at 8, 28–29.

¹⁰¹ *Id.* at 29.

¹⁰² *Id.* at 9.

¹⁰³ *Id.* at 28.

¹⁰⁴ *Id.* at 31.

claims that émigrés were denied access to destinations other than Israel.¹⁰⁵ After a terrorist incident in Vienna, the Austrian government took control of the emigration process and adamantly guaranteed Soviet émigrés a choice in their resettlement destination.¹⁰⁶ The government would then reroute émigrés through the American Joint Distribution Committee and HIAS to Rome, where they could apply for US visas.¹⁰⁷

Once in Rome, reports indicate that HIAS counseled immigrants to emphasize anti-Semitism and persecution as their reasons for “fleeing” the Soviet Union.¹⁰⁸ One former head of the Council of Jewish Federations and the National Conference for Soviet Jewry claimed that HIAS tried to get refugee status for unqualified people.¹⁰⁹ With HIAS’s assistance and the support of the American Jewish community, more and more Soviet Jews chose to resettle in the United States, rather than Israel.¹¹⁰ This created what is known as the *dropout* controversy over Soviet Jews exiting on Israeli visas and then rerouting and choosing to go to the United States.¹¹¹

III: HISTORICAL BACKGROUND OF SALVADORAN REFUGEES

Until recently, scholarship has completely overlooked the mass displacement of one-fifth of El Salvador’s population that resulted from the protracted civil war that took place there between 1980 and 1992.¹¹² Some experts have posited El Salvador as Latin America’s least researched nation-state.¹¹³ In the 1980s, a storm of social discontent, public protest, and collective organization began to draw attention to the abuses of the Salvadoran military regime.¹¹⁴ Progressive Catholic priests began preaching liberation theology to the Campesinos, rural dwellers or “peasants” who survived by a combination of subsistence agriculture, animal husbandry, and seasonal wage labor.¹¹⁵ The Campesinos

¹⁰⁵ *Id.* at 10.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 10, 81.

¹⁰⁸ *Id.* at 83.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 10.

¹¹¹ *Id.*

¹¹² MOLLY TODD, BEYOND DISPLACEMENT: CAMPESINOS, REFUGEES, AND COLLECTIVE ACTION IN THE SALVADORAN CIVIL WAR 5 (2010).

¹¹³ *Id.*

¹¹⁴ *Id.* at 18.

¹¹⁵ *Id.* at 3.

predominantly resided in the northern part of El Salvador, a sparse terrain known as *tierra olvidada*, or “forgotten land.”¹¹⁶ This region and its residents were traditionally marked as non-productive, apathetic, and non-political; a degraded part of the country that was economically useless.¹¹⁷ However, the Campesinos were actually adept at organizing cooperatives and collective actions to promote local group survival. At the same time that priests were bringing liberation theology to the region, the revolutionary guerrilla group, Frente Farabundo Marti para Liberacion Nacional (FMLN) was beginning to consolidate its forces.¹¹⁸

The Salvadoran government painted both the priests and the FMLN as agents of international terrorist and Communist networks and accused both groups of agitating the rural population for their own political gains.¹¹⁹ When Campesinos began to organize and demand civil rights, the government wrote off these public expressions of discontent as the work of Communist priests and demands for human rights were considered a front for the FMLN.¹²⁰ As the popular movement became more radicalized and protests grew, the government responded in increasingly violent ways.¹²¹ Political leaders and independent voices were silenced through arrests, disappearances, and assassinations. The national security forces attacked protesters and the military responded to rural organizational activities with large massacres.¹²² In October of 1979, a coup ousted the military dictator Gen. Carlos Humberto Romero and a civilian-military junta was established.¹²³ This junta quickly dissolved. Meanwhile, five politico-military organizations joined to form the FMLN.¹²⁴ Then, in January of 1980, the march of the “Union of Democratic and Revolutionary Forces” took place with 250,000 people in attendance. The moment that the military opened fire on the crowds can be considered the incident that preceded open war.¹²⁵

The mass displacements of Salvadoran citizens began in earnest in 1980.¹²⁶ At this point, national governments, journalists, international

¹¹⁶ *Id.* at 17.

¹¹⁷ *See id.*

¹¹⁸ *Id.* at 18.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 48.

¹²² *Id.*

¹²³ *Id.* at 53.

¹²⁴ *Id.* at 51.

¹²⁵ *Id.* at 48.

¹²⁶ *Id.* at 51.

aid workers, and historians ceased to view Campesinos as individuals with agency and began to chronicle their activities through one of two lenses: either as victimized refugees fleeing for their lives or communist, militant guerrillas; wolves hiding in sheep's clothing.¹²⁷ Within this political environment, flight became a key self-defense tactic; rather than a desperate impulse, flight was a deliberate maneuver as part of a larger process of resistance.¹²⁸

While more than half of the displaced persons transited into UN-sponsored refugee camps across the border in Honduras, nearly 1 million Salvadorans went abroad to Canada, Bolivia, Sweden, Mexico, and elsewhere.¹²⁹ Roughly half of them attempted to reach the United States.¹³⁰ The term for this flight, "*guinda*" denotes, "purposeful, temporary flight from one's home and community to evade government troops and violence."¹³¹ Initially, the men left their homes at night to hide in the forest, attempting to evade military searches for the guerrillas, but then troops began targeting women based solely on their kinship ties to men who were presumed to be rebel collaborators.¹³² By the late 1970s, entire communities were mobile, evacuating from the military's scorched earth campaigns.¹³³ These attacks were indiscriminate, random, and the military's orders were to leave no one and nothing alive.¹³⁴ Given the chances of survival if they remained, Campesinos chose to flee.¹³⁵

The events of May 14, 1980, perhaps best demonstrate the type of brutality that can occur when individual nation-states deny responsibility for international refugee protection. On that day, Salvadoran government forces attacked a large group of Campesinos near the northern border without warning.¹³⁶ They fled to the Sumpul River on the border with Honduras. As the large mass of people attempted to cross the river, the Salvadoran army gunned them down from an elevated vantage point. On the other side, the Honduran military turned them back. Those who survived the Sumpul River Massacre and

¹²⁷ *Id.* at 51–52.

¹²⁸ *Id.* at 52.

¹²⁹ *Id.* at 54, 85.

¹³⁰ *Id.* at 85.

¹³¹ *Id.* at 56.

¹³² *Id.*

¹³³ *Id.* at 58.

¹³⁴ *Id.* at 58, 60.

¹³⁵ *Id.* at 60.

¹³⁶ *Id.* at 82–83.

the 600 lives that were lost that day marked the first large group of internationally recognized Salvadoran war refugees.¹³⁷

IV: COMPARISON

A: HOW DID THE SITUATIONS DIFFER?

The most salient points of difference in these two situations revolve around the political pressure that a well-organized in-country interest group can provide and the political relationship between the country where the conflict takes place and the country that receives the refugees. The degree of favorability that the receiving country will show a particular group can probably be explained best by interest convergence theory.¹³⁸ That is to say, when the political will of national elites converges with the interests of a specific refugee ethnic or social population, the receiving country will be much more likely to extend asylum protection to that group.¹³⁹

1. Soviet Jews

The case of Soviet Jewry provides important insights into the political behavior, influence, and style of a well-established minority group in the United States.¹⁴⁰ A driving force behind their asylum movement was the sympathy of the American Jewish public, which lobbied the US government to admit Soviet Jews as refugees and offered to sponsor refugees by assisting with housing, jobs, health care, and other social programs.¹⁴¹ Stories of Soviet Jews waiting decades to emigrate to reunite with family awoke American Jewish sympathies.¹⁴²

In addition, reports of economic deprivation and harassment by the KGB made the cause of Soviet Jewry popular with American

¹³⁷ *Id.* at 83.

¹³⁸ See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

¹³⁹ "Receiving country" is used here to describe countries where the government makes a decision about whether to receive asylum-seekers as refugees, as opposed to neighboring countries into which refugees flee across borders.

¹⁴⁰ LAZIN, *supra* note 77, at 4.

¹⁴¹ *Id.* at 2

¹⁴² GAL BECKERMAN, WHEN THEY COME FOR US, WE'LL BE GONE: THE EPIC STRUGGLE TO SAVE SOVIET JEWRY 8 (2010).

political leaders as an ideological weapon against Communism.¹⁴³ By the 1980s, the Soviet Union was beginning to show serious signs of weakness, including economic problems, food shortages, and a draining military campaign in Afghanistan.¹⁴⁴ Soviet Jewish demands for emigration inflamed government leaders, presenting a fundamental internal challenge to the regime's international reputation.¹⁴⁵ Likewise, the situation exacerbated criticism that the Soviet Union was not upholding the right to free movement enshrined in article 13 of the Universal Declaration on Human Rights.¹⁴⁶

Initially, pushing for free Soviet Jewish emigration was a no-lose proposition for the United States and other Western nations. The existence of Israel as a sponsoring state allowed the United States the luxury of criticizing the Soviet Union's human rights record, without the burden of having to resettle refugees within its own borders.¹⁴⁷ Through 1971, demands for free emigration of Soviet Jews revolved around family reunification and repatriation of their "territorial homeland."¹⁴⁸ These initial demands did not focus on persecution and until 1973 almost all Soviet Jewish émigrés were resettled in Israel.¹⁴⁹ By 1976, however, a near majority preferred resettlement in the United States and the West.¹⁵⁰ Until 1989, no Israeli government actually denied Israeli exit visas to Soviet Jews, despite the unlikelihood of their actually immigrating to Israel.¹⁵¹ Pragmatically, Israel did not wish to antagonize American Jewish communities, for whom Israel's security was the number one priority, above even Soviet Jewish resettlement.¹⁵²

Congress was also pragmatic in its use of the Soviet Jewry movement to pressure the Soviet Union on its human rights record. At the height of the Cold War, "petitions and calls to Soviet Jewish activists were first class political capital."¹⁵³ The National Conference for Soviet Jewry had congressmen and senators "adopt" Soviet Jewish Activists; they established groups like Congressional Wives for Soviet Jewry and

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 8–9.

¹⁴⁶ *Id.*

¹⁴⁷ LAZIN, *supra* note 77, at 34.

¹⁴⁸ *Id.* at 35, 37.

¹⁴⁹ *Id.* at 79.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 80.

¹⁵³ *Id.* at 42.

ran orientations for freshman Congressmen on their issues.¹⁵⁴ Such organizations also maintained full-time lobbyists in Washington, D.C.¹⁵⁵

Under US asylum law, until the 1980 Refugee Act, the United States really only counted as refugees individuals fleeing from communist regimes.¹⁵⁶ Clearly, this was the case with Soviet Jewry. However, the passage of the Refugee Act changed the US refugee definition to match that of the 1951 Convention. Nonetheless, until 1989, the United States continued to count all Soviet Jews as *de facto* refugees.¹⁵⁷ Furthermore, the Attorney General extended an additional option to the few individuals who were rejected for refugee status to be admitted to the United States as "parolees" without quotas, as long as sponsoring agencies pledged to take responsibility for the individual's support.¹⁵⁸

In principle, the Soviet Union also limited its emigration allowances to individuals with close relations in the United States. It rarely granted any direct applications for emigration to the United States, but did allow Soviet Jews to exit for processing in third-party countries for the strict purposes of family reunification.¹⁵⁹ While HIAS claimed that over 80 percent of the individuals applying for resettlement in the United States did so for the purposes of family reunification, the Immigration and Naturalization Service (INS) found that only 5 percent of those who went through third-party processing in Rome in 1974-75 had close enough relatives in the United States to qualify for a visa based on relationships, therefore they continually granted Soviet Jewish émigrés conditional entry visas intended for refugees to enter the United States.¹⁶⁰

The United States additionally circumvented its usual policies regarding country of first refuge for the Soviet Jewry movement.¹⁶¹ In 1975, INS General Counsel Samuel Berenson issued a ruling, stating that Soviet Jews who had first settled in Israel would be permitted to enter the United States as refugees, and that "in the absence of an overt act signifying acceptance of Israeli nationality, its voluntary acquisition

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 83.

¹⁵⁷ *Id.* at 84.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See id.* at 89.

neither precludes a Soviet Jew from conditional entry eligibility (reserved for refugees) nor constitutes evidence of firm resettlement.”¹⁶² This was done despite the fact that in 1973, the UNHCR had ruled that Soviet Jewish emigrants who reached Vienna did not have refugee status, as they were “protected” by Israel.¹⁶³ Though they were not “ordinary refugees,” they were to be regarded as refugees by the US government. These statements indicate that the United States went above and beyond the requirements of the international protection regime in promoting Soviet Jewry as refugees, which, in turn, raises questions about the nature of asylum in the United States and how it was used by Soviet Jews.

Today, much controversy exists over the challenges of distinguishing *economic migrants* from refugees. In the 1970s and 80s, immigration to Israel was a hard sell because of its popular image as a desert nation with a developing economy and serious security concerns.¹⁶⁴ By the 1980s, emigrants were much keener to take their chances in the United States, which they saw as a much larger economic market with room for personal growth and security. The American Jewish community supported freedom of choice as an ideological justification for Soviet Jewish “dropouts.”¹⁶⁵ Were Soviet Jews merely economic migrants or were they truly refugees? In the late 1980s, this question became more and more salient. Another conundrum of the Soviet Jewry movement was the question of whether “loss of Jewish identity” was a sufficient support for granting refugee status.¹⁶⁶ While freedom of movement and family reunification were important principles grounded in the UDHR,¹⁶⁷ the question of protecting one’s identity in a cultural, and not physical sense, does not appear to have formed the basis for refugee protection for other groups.

Furthermore, the debate over freedom of choice in the Soviet Jewry context raises a paradoxical question about the asylum regime and highlights the double standard the United States applied in its asylum policy for Soviet Jews, as opposed to its treatment of other groups of refugees. For one, should the international asylum regime recognize refugees’ agency by offering a right to choose where to resettle? Is this a

¹⁶² *Id.*

¹⁶³ *Id.* at 169 n.53.

¹⁶⁴ *Id.* at 90.

¹⁶⁵ *Id.* at 91.

¹⁶⁶ *See id.* at 94.

¹⁶⁷ *Id.* at 104.

realistic expectation, given the economic cost of refugee resettlement on host nations? And second, is a refugee really a “refugee” in the sense of the 1951 Convention if she would rather remain in her country of habitation, than accept the protection of a sponsoring country? At certain points, like in the mid-1970s when the “dropout rate” rose to over 50%, Israel actually lobbied the United States to refuse entry to Soviet Jewish “refugees.”¹⁶⁸ The American Jewish community adamantly opposed such proposals, believing that many Soviet Jews would choose to remain, rather than immigrate to Israel, and that the goal of the international Jewish community was to “save” as many Jews as possible from the USSR.¹⁶⁹ Zionist perspectives like those of activist Aryeh Dulzin undermined the refugee status of Soviet Jews, claiming that “activists [in the Soviet Union were] fighting for aliyah to Israel, not for emigration to the United States.”¹⁷⁰ Both American and Soviet Jews emphasized guilt and fear that another Holocaust could occur in the Soviet Union.¹⁷¹ Though some leaders admitted there was no physical threat at the time, they claimed that the future for Jews in the Soviet Union was too uncertain to remain.¹⁷² While Soviet Jews experienced “ethnocide and cultural denudation,” many leaders in the American Jewish community agreed that the situation in the USSR did not resemble that of Germany in the 1930s and 1940s.¹⁷³

The United States had laws in place to provide assistance to refugees abroad since the 1962 Migration and Refugee Assistance Act; however, Soviet Jewry occupied a unique status in American refugee policy as the only resettlement effort to ever be funded by the United States outside of its territory.¹⁷⁴ In 1973, the US government gave Israel \$25 million for resettlement of Soviet Jews because “movement of Soviet Jews from the Soviet Union [was] a matter of United States foreign policy, and as such it deserve[d] close support.”¹⁷⁵ By June 1977, the United States had spent \$155 million on programs to resettle Soviet

¹⁶⁸ *Id.* at 10.

¹⁶⁹ *See id.*

¹⁷⁰ *Id.* at 134.

¹⁷¹ *Id.* at 33.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 132.

¹⁷⁵ *Id.* at 83.

Jews, covering the cost of building Israel's infrastructure, housing, medical centers, financing mortgages, etc.¹⁷⁶

Around the time that Congress began to debate the issue of rethinking the refugee definition, some congressmen began to question the disparity in treatment of Soviet refugees. In a closed-door session, Senator Inouye raised important concerns about the resources allocated to the movement: "he asked why we should give \$2,400 to help a Soviet Jew in Israel, \$600 to assist a Cuban in the United States and only 50 cents per person to help a Vietnamese in South Asia."¹⁷⁷ When federal funding for Soviet Jewish resettlement organizations began to dry up, American Jewish communities began to back away from their freedom of choice principles.¹⁷⁸

In 1982, the Soviet Union shut its doors to Jews seeking to emigrate.¹⁷⁹ Five years later, when it became clear that Gorbachev was loosening his grip on the borders, the prospect of a million or more Soviet Jews flooding the United States tempered the American Jewish community's support and enthusiasm for Soviet Jewish immigration and more attention was paid to the potential conflicts with other refugee advocacy groups in the United States over how much the establishment had favored the Soviet Jewry cause.¹⁸⁰ Ultimately, the American Jewish community acquiesced to the Executive's setting a quota to restrict annual immigration of Soviet Jews to 40,000 persons with close relatives in the United States. This was achieved through the consultation process established in the 1980 Refugee Act, which allows the executive to seek congressional input on the number of refugee entries per fiscal year.¹⁸¹

2. *Salvadoran Campesinos*

In contrast to its treatment of Soviet Jewry, the United States never viewed Campesinos as a designated social group deserving of refugee status, and they lacked any organized political voice in Washington. As tens of thousands of Salvadorans urged social, economic, and political reforms, the Salvadoran government pursued them through death squad terrorism and scorched earth military

¹⁷⁶ *Id.* at 83, 111–12 n.14.

¹⁷⁷ *Id.* at 85.

¹⁷⁸ *Id.* at 80.

¹⁷⁹ *Id.* at 11.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 12.

campaigns in the countryside.¹⁸² In 1980, more than 8,000 people were murdered, an increase of over 800% from the previous year.¹⁸³ Campesinos accounted for more than 78% of the dead and 95% of the violence occurred in rural areas from 1980–1992.¹⁸⁴ This harsh reality prompted the UN Truth Commission to conclude that the government participated in a “systematic . . . pattern of conduct” against the Campesinos, with the “deliberate strategy of eliminating or terrifying the peasant population.”¹⁸⁵ But precisely because “no one was safe from state-sponsored terrorism,” even clergy and international aid workers were targeted, the US government saw the violence in El Salvador as “generalized” and “not targeting a specific group.”¹⁸⁶

Honduras was not a signatory to the 1951 Convention or the 1967 Protocol, so it had no obligation to receive Salvadoran refugees.¹⁸⁷ By mid-1981, the UNHCR negotiated with the government of Honduras to establish official, closed refugee camps.¹⁸⁸ Meanwhile, Honduran officials claimed Salvadoran refugees were merely economic migrants, seeking a better life, not in any real danger from the Salvadoran government.¹⁸⁹ US advisors in the region actively fueled these opinions because of cold war anxieties about the international spread of Communism. They branded the refugees as FMLN sympathizers or guerrillas with ties to international communist networks.¹⁹⁰ Salvadoran refugees were not officially granted refugee status until the UNHCR had been providing them aid for over a year.¹⁹¹ During this time, Salvadoran and Honduran military border patrols attempted to clear the area of lingering refugees. Americas Watch calculated that over 2,000 refugees were assassinated at the border between January 1980 and July 1981.¹⁹² Without proper migration and identification documents, Salvadoran refugees faced harassment, refoulement, arrest, or even death.¹⁹³

¹⁸² TODD, *supra* note 112, at 53.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 53–54.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 90.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 88–89.

¹⁹⁰ *Id.* at 89.

¹⁹¹ *Id.* at 90.

¹⁹² *Id.* at 94.

¹⁹³ *Id.*

V. CONCLUSION

Concerns over the temporary placement of hundreds of thousands of refugees in neighboring and, often, developing nations should expand beyond the economic and national security of the host nations to address the health, safety, and human security of the refugees themselves. Furthermore, refugees' agency in terms of their desire for repatriation or relocation should weigh most heavily in debates over "solutions" to these crises. Likewise, the increased burden on developing nations resulting from ongoing and protracted conflict around the world raises questions about how industrialized nations, such as the United States, can afford to impose restrictive and sometimes arbitrary admissions criteria to asylum-seekers, depending on the nature of the conflict from which they have emerged or the political relationships between nations. The comparison between Soviet Jewish political refugees and Salvadoran refugees fleeing from a civil war provides a key insight into the failures of a one-size-fits-all approach to making individualized refugee determinations. At the same time, these historical examples caution against applying blanket permissions to entire ethnic groups who may or may not actually meet international criteria for refugee protection.

To minimize opportunities for individual host countries to abuse their discretion in making determinations of refugee status, the United Nations should enact a new Protocol to the 1951 Convention, which creates a bright-line rule for defining refugee status, as well as additional safeguards for asylum-seekers throughout the process, from flight to resettlement and repatriation. Refugees can no longer count on individual nations using vague standards for determining whether or not to protect them, and the international system cannot accommodate the growing numbers of refugees by relying on loose schemes of international cooperation. The United States and United Nations would be wise to adopt some of the updates made in documents like the Convention Governing the Specific Aspects of Refugee Problems in Africa¹⁹⁴ or the Cartagena Declaration.¹⁹⁵ Both of these regional documents more accurately reflect that refugees are usually the product of conflicts, not easily defined by personal characteristics. The decision whether to grant asylum should be based not on the applicant's individual narrative and

¹⁹⁴ Jastram & Achiron, *supra* note 35, at 9.

¹⁹⁵ *Id.*

credibility, but on fact-seeking and the reality of conflicts as they occur on the ground.

**TRANSNATIONAL CHILD SUPPORT ENFORCEMENT
AND THE NEED FOR A RECIPROCAL AGREEMENT
BETWEEN THE UNITED STATES AND MEXICO**

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Introduction 781

I. The Child Support Obligation.....782

II. History of Child Support Enforcement.....784

 A. United States Efforts to Enforce Foreign Support Orders 784

 B. The Hague Convention on International Recovery of
 Child Support and Maintenance in 2007.....786

III. Reciprocal Agreements 789

 A. Requirements for a Reciprocal Agreement 792

 1. Comity.....792

 2. Reciprocity.....794

 3. Substantially Similar Laws 796

 i. Child Support Laws in the United States 796

 ii. Child Support Laws in Mexico 797

 B. Barriers to a Reciprocal Agreement in the United States 798

 1. Federalism.....799

 2. Due Process.....800

 3. Jurisdiction.....801

Iv. Conclusion 803

INTRODUCTION

Over the last century, the federal government has consistently revised child support statutes in the United States as citizens have become more mobile between states. In recent years, based upon the increasing presence of multinational families and the fluid movement of individuals and families between foreign countries, the need for revision

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of child support laws has expanded.¹ It is not uncommon following a divorce or separation for one parent to either return to their home country or immigrate to a new country. While there are no statistics regarding total child support cases, currently 1–3 percent of support cases requiring enforcement services contain an international aspect.² Despite this reality, the United States has reciprocal child support enforcement agreements with only fifteen countries.³ Without this type of agreement, it is difficult, costly, and often impossible to enforce a child support obligation in another country.⁴ The current international child support laws do not account for the needs of children, in a world where multinational families and fluid movement across national borders is becoming the norm.⁵ The United States does not have a reciprocal agreement with Mexico.⁶

This note addresses the need for a reciprocal support agreement between the United States and Mexico. Part I gives a brief background of the child support obligation. Part II provides an overview of international attempts to regulate transnational support orders. This part focuses on The Hague Convention of 2007, evaluating its goals, the ultimate agreement, and its shortcomings. Part III presents a reciprocal agreement as the best option for child support enforcement between the United States and Mexico. This part also explains the requirements for such an agreement, including comity, reciprocity, and substantially similar laws. Finally, Part III concludes by presenting and evaluating the barriers faced during implementation of such an agreement, specifically, issues of federalism, due process, and personal jurisdiction.

I. THE CHILD SUPPORT OBLIGATION

Child support is a court-ordered amount of money that a non-custodial parent must pay in order to provide for the necessary expenses

¹ Michael J. Peters, *International Child Support: The United States Striving Towards a Better Solution*, 15 NEW ENG. J. INT'L & COMP. L. 91, 94 (2009).

² CARMEN SOLOMON-FEARS & ALISON M. SMITH, CONG. RESEARCH SERV., R43109, HAGUE CONVENTION TREATY ON RECOVERY ON INTERNATIONAL CHILD SUPPORT AND H.R. 1896, at 1, 5 (2013).

³ *Foreign Reciprocating Countries*, OFF. CHILD SUPPORT ENFORCEMENT (Feb. 4, 2012), <http://www.acf.hhs.gov/programs/css/resource/foreign-reciprocating-countries>.

⁴ Dave Eberhart, *Deadbeat Dads Enjoy Immunity from U.S. Laws*, NEWSMAX (Dec. 22, 2008, 8:58 PM), <http://www.newsmax.com/US/deadbeat-dads/2008/12/22/id/327264>.

⁵ Peters, *supra* note 1, at 94.

⁶ See *Foreign Reciprocating Countries*, *supra* note 3.

of a child, such as food, clothing, and shelter.⁷ This support allows children to enjoy a standard of living that is minimally sufficient and not grossly inferior to that of their non-custodial parent.⁸ The need for such an obligation has been exacerbated by recent public benefit policy changes that limit the amount of aid a family may receive over time.⁹ These changes reinforce the notion of a mother's and father's responsibility to provide care and support for their children.¹⁰

However, child support orders are only enforceable within the United States, and in partnership with a limited number of countries.¹¹ At this point, the obligation to pay child support is halted at the southern border of the United States.¹² In an increasingly mobile society, US laws must change in relation to foreign countries to provide children with the family support that they both need and deserve. US courts have long held that it is unjust to punish children for the actions of their parents.¹³ A child should not suffer a loss of opportunity that his or her parents could provide solely due to his or her country of residence.¹⁴ "Whatever his differences may be, man can always unite in his concern for the welfare of his children in his efforts to assist them."¹⁵ Providing children with the financial support they need to be successful should be no different.

Additionally, this issue extends beyond the responsibility of parents to provide for their children. International enforcement and recognition of child support judgments is vital to the global economy and business community.¹⁶ When each country insists on utilizing its own methods and procedures, and remains entrenched in nationalist conceptions of law, normal patterns of life are disrupted, resulting in injustice.¹⁷ The long history of attempts to develop a multinational child support enforcement agreement demonstrates the worldwide

⁷ Lauren C. Barnett, Comment, *Having Their Cake and Eating It Too? Post-emancipation Child Support as a Valid Judicial Option*, 80 U. CHI. L. REV. 1799, 1806 (2013).

⁸ Peters, *supra* note 1, at 93.

⁹ See Maria Cancian, Daniel R. Meyer & Eunhee Han, *Child Support: Responsible Fatherhood and the Quid Pro Quo*, 635 ANNALS AM. ACAD. POL. & SOC. SCI., May 2011, at 140, 141.

¹⁰ *Id.*

¹¹ See UNIF. INTERSTATE FAMILY SUPPORT ACT § 603 (amended 2008).

¹² See *Foreign Reciprocating Countries*, *supra* note 3.

¹³ Trimble v. Gordon, 430 U.S. 762, 769–70 (1977).

¹⁴ Peters, *supra* note 1, at 93.

¹⁵ Norman Acton, *The World's Children*, 28 J. EDUC. SOC. 282, 285 (1955).

¹⁶ Russell J. Weintraub, *Recognition and Enforcement of Judgments and Child Support Obligations in United States and Canadian Courts*, 34 TEX. INT'L L.J. 361, 368 & n.64 (1999).

¹⁷ *Id.* at 368 n.64.

community's recognition that international child support enforcement is a significant issue that needs to be addressed.¹⁸ Despite continuous and ongoing attempts to form a multinational support enforcement agreement, however, there have not yet been any successes.¹⁹ While there may one day be an agreement that resolves this issue, it is essential that something be done to address this important concern immediately.

II. HISTORY OF CHILD SUPPORT ENFORCEMENT

In the United States, it has become increasingly common for individuals to move easily between states. This mobility has expanded dramatically over the last fifty years as individuals and families began to spread out across the globe.²⁰ Individuals are consistently crossing and re-crossing international borders to live and work in a global economy, and it has become increasingly crucial that nations cooperate to meet the challenges that such a reality poses.²¹ As a result of this movement, legal disputes are no longer contained within national boundaries, and this includes family law and child support issues.²² The UN Convention on the Recovery Abroad of Maintenance was enacted to allow foreign nations to enter into reciprocal enforcement agreements,²³ likely in response to this growing concern. Additionally, it allows individual states and provinces within countries to enter into agreements with foreign countries, without deference to a national government.²⁴

A. UNITED STATES EFFORTS TO ENFORCE FOREIGN SUPPORT ORDERS

The concept of child support was first introduced in the United States with the Uniform Desertion and Non-Support Act in the early

¹⁸ See Peters, *supra* note 1, at 95–99.

¹⁹ Hague Convention on International Recovery of Child Support and Family Maintenance, S. TREATY DOC. NO. 110-21, at VI (2008).

²⁰ Merle H. Weiner, *The Internationalization of Family Law in the United States Over the Last Fifty Years*, 42 FAM. L.Q. 619, 619 (2008).

²¹ Eberhart, *supra* note 4.

²² PAMELA BROWN, TEXAS RIOGRANDE LEGAL AID, SERVICE OF PROCESS ON MEXICAN RESIDENT RESPONDENTS PURSUANT TO THE HAGUE SERVICE CONVENTION 1, *available at* <http://servicewithanattitude.com/wp-content/uploads/Hague-Convention-SBS.pdf>.

²³ Peters, *supra* note 1, at 97.

²⁴ *Id.*

1900s.²⁵ This piece of legislation criminalized the act of intentionally neglecting or refusing to provide support to a parent's child or children.²⁶ As the nation expanded and the population became more mobile, however, issues of extradition of individuals convicted under the statute and enforcement of obligations became difficult to address.²⁷

The Uniform Reciprocal Enforcement of Support Act (URESA) was enacted to respond to these social changes.²⁸ URESA allowed individual states to enforce an order from a foreign nation if there were substantially similar reciprocal laws in effect in that nation.²⁹ This legislation was self-executing and did not require any individual agreements or declarations.³⁰ Many other foreign nations, specifically Canada and several countries in Western Europe, developed their support legislation after the United States, creating a system of reciprocity without any official agreements.³¹

The United States responded to this change in other nations' laws by enacting the Uniform Interstate Family Support Act (UIFSA) to replace URESA, allowing any foreign order to be registered for enforcement in the United States.³² The primary goal of UIFSA is to ensure that individual US states did not second-guess support orders entered in other states and countries.³³ Furthermore, Congress sought to demonstrate respect and tolerance for the laws of other nations.³⁴ These foreign orders are often recognized and enforced as if they were from a US state.³⁵ However, there is no mechanism to achieve equivalent recognition and enforcement of US orders abroad.³⁶ Currently, most countries do not extend this same courtesy and do not enforce support

²⁵ Eric M. Fish, *The Uniform Interstate Support Act (UIFSA) 2008: Enforcing International Obligations Through Cooperative Federalism*, 24 J. AM. ACAD. MATRIMONIAL L. 33, 35 (2011).

²⁶ *Id.* at 35–36.

²⁷ *Id.* at 36.

²⁸ *Id.*

²⁹ Gloria Folger DeHart, *Comity, Conventions and the Constitution: State and Federal Initiatives in International Support Enforcement*, 28 FAM. L.Q. 89, 93 (1994).

³⁰ *Id.*

³¹ *Id.* at 94–98.

³² UNIF. INTERSTATE FAMILY SUPPORT ACT § 603(b) (amended 2008).

³³ See *OCS/Glenn Pappas v. O'Brien*, 2013 VT 11, ¶ 29, 93 Vt. 340, 67 A.3d 916.

³⁴ John J. Sampson, *Uniform Interstate Family Support Act (2001) with Prefatory Note and Comments*, 36 FAM. L.Q. 329, 342 (2002).

³⁵ Ann K. Wooster, Annotation, *Applicability and Application of Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to International Child Custody and Support Actions*, 66 A.L.R.6TH 269, 286 (2011).

³⁶ *Id.* at 286–87.

orders from the United States unless there is a treaty or agreement creating an obligation to do so.³⁷ As a result, reciprocity continues to be a major issue in the enforcement of support orders.³⁸

B. THE HAGUE CONVENTION ON INTERNATIONAL RECOVERY OF CHILD SUPPORT AND MAINTENANCE IN 2007

To address this growing issue, the United States, along with approximately sixty other nations, attended the Hague Convention on International Recovery of Child Support and Maintenance in 2007.³⁹ This was not the first attempt at a multinational agreement regarding enforcement of child support. Previous attempts, such as the New York Convention of 1956, failed, as they did not establish uniform procedures, which resulted in wide variation and confusion in any attempts to register, enforce, or regulate foreign orders.⁴⁰ Additionally, the United States did not attend previous conventions due to federalist and jurisdictional limitations imposed by its Constitution.⁴¹ The Hague Convention was different, however, as many foreign delegates recognized the importance of US support, leading to compromises not previously achieved.⁴² At the Hague Convention, the international community recognized the importance of providing an adequate standard of living for all children.⁴³

An important way to account for this interest is to establish a procedure to ensure that parents' support obligations do not cease to exist at any one nation's borders.⁴⁴ There must be a uniform way to establish support orders when a child resides in a different country from his or her non-custodial parent. The Convention sought to improve the existing international system for support enforcement and create an efficient and

³⁷ Hague Convention on International Recovery of Child Support and Family Maintenance, S. TREATY DOC. NO. 110-21, at VI (2008).

³⁸ See Sampson, *supra* note 34, at 342.

³⁹ GREGG M. HERMAN, AM. BAR ASSOC., SECTION OF FAMILY LAW, REPORT TO THE HOUSE OF DELEGATES NO. 106, at 1, 2 (2008).

⁴⁰ See Marilyn Ray Smith, *Child Support at Home and Abroad: Road to the Hague*, 43 FAM. L.Q. 37, 52-53 (2009).

⁴¹ Peters, *supra* note 1, at 96.

⁴² See Mary Helen Carlson, *Symposium on International Enforcement of Child Support United States Perspective on the New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, 43 FAM. L. Q. 21, 26 (2009).

⁴³ Hague Convention on International Recovery of Child Support and Family Maintenance, S. TREATY DOC. NO. 110-21, pmbl. (2008).

⁴⁴ See *id.*

fair enforcement structure between nations.⁴⁵ The nations present at the convention recognized that each country regulates and enforces support orders in its own unique way.⁴⁶ As a result, an organized procedure that accounts for the wide variety of legal systems and professionals responsible for entering, implementing, and enforcing child support obligations must be established.⁴⁷

The Convention established a uniform procedure to allow transnational orders to be registered and enforced if certain procedural requirements are met. Each participating country must establish a central authority, which is responsible for such registration and enforcement.⁴⁸ To register an order, proof must also be submitted that the debtor⁴⁹ had proper notice of the proceedings and decision, and had an opportunity to appeal.⁵⁰ The receiving country is then obligated to enforce the order, regardless of its merits, in the same way it would treat a domestic order.⁵¹ These regulations are essential, as many transnational child support workers note that failures to enforce are often due to a lack of administrative cooperation, rather than jurisdictional or legal differences.⁵² With the establishment of a uniform administrative procedure, it is likely that orders will be streamlined and processed at a faster pace, providing more effective and successful outcomes for children.⁵³

Further, the agreement creates a means test for services, based upon the needs of the child.⁵⁴ The United States felt strongly that the Convention could not succeed if it did not require cost-free services in all support cases.⁵⁵ Most individuals affected by child support orders are of modest means and would be unable to pursue recovery of support if required to pay high fees in exchange for legal services.⁵⁶ This is

⁴⁵ See *id.* art. 1.

⁴⁶ See William Duncan, *Symposium on International Enforcement of Child Support The New Hague Child Support Convention: Goals and Outcomes of the Negotiations*, 43 FAM. L.Q. 1, 11 (2009).

⁴⁷ *Id.* at 4.

⁴⁸ S. TREATY DOC. NO. 110-21, art. 4.

⁴⁹ A debtor is an individual who owes or alleges to owe support or maintenance. *Id.* art. 3.

⁵⁰ *Id.* art. 25.

⁵¹ *Id.* art. 28.

⁵² Carlson, *supra* note 42, at 26.

⁵³ See *id.* at 31.

⁵⁴ *Id.*

⁵⁵ *Id.* at 29.

⁵⁶ *Id.* at 30.

especially true in international enforcement cases where the cost of legal services is often higher than the amount collected.⁵⁷ However, most nations do not provide sufficient free, or even low-cost, legal services.⁵⁸

While the Convention succeeded in meeting its goal to establish a fair, efficient, and effective international system for the recovery of support, there are several areas in which it falls short. Under the current regime, it is extremely difficult to attempt to modify a current transnational support order; the Convention does not address instances when a creditor moves to a new country, and it does not prevent a parent who moves a child to a new country without consent from seeking child support from the parent left behind.⁵⁹

Despite these issues, the Convention successfully established a streamlined and clear procedure for establishing and enforcing international child support orders.⁶⁰ The United States signed the agreement, a novel occurrence, as this was the first multilateral treaty on maintenance or support to which the United States became a signatory.⁶¹ US participation was extremely important since the United States has the most cases under the Hague Convention.⁶² Additionally, such an agreement relieves the US government from having to negotiate with foreign nations individually to ensure enforcement of American support orders, at least for those nations that also become a party to the convention.⁶³ Thus far, however, only four countries have ratified the agreement.⁶⁴

Additionally, while the United States became a signatory to the convention, it is not a self-executing treaty and requires ratification before it can become effective,⁶⁵ something that the US Senate still has not done.⁶⁶ The United States also has not amended the text of UIFSA to integrate the new foreign order enforcement procedures into current

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Weiner, *supra* note 20, at 644.

⁶⁰ HERMAN, *supra* note 39, at 5.

⁶¹ Weiner, *supra* note 20, at 642.

⁶² *Id.* at 649.

⁶³ *See id.* at 641–42.

⁶⁴ Albania, Bosnia and Herzegovina, Norway and Ukraine are the only countries to have ratified the agreement. *See Status Table*, HCCH, http://www.hcch.net/index_en.php?act=conventions.status&cid=131 (last updated Aug. 8, 2013).

⁶⁵ *See Uniform Interstate Family Support Act (Last Amended or Revised in 2008) with Prefatory Note and Comments*, 43 FAM. L.Q. 75, 85 (2009).

⁶⁶ SOLOMON-FEARS, *supra* note 2, at 8.

support law.⁶⁷ Amending the text of UIFSA is essential to ensure that each aspect of the convention can be carried out successfully within the borders of the United States.⁶⁸ While steps have been taken toward amending US child support legislation and ratifying the convention, the federal government has not yet met this goal.⁶⁹ As a result, the Convention has done little to alter the current status quo. As is common with international issues and agreements, it will likely be several decades before enough countries not only become signatories, but also establish the central authority and implement the procedural changes required under the Convention.⁷⁰ Until this occurs, the promise of financial support to children whose parents live in a different country will likely remain unfulfilled.

III. RECIPROCAL AGREEMENTS

While The Hague Convention may prove to be successful in the future, more immediate measures must be taken to address the major gap in child support regulation that exists now, specifically between the United States and Mexico. One solution, commonly utilized by the international community to address support issues, is a reciprocal agreement.⁷¹

Reciprocal agreements are helpful to expedite the enforcement of child support orders across varying jurisdictions.⁷² They promote certainty and avoid duplication, which can cause aggravation for both courts and individual litigants.⁷³ These agreements allow the issuing nation's law to govern the nature, extent, amount, and duration of support while the enforcing nation collects and distributes support payments.⁷⁴ Following the execution of an agreement, the United States can have confidence that a full and fair trial occurred abroad before a court of competent jurisdiction, so there is no need to retry the case.⁷⁵ If a

⁶⁷ See Fish, *supra* note 25, at 43.

⁶⁸ HERMAN, *supra* note 39, at 4.

⁶⁹ SOLOMON-FEARS, *supra* note 2, at Summary.

⁷⁰ See Smith, *supra* note 40, at 60.

⁷¹ Gary Caswell, *Features Making Long-Distance Parents Pay Up International Child Support Enforcement*, 23 FAM. ADV. 52, 52 (2000).

⁷² Weintraub, *supra* note 16, at 364.

⁷³ State v. del Castillo, No. A04-1528, 2005 Minn. App. LEXIS 602, at *11 (Minn. Ct. App. June 7, 2005).

⁷⁴ See UNIF. INTERSTATE FAMILY SUPPORT ACT, § 604(a) (amended 2008).

⁷⁵ Weintraub, *supra* note 16, at 365.

court finds that an order was entered by a competent court and does not violate the public policy⁷⁶ of the United States, the order should be implemented and enforced.⁷⁷ This helps further a major goal of UIFSA to expedite the enforcement of child support orders and eliminate the problem of conflicting orders.⁷⁸ An agreement should not be signed, however, unless the country or state has confidence that the other party has the capacity to meet its obligation.⁷⁹

The United States began entering into these types of agreements in 1996.⁸⁰ Reciprocal agreements govern a majority of international child support enforcement cases in the United States.⁸¹ Currently, the United States has reciprocal agreements with twenty-six countries around the world.⁸² However, most of these countries are located in Western Europe.⁸³ This leaves a large gap in the international enforcement of American support orders across the rest of the world.⁸⁴ While Mexico contributes to a large portion of international child support cases in the United States, there is currently no reciprocal agreement existing between these two countries.⁸⁵

Individual US states are able to enter into their own agreements with foreign countries, up until the foreign country enters into an agreement with the US federal government.⁸⁶ However, they may do so only if the Attorney General⁸⁷ deems the foreign country a "reciprocating country."⁸⁸ The reciprocity requirement echoes the decision of *Hilton v.*

⁷⁶ If an order is found to be in the best interest of the child, it is generally held to be in furtherance of public policy. *In re Interest of E.I.R.H.*, No. 04-97-00667-CV, 1999 Tex. App. LEXIS 6125, *9 (Tex. App. 1999).

⁷⁷ *Id.* at *5.

⁷⁸ *State v. del Castillo*, No. A04-1528, 2005 Minn. App. LEXIS 602, at *11 (Minn. Ct. App. June 7, 2005).

⁷⁹ Smith, *supra* note 40, at 57.

⁸⁰ Weiner, *supra* note 20, at 638.

⁸¹ Peters, *supra* note 1, at 102.

⁸² *Foreign Reciprocating Countries*, *supra* note 3.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Fish, *supra* note 25, at 54.

⁸⁶ See *Willmer v. Willmer*, 144 Cal. App. 4th 951, 957, 51 Cal. Rptr. 3d 10 (Cal. Ct. App. 2006); *Country of Luxembourg ex rel. Ribeiro v. Canderas*, 338 N.J. Super. 192, 197, 768 A.2d 283 (N.J. Ch. 2000).

⁸⁷ *Willmer*, 144 Cal. App. 4th at 957.

⁸⁸ A reciprocating country is one that has established or intends to establish a procedure for enforcement of responsibility of child support owed to residents of the United States. Smith, *supra* note 40, at 57. Additionally, US citizens must not be charged to establish or enforce child support orders in foreign countries. Weiner, *supra* note 20, at 639.

Guyot, which held that a French judgment was unenforceable in the United States due to a lack of reciprocity in French courts for American judgments.⁸⁹ The court's interpretation that states are able to enter into individual agreements with foreign nations based on principles of reciprocity and comity is important, as the United States does not have a central authority governing child support and, instead, enforces obligations on a state-by-state basis. As a result, it is more effective for states to enter into these agreements on an individual basis.⁹⁰ Despite the Hague Convention's requirement that party states create a central authority⁹¹ to manage child support obligations, the United States still has not established such an agency.⁹²

The United States has gone further in its quest for reciprocal agreements by authorizing individual states to enter into agreements with foreign nations regarding the registration and enforcement of support orders.⁹³ This can only occur in the absence of a federal reciprocal declaration.⁹⁴ This authorization has not necessarily furthered the goal of enforcement, however, as it is rare for a state to have enough cases from one nation to justify the execution of a reciprocal agreement.⁹⁵ It also leads to major differences in enforcement between states, contradicting the goal of US support laws to uniformly enforce child support judgments.⁹⁶ Furthermore, allowing each individual state to develop agreements with foreign nations diverts focus from the creation of a central authority for registration, enforcement, and problem solving, by serving as a placeholder.⁹⁷ This can increase confusion and exacerbate problems already experienced by individuals looking to register and enforce support orders internationally.⁹⁸

Rather than allowing each state to execute independent agreements, it would be more beneficial for support enforcement if the federal government executed an agreement with Mexico. The

⁸⁹ James P. George, *Enforcing Judgments Across State and National Boundaries: Inbound Foreign Judgments and Outbound Texas Judgments*, 50 S. TEX. L. REV. 399, 426 (2009).

⁹⁰ Smith, *supra* note 40, at 54.

⁹¹ Hague Convention on International Recovery of Child Support and Family Maintenance, S. TREATY DOC. NO. 110-21, art. 4 (2008).

⁹² See Fish, *supra* note 25, at 54.

⁹³ Weintraub, *supra* note 16, at 377.

⁹⁴ *In re Interest of V.L.C.*, 225 S.W.3d 221, 228 (Tex. App. 2006).

⁹⁵ DeHart, *supra* note 29, at 108.

⁹⁶ *Id.* at 109.

⁹⁷ *Id.*

⁹⁸ *Id.*

establishment and enforcement of international agreements comes within the treaty power of the president⁹⁹ and enumerated powers of Congress.¹⁰⁰ These branches of government have flexibility in the selection and implementation of solutions to international problems, which the states do not.¹⁰¹

A. REQUIREMENTS FOR A RECIPROCAL AGREEMENT

The United States has several requirements that must be met before entering into a reciprocal agreement with a foreign nation regarding the enforcement of child support orders. These requirements include comity, reciprocity, and that the foreign nation has substantially similar laws and procedures to those implemented in the United States.¹⁰² These requirements are essential for establishing an effective system of child support enforcement among foreign nations.

1. Comity

Comity is the broad principle designed to help courts resolve issues and disputes involving multiple jurisdictions.¹⁰³ The literal meaning of comity is "a disposition to accommodate."¹⁰⁴ It is often equated with friendship, policy interests, and mutual respect between two nations.¹⁰⁵ The doctrine of comity rests not on a foundation of simple courtesy, but rather one of moral duty.¹⁰⁶

Comity is a discretionary decision allowing the legislative, executive, or judicial acts of one nation to be implemented and enforced upon the citizens of another nation.¹⁰⁷ Essentially, it creates an obligation to enforce the laws of one nation within the borders of another.¹⁰⁸ Comity

⁹⁹ U.S. CONST. art. II, § 2.

¹⁰⁰ U.S. CONST. art. I, §§ 1, 10.

¹⁰¹ DeHart, *supra* note 29, at 110.

¹⁰² Peters, *supra* note 1, at 107.

¹⁰³ Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 GEO. WASH. J. INT'L L. & ECON. 1, 4 (1996).

¹⁰⁴ *Hilton v. Guyot*, 159 U.S. 113, 135 (1895).

¹⁰⁵ Peters, *supra* note 1, at 107.

¹⁰⁶ *Hilton*, 159 U.S. at 165.

¹⁰⁷ Chelsea P. Ferrette, *A Critical Analysis of the International Child Support Enforcement Provisions of the Social Security Act: The (In)Ability of States to Enter into Agreements with Foreign Nations*, 6 ILSA J. INT'L & COMP. L. 575, 607 (2000).

¹⁰⁸ Swanson, *supra* note 103, at 5.

is rooted in three principles: (1) a specific nation's law is limited to a territorial application, (2) anyone within that territory is subject to that law, and (3) the laws of each nation maintain their validity across the world, to the extent that power or laws of other states or countries are not prejudiced.¹⁰⁹ This concept is often used as an attempt to create and ensure a working international dispute resolution system by advocating respect or deference for a foreign jurisdiction's laws.¹¹⁰ General comity leads to final judgments of foreign courts of competent jurisdiction being reciprocally executed.¹¹¹ For comity to be successful, a nation must value the laws of other nations and find value in the policy reasons for supporting and enforcing those laws.¹¹²

Comity has effects on more countries than just the two nations exercising the principle. It requires consideration of every nation's interests because implementing a foreign body's laws can affect relations with other nations and have unintended political consequences.¹¹³ A successful implementation of comity principles allows nations to maintain amicable relations with other countries.¹¹⁴ It also stresses the importance of extending courtesy to the governmental interests of other nations.¹¹⁵ Comity creates a form of the "golden rule" for international relations by encouraging each nation to treat other nations as it would want to be treated.¹¹⁶ This principle promotes friendly intercourse between sovereignties, and, as a result, governments have continually utilized comity in the international community.¹¹⁷

When a court is charged with making a decision based on comity, it is required to balance the various public, private, and international concerns that may be present.¹¹⁸ This causes concern for many, as it implies an exercise of judicial discretion without guidance by any detailed principles or legal tests.¹¹⁹ Furthermore, it can potentially provide a forum for courts to make decisions heavily anchored in politics

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 4.

¹¹¹ *Hilton*, 159 U.S. at 166.

¹¹² Peters, *supra* note 1, at 109.

¹¹³ Swanson, *supra* note 103, at 9.

¹¹⁴ *Id.* at 8.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 10.

¹¹⁷ *Hilton v. Guyot*, 159 U.S. 113, 165 (1895).

¹¹⁸ Donald Earl Childress, III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 14 (2010).

¹¹⁹ *Id.* at 15.

and international relations under the façade of legal necessity.¹²⁰ However, without this concept, there would be no avenue to implement the laws of one nation within the borders of another, which would cause extreme and unnecessary complications to international commerce, trade, and relations.¹²¹

The US federal government has the ability to exercise comity and inserts this principle in most international agreements.¹²² However, individual states do not have this same power, as they do not have the ability to implement federal policy.¹²³

2. Reciprocity

Reciprocity requires the United States to treat a request by a foreign country the same way it would treat a request by another state.¹²⁴ Each country must enforce the child support obligation imposed in the other country.¹²⁵ If the original order cannot be enforced, then the country must impose and enforce an equivalent order.¹²⁶

The foreign reciprocating country must have procedures for US residents to establish paternity and support orders.¹²⁷ If the system is debtor based, a creditor may need to request another country to establish a support order.¹²⁸ To do this, a procedure for determining parentage must also exist.¹²⁹

Finally, there must be no income-based test to qualify for legal services in the enforcing nation.¹³⁰ At both the Hague Convention and throughout the development of reciprocal agreements with other nations, the United States has emphasized the importance of providing virtually cost-free services in support cases.¹³¹ Representatives of the United States attending the convention asserted that no agreement could ever succeed, regardless of how ideal the provisions were, if the services provided were

¹²⁰ *Id.*

¹²¹ *Id.* at 22.

¹²² Ferrette, *supra* note 107, at 608.

¹²³ *Id.* at 607.

¹²⁴ Smith, *supra* note 40, at 57.

¹²⁵ Peters, *supra* note 1, at 108.

¹²⁶ *Id.*

¹²⁷ Smith, *supra* note 40, at 57.

¹²⁸ Carlson, *supra* note 42, at 29.

¹²⁹ *Id.*

¹³⁰ Peters, *supra* note 1, at 108.

¹³¹ Carlson, *supra* note 42, at 29.

not affordable.¹³² Individuals who use government support and enforcement programs are generally of low to modest means and would not be able to pursue recovery if they needed to pay high fees for enforcement and legal services.¹³³ This is especially true in international cases where costs for attorney fees and enforcement actions can be much greater than the amount collected, due to the uniqueness, length, and complexity of each individual case.¹³⁴ If these services are not offered for low to no-cost, the system loses a great deal of effectiveness.¹³⁵

However, this can cause major issues in countries that do not typically offer these types of services for their own citizens.¹³⁶ Additionally, issues can arise when creating reciprocal agreements with countries whose poverty thresholds are much lower than the poverty threshold in the United States.¹³⁷ This can lead to absurd results, as individuals who would qualify as indigent in the United States may not qualify for free services in reciprocating countries.¹³⁸

One way to deal with this concern is for the United States to only offer free legal services to individuals from foreign countries that likewise provide free legal services to US citizens.¹³⁹ However, such an incentive system would provide minimal assistance to US citizens registering and enforcing a support order in a foreign nation.¹⁴⁰

A more realistic solution, and one incorporated in the Hague Convention, is a child-based means test that evaluates the income of a child, rather than the income of the parent.¹⁴¹ Because a child rarely has income, or a substantial income, this type of means test results in nearly all support enforcement cases being virtually cost-free.¹⁴² It also encourages countries to streamline their support enforcement process and increase efficiency to cut down on their own costs.¹⁴³

¹³² *Id.*

¹³³ *Id.* at 30.

¹³⁴ *Id.*

¹³⁵ DeHart, *supra* note 29, at 114.

¹³⁶ Carlson, *supra* note 42, at 31.

¹³⁷ *Id.* at 30.

¹³⁸ *Id.*

¹³⁹ DeHart, *supra* note 29, at 114.

¹⁴⁰ *Id.*

¹⁴¹ Fish, *supra* note 25, at 42.

¹⁴² Carlson, *supra* note 42, at 31.

¹⁴³ *Id.*

3. Substantially Similar Laws

The third requirement is that the agreeing nation must have substantially similar laws and procedures for child support.¹⁴⁴ This can raise complications when the norms and values in two societies differ. An evaluation of the support obligation laws of the United States and Mexico must be done to ensure that an agreement may be executed successfully.

i. Child Support Laws in the United States

The UIFSA includes an individual's obligation to support his or her children financially until they reach the age of majority.¹⁴⁵ It further details the jurisdictional requirements for establishing and modifying an order through a system of debtor-based jurisdiction.¹⁴⁶ This concept is explained further in Part III. This piece of legislation also details how an order can be registered for enforcement in a new state after the creditor, debtor, or child moves out of the issuing state.¹⁴⁷ This important section is what sets this piece of support legislation apart from its predecessor.¹⁴⁸ By allowing individuals to register an order for enforcement in a new state, it prevents the creation of multiple support orders and confusion between states.¹⁴⁹ The UIFSA also established rules for determining which order controls in the event that multiple orders are entered in different states.¹⁵⁰ This ability to register an order for enforcement in a new state, however, does not allow the custodial parent to modify an order in any state in which the custodial parent establishes residency.¹⁵¹ Instead, personal jurisdiction requirements over the debtor must still be met to modify a particular order.¹⁵²

UIFSA establishes the support obligation and the methods and means available to collect the support.¹⁵³ However, it leaves each state with the independence to establish support guidelines, factors, and other

¹⁴⁴ Peters, *supra* note 1, at 107.

¹⁴⁵ UNIF. INTERSTATE FAMILY SUPPORT ACT, § 102 (amended 2008).

¹⁴⁶ *Id.* § 201.

¹⁴⁷ *Id.* § 602.

¹⁴⁸ See Fish, *supra* note 25, at 37.

¹⁴⁹ *Id.*

¹⁵⁰ UNIF. INTERSTATE FAMILY SUPPORT ACT, § 207 (amended 2008).

¹⁵¹ *Id.* § 613.

¹⁵² *Id.*

¹⁵³ SOLOMON-FEARS, *supra* note 2, at 3.

important legislative decisions.¹⁵⁴ Despite this freedom, most states have enacted nearly identical child support laws.¹⁵⁵ This is an example of cooperative federalism, a concept that gives individual states the freedom to establish their own legislative policies within a framework created by the federal government.¹⁵⁶

ii. Child Support Laws in Mexico

The child support laws in Mexico tend to be extremely confusing and spread out across both the civil and criminal code.¹⁵⁷ However, despite this lack of clarity, Mexico has an obligation requiring individuals to provide support for their children identical to that of the legal obligation in the United States.¹⁵⁸ This support encompasses food, clothing, shelter, necessities in the event of a child's illness, and educational expenses.¹⁵⁹ A party cannot waive his or her right to support.¹⁶⁰ While Mexico has a legal presumption of paternity for all children born of married couples,¹⁶¹ it also has methods of establishing paternity for children born out of wedlock or whose paternity is disputed.¹⁶² In these instances, a guardian ad litem is appointed to represent the best interests of the child.¹⁶³

Differences between Mexican and US child support laws do exist, however. If a parent is absent or unable to provide for his or her children, the obligation falls to the next closest relative to support minor children.¹⁶⁴ The civil code outlines the hierarchy of family members that the obligation falls on, in the event of a parent's failure or inability to pay.¹⁶⁵ This continued obligation does not exist in the United States, which could be attributed to different cultural understandings of family

¹⁵⁴ Barnett, *supra* note 7, at 1807.

¹⁵⁵ *Id.*

¹⁵⁶ Fish, *supra* note 25, at 44.

¹⁵⁷ See VIVIANE BRACHET-MARQUEZ, ABSENTEE FATHERS: A CASE-BASED STUDY OF FAMILY LAW AND CHILD WELFARE IN MEXICO 5–6 (1994).

¹⁵⁸ Compare Código Civil Federal [CC] [Federal Civil Code], art. 301, Diario Oficial de la Federación [DO], 29 de junio de 1988 (Mex.) with UNIF. INTERSTATE FAMILY SUPPORT ACT, § 102 (amended 2008).

¹⁵⁹ CC art. 308 (Mex.).

¹⁶⁰ *Id.* art. 321.

¹⁶¹ *Id.* art. 324.

¹⁶² *Id.* art. 336.

¹⁶³ *Id.*

¹⁶⁴ *Id.* art. 303.

¹⁶⁵ *Id.* art. 305.

structure between the United States and Mexico. Additionally, Mexico allows a variety of reasons for early termination of support, including the child or creditor's lack of need.¹⁶⁶ This is different from the United States, where the creditor's and child's means are never considered for establishing the level of support required or the terms of enforcement of a support order.¹⁶⁷ Despite these various differences between the United States' and Mexico's support laws, an adequate level of similarity in support procedures exists between the United States and Mexico to establish reciprocity in the area of child support.¹⁶⁸

B. BARRIERS TO A RECIPROCAL AGREEMENT IN THE UNITED STATES

Significant barriers existed in the United States as child support agreements began to be registered or enforced across state lines, including a lack of uniform laws, insufficient cooperation, inconsistent practices among jurisdictions, conflicting support orders, and inadequate training of judges, attorneys, and caseworkers.¹⁶⁹ These barriers exist in forming international agreements as well, but are also complicated by issues such as differing languages, legal systems, family relations, and economic conditions.¹⁷⁰ Mexico is extremely protective of its citizens and, traditionally, does not look favorably at enforcing other nation's laws upon its own people.¹⁷¹ This causes complications in negotiations with other nations, particularly with the United States, as the United States tends to be extremely ethnocentric in the evaluation and enforcement of its own laws and ideas, even when developing international agreements.¹⁷²

The United States also must ensure that the constitutional requirements of federalism, jurisdiction, and due process are met, issues that regularly held this nation back from signing on to prior multinational agreements related to child support and maintenance.¹⁷³

¹⁶⁶ *Id.* art. 320.

¹⁶⁷ See generally UNIF. INTERSTATE FAMILY SUPPORT ACT (amended 2008).

¹⁶⁸ *State v. del Castillo*, No. A04-1528, 2005 Minn. App. LEXIS 602, at *7-8 (Minn. Ct. App. June 7, 2005). While this case dealt with Minnesota law specifically, Minnesota has implemented UIFSA, a Federal Support law. See *id.* at *5.

¹⁶⁹ Smith, *supra* note 40, at 38.

¹⁷⁰ Peters, *supra* note 1, at 94.

¹⁷¹ Email from Ernesto Romero, Attorney, to author (Nov. 6, 2013, 9:02 AM) (on file with author).

¹⁷² *Id.*

¹⁷³ Weiner, *supra* note 20, at 642.

1. Federalism

The US Constitution prohibits any state from entering into a treaty or alliance with any foreign power without the consent of Congress.¹⁷⁴ However, reciprocal agreements are not formal treaties, but rather are agreements of comity.¹⁷⁵ Additionally, enforcement of child support, and family law issues, in general, traditionally has been held to be a state issue.¹⁷⁶ It is important to note, however, that it was not until recent years that support became not only an interstate issue, but also an international issue.¹⁷⁷ As these international issues develop, the federal government must now play a role in family law.¹⁷⁸ By way of compromise, states have been able to enter into individual agreements on the basis of comity, rather than any legally binding agreement.¹⁷⁹ Both federal and state courts have held that this act does not constitute a violation of the separation of powers established by the US Constitution.¹⁸⁰

The federal government is still left with the task of determining when a uniform national policy is more appropriate to address an issue than inconsistent state laws.¹⁸¹ While some state governments could argue that child support enforcement is an issue that should be left to the states, the federal government has the power to regulate any activity that has a substantial effect on foreign commerce and activity.¹⁸² This power comes from the supremacy clause of the Constitution.¹⁸³ Enforcing support orders from other nations or having a US order enforced within another country's borders would have a substantial effect on foreign commerce and activity.¹⁸⁴

One way the federal government could circumvent this potential issue is through the use of cooperative federalism. Cooperative federalism allows states autonomy within a framework prescribed by

¹⁷⁴ DeHart, *supra* note 29, at 91.

¹⁷⁵ *Id.* at 92.

¹⁷⁶ *In re Burrus*, 136 U.S. 586, 594 (1890).

¹⁷⁷ See DeHart, *supra* note 29, at 91.

¹⁷⁸ *Id.* at 104.

¹⁷⁹ *Id.* at 92.

¹⁸⁰ *Id.* at 103.

¹⁸¹ Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J. L. & PUB. POL'Y 267, 331 (2009).

¹⁸² Ferrette, *supra* note 107, at 597–98.

¹⁸³ Estin, *supra* note 181, at 331.

¹⁸⁴ Ferrette, *supra* note 107, at 599–600.

federal law.¹⁸⁵ Congress is unable to direct or require states to implement specific laws; however, they are able to provide methods short of coercion to urge states to adopt a legislative program that furthers a federal interest.¹⁸⁶ This can be done either by preemption¹⁸⁷ or conditioned receipt of federal funding.¹⁸⁸ Traditionally, conditioned receipt of federal funding is the preferred method for persuading states to implement desired legislation.¹⁸⁹ While this concept is often exercised to address domestic issues, it could also be used to further a goal with international implications.¹⁹⁰

This compromise would allow the federal government to establish the child support standard and ultimate goal of a reciprocal agreement, while still allowing each individual state to pass its own legislation to reach this goal.¹⁹¹ While this could become confusing because each state may have different laws, it allows states to remain in control of support orders and enforcement.¹⁹² This compromise has the additional benefit of allowing support enforcement cases to be heard in state courts rather than increasing the burden placed on the federal courts.¹⁹³

In this particular instance, the federal government could establish the ultimate goal of reciprocal enforcement of support orders between the United States and Mexico. Then, each individual state would be allowed to develop individual legislation to move toward this goal. Ultimately, this would maintain the status quo of state control of child support, while still moving toward reciprocal enforcement.

2. Due Process

Due process is a promise contained in the US Constitution that the government will operate within the law and enforce all regulations

¹⁸⁵ Fish, *supra* note 25, at 44.

¹⁸⁶ New York v. United States, 505 U.S. 144, 188 (1992).

¹⁸⁷ If there is a state law and a federal law, which regulate the same act or entity in conflict, the state law is preempted by the federal law. Fish, *supra* note 25, at 45.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 44.

¹⁹¹ *Id.* at 45.

¹⁹² *See id.*

¹⁹³ *See id.*

fairly.¹⁹⁴ It further implies a concern with the government following procedural requirements both in and out of the American court system.¹⁹⁵ For a court to obtain jurisdiction over a defendant, due process requires that the defendant have certain minimum contacts with the jurisdiction to ensure the court's procedures do not violate basic concepts of justice and fairness.¹⁹⁶ These minimum contacts include the individual purposefully availing him or herself of the protections and benefits of the laws of the forum state.¹⁹⁷ Further, a court must evaluate whether forcing an individual to be subject to the laws of the foreign state would violate "notions of fair play and substantial justice."¹⁹⁸ It is unlikely that a child support payee, who has never entered the forum state, would be afforded the protections or benefits of the law in that state. As a result, it would violate the payee's due process rights to force him or her to be subject to the laws of that state. Regardless of an individual's obligation to support his or her child or children, it would violate basic tenets of US public policy to enforce an order without regard for due process.¹⁹⁹

3. Jurisdiction

The United States requires personal jurisdiction to enforce a support order.²⁰⁰ The notion of personal jurisdiction is rooted in the due process clause.²⁰¹ To establish this type of jurisdiction, there must be a nexus between the respondent and the forum state.²⁰² In the United States, it is the debtor's contacts with the forum that are determinative.²⁰³ The fact that the creditor or child resides in the forum does not give that forum jurisdiction over the debtor for child support enforcement purposes.²⁰⁴ This requires the non-custodial parent either to live in, or have significant contact with, the state attempting to establish or enforce

¹⁹⁴ Peter Strauss, *Due Process*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/due_process (last visited Dec. 15, 2014).

¹⁹⁵ *Id.*

¹⁹⁶ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

¹⁹⁷ *Id.* at 319.

¹⁹⁸ *Id.* at 316.

¹⁹⁹ *Country of Luxembourg ex rel. Ribeiro v. Canderas*, 338 N.J. Super. 192, 202, 768 A.2d 283 (N.J. Ch. 2000).

²⁰⁰ Peters, *supra* note 1, at 109.

²⁰¹ *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

²⁰² Carlson, *supra* note 42, at 27–28.

²⁰³ *Id.* at 28.

²⁰⁴ Fish, *supra* note 25, at 41.

a support order.²⁰⁵ This has been further narrowed, in that the parent-child relationship alone does not equate to significant contact with that state.²⁰⁶ The court must not exercise jurisdiction over a non-resident parent of a minor child, as it would lead to a violation of the due process clause of the Fourteenth Amendment.²⁰⁷ It is well settled that a court may only render a judgment for child support against a person if the court has jurisdiction over that person.²⁰⁸

It has been long held that a court may exercise personal jurisdiction over a non-resident, however, if the non-resident voluntarily enters the state and can be served within the borders of the state, regardless of how fleeting the visit is.²⁰⁹ Once this requirement is met, the court may exercise jurisdiction over the non-resident.²¹⁰ Additionally, an order remains valid and enforceable following a loss of jurisdiction until it is properly modified in the new jurisdiction.²¹¹ However, that view has shifted in recent years with many courts holding that personal service is not enough to constitute personal jurisdiction.²¹²

Furthermore, for a US court to have jurisdiction over an individual, there are service requirements that must be met. Serving an individual in Mexico, however, can be extremely costly and complicated. It also takes substantially more time to serve an individual in Mexico than in the United States. While service to Mexico can take as little as two months, it generally takes between six months and one year to complete.²¹³ Mexico also does not allow any form of service by mail, which can cause complications in finding an individual to personally serve the debtor.²¹⁴ This deterrent causes many American attorneys and individuals looking to enforce orders to abandon their efforts.²¹⁵

²⁰⁵ Peters, *supra* note 1, at 110.

²⁰⁶ Kulko v. Superior Court of California, 436 U.S. 84, 86 (1978).

²⁰⁷ Peters, *supra* note 1, at 110.

²⁰⁸ Flores v. Melo-Palacios, 921 S.W.2d 399, 404 (Tex. App. 1996).

²⁰⁹ *Id.* at 402.

²¹⁰ *Id.*

²¹¹ Earls v. Mendoza, No. W2010-01878-COA-R3-CV, 2011 Tenn. App. LEXIS 430, at *14, *15 Ct. App. Aug. 10, 2011).

²¹² See, e.g., *In re Marriage of Kohl*, 268 Ill. Dec. 547, 778 N.E. 2d 1169 (App. Ct. 2002); *Vailas v. Vailas*, 939 N.E.2d 565 (Ill. App. Ct. 2010); *In re Marriage of Hillstron*, 126 P.3d 315 (Colo. Ct. App. 2005).

²¹³ Charles B. Campbell, *No Serve: The Invalidity of Service of Process Abroad by Mail or Private Process Server on Parties in Mexico Under the Hague Service Convention*, 19 MINN. J. INT'L L. 107, 115–16 (2010).

²¹⁴ *Id.* at 127.

²¹⁵ Email from Ernesto Romero, Attorney, to author (Nov. 6, 2013, 9:02 AM) (on file with author).

However, most other countries use child-based jurisdiction, allowing a support order to be established or enforced in a country where either the child or non-custodial parent lives.²¹⁶ This difference in jurisdictional policy has traditionally caused problems in attempts to create both reciprocal agreements and multinational agreements.²¹⁷ In the negotiations for the Hague Convention, many countries attempted to require the United States to amend its constitution in order to allow for child-based jurisdiction.²¹⁸ However, the United States refused to even discuss a system with a child-based or creditor-based jurisdictional requirement.²¹⁹ Not only does this type of jurisdictional requirement violate the US Constitution, as it ignores the contacts the payor has with the forum state or nation, it also encourages forum shopping.²²⁰ Forum shopping occurs when a creditor chooses a particular jurisdiction to bring their case, based on more favorable support laws, in an attempt to obtain a more beneficial support order.²²¹

Gloria DeHart developed a solution to address this important difference between nations. Rather than require a country to enforce the original order, the responding nation may instead establish a new order that is equivalent, using its own laws and procedures.²²² This compromise allows individual countries or states to apply their laws and jurisdictional requirements while still implementing and enforcing a support requirement from another nation.²²³

IV. CONCLUSION

With the development of the United Interstate Family Support Act, the United States recognized the need for a central authority and unified legal system for support. This reduced confusion and unnecessary harassment, as well as increased efficiency and success with enforcement of support orders across state lines. However, the federal government has

²¹⁶ Peters, *supra* note 1, at 111; Carlson, *supra* note 42, at 27.

²¹⁷ Carlson, *supra* note 42, at 28.

²¹⁸ *Id.*

²¹⁹ *Id.* at 27–28.

²²⁰ Nicholas Bala, J. Thomas Oldham & Alison Perry, *Regulating Cross-Border Child Support Within Federated Systems: The United States, Canada, and the European Union*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 87, 93 (2005).

²²¹ *Id.*

²²² Smith, *supra* note 40, at 56 (citing DeHart, *supra* note 29, at 99–100).

²²³ *Id.*

been slow to expand this concept across its borders, forming agreements with only a limited number of countries across the globe. Without a unified goal or mission for registration and enforcement of international support orders, there continues to be confusion and a lack of justice for our nation's children. While steps have been taken toward creating a central authority to resolve this issue, progress is slow and will likely take decades to achieve. In the interim, it is imperative that the United States continues to expand the number of reciprocal agreements for support enforcement that it maintains.

Support enforcement cases between Mexico and the United States continue to account for a significant number of the international child support cases that exist in America today. However, no progress has been made to allow for enforcement of these orders to force individuals to fulfill their obligation to provide for their children. It is essential that the United States take steps to protect children within its territory, as well as those living in Mexico. The United States must establish a reciprocal agreement with Mexico to provide a uniform and transparent system for enforcing support orders. By doing so, they will ensure that children receive the financial support they need and deserve in order to thrive.

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