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TRANSNATIONAL ADOPTION FROM AN AMERICAN PERSPECTIVE: THE NEED FOR UNIVERSAL UNIFORMITY

*Jennifer M. Lippold**

I. ADOPTION SCENARIO

Adam and Kate Reta¹ are a middle-aged, Caucasian couple who have been married for seven years. Both are U.S. citizens. Adam has one son from a prior marriage who currently resides with Adam's ex-wife. Kate has no children, and this is her first marriage. Five years ago, Adam and Kate decided to start a family.

Both are healthy adults, capable of physically conceiving a child. Nevertheless, Adam and Kate decided to pursue the avenue of adoption, mainly because Kate was adopted by her parents. She had decided long before her marriage to Adam that she would prefer to adopt her own children as well.

Adam and Kate initiated the process of locating a child to adopt by contacting a public adoption agency in their state of residence. They informed an agency social worker that they were interested in adopting a healthy, Caucasian male infant. The social worker replied that if the Retas did not know of a willing birthmother, such an adoption would require an approximate ten-year wait if handled through the public agency. The social worker also made it clear that other applicants would be given priority over the Retas, since Adam and Kate are middle-aged, capable of conceiving, and Adam, a divorcee, already had one child from his previous marriage.

Desiring a child before reaching their mid-forties, Adam and Kate opted to try the less time-consuming and less restrictive independent adoption route. They contacted a local adoption attorney to act as an

* J.D. Candidate, Case Western Reserve University School of Law (1995). I would like to thank Judith P. Lipton, Instructor of Law at Case Western Reserve University School of Law, for her invaluable direction and advice.

¹ Adam and Kate Reta are fictitious persons created for the purpose of this adoption scenario. However, their international adoption experience illustrated in the hypothetical is based in part on the true international adoption experience of Andrew and Kelly Eisle. The Eises, who currently reside in Illinois, adopted a Korean-born female child in 1992. I learned of their experience through a telephone interview conducted in November, 1993. Telephone Interview with Andrew and Kelly Eisle (Nov. 1993). I would like to thank the Eises for their candor and generosity in relating their experience.

intermediary, and instructed the attorney that, although they still preferred to adopt a healthy, Caucasian infant, gender was no longer a concern. To their surprise and joy, a young, unwed birthmother, already three months pregnant, was located by the attorney in eighteen months. Before the long anticipated delivery date, Adam and Kate incurred costs totaling \$5,000.00 for legal fees and the birthmother's medical expenses. Two days prior to the baby's delivery, the birthmother, emotionally unable to part with her child, decided to raise the child herself instead of giving her baby up for adoption.

Heartbroken but determined, and less concerned about the child's race now, Adam and Kate next inquired about adopting a child from a foreign country. They contacted a private agency specializing in international adoptions. The agency allowed Adam and Kate to select a country from which they wished to adopt a child. They chose to adopt a child from the Philippines and were subsequently put on a waiting list. The preliminary adoption paperwork, which cost Adam and Kate \$1,000.00 was sent by the agency to the Philippines. After a one-year wait, however, the Philippine government redrafted its laws regulating the international adoption of its national children. As a result of the abrupt and unexpected change, Adam and Kate no longer met the criteria necessary for foreign couples to adopt children from the Philippines. Adam and Kate then agreed to be placed on a waiting list to adopt Colombian children.

After a two-year wait, the agency located a six-month-old Colombian female for Adam and Kate to adopt. Adam and Kate were required to travel to Colombia in order to secure an adoption decree from the Colombian government. They did so immediately and successfully. Adam and Kate incurred costs associated with the Colombian adoption totaling \$9,000.00 for adoption fees and traveling expenses. When they returned to America with their new daughter, Moyana,² the Retas were shocked and dismayed by the reception they received from the U.S. government.

The Immigration and Naturalization Services (INS), which regulates transnational adoptions in the United States, refused to acknowledge the Colombian Government's adoption decree for several reasons. First, it was determined from medical exams performed on Moyana in the United States that she suffered from serious physical and emotional disabilities, undisclosed to Adam and Kate. Further, it was determined from investigation that Moyana's birthmother had been financially induced to relinquish her child, making Moyana an innocent victim of the illegal Colombian black market baby trade. The INS also determined that Moyana's

² Moyana is a fictitious person created for the purpose of this international adoption scenario.

birthmother and birthfather, both alive, had neither "abandoned" nor "relinquished" their legal rights to Moyana, as required by U.S. federal law. Therefore, Moyana did not meet the status of an "orphan," as defined by U.S. immigration laws. It is mandatory for foreign children to meet the requirements of an orphan under U.S. immigration laws in order to be adopted by American couples, as will later be discussed in this Note.³ Consequently, the INS deported Moyana to Colombia.

Discouraged and frustrated, Adam and Kate decided to conceive a child and abandon the adoption process which cost them a total of \$15,000.00, took five years of their lives, and left them with nothing but pain and grief.

II. INTRODUCTION

The above hypothetical illustrates the many problems that U.S. couples face in adopting children, both domestically and internationally, as a result of the inconsistencies among diverse jurisdictional laws. Transnational adoptions have occurred for over forty years.⁴ The absence of a uniform system allows nations to freely regulate international adoptions according to their own schemes, which often conflict with the adoption methods of other nations. Divergent laws in various jurisdictions create inconsistencies and complexities, which result in a plethora of problems for all parties involved. These problems are compounded for U.S. couples wanting to adopt a child from a foreign land since they must satisfy the adoption criteria of three different jurisdictions — their own U.S. state of residence, the U.S. federal government, and the foreign nation from which they wish to adopt a child.⁵

This Note begins with an overview of transnational adoptions in the United States. It then explores the various and variant U.S. state, federal, and foreign laws and procedures which govern domestic adoptions and international adoptions, and looks at the problems created by the resulting conflicts of law. This Note proposes that a uniform international adoption law must be implemented in order to solve the prolific problems associated with intercountry adoptions. The recently drafted Hague Private Law Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption⁶ is examined as such a workable model. This Note

³ See *infra* Section V.

⁴ Galina Bryntseva, *How Much Are Russian Babies Worth on the Market?*, *RUSSIAN PRESS DIG.*, March 14, 1992, at 6, available in LEXIS, NEWS Library, Non-US File.

⁵ Mary C. Hester, *Intercountry Adoption from a Louisiana Perspective*, 53 *LA. L. REV.* 1271, 1276 (1993).

⁶ Hague Conference on Private International Law: Convention on Protection of

concludes with certain suggestions for additional provisions that should be incorporated into the Hague Convention, in an effort to establish the most conclusive and enforceable uniform law possible. These suggestions include: 1) a comprehensive disclosure of the birthparents' and their birthchild's complete medical histories to the prospective adoptive parents; 2) a ceiling cap placed on costs associated with transnational adoptions; 3) an appellate review process to be implemented in each member country; and 4) mandatory post-placement adoption services.

III. TRANSNATIONAL ADOPTION: AN AMERICAN OVERVIEW

A. Definitions

In the United States, adoption of children is defined as "the method provided by law to establish the legal and social relationship of parent and child between persons who are not so related by birth with the same mutual rights and obligations that exist between children and their birthparents."⁷ Transnational adoption, also referred to as international adoption or intercountry adoption (ICA), is defined as the "process by which a married couple or single individual of one country adopts a child from another country."⁸ Common terms associated with adoption include birthparents, adoptive parents, and adoptees.⁹ Birthparents are the adopted child's biological parents,¹⁰ while adoptive parents are the adopted child's non-blood-related parents who obtain custody of and legal rights to the child.¹¹ An adoptee is a child who has been legally adopted.¹²

B. U.S. Statistics

The modern era of transnational adoption began in the United States in the mid-1950s.¹³ Since then, over 100,000 foreign children have been

Children and Co-operation in Respect of Intercountry Adoption, 17th Sess., May 29, 1993, reprinted in 32 I.L.M. 1134 (1993) [hereinafter Hague Convention].

⁷ U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, PUB. NO. 80-30251, CHILDREN'S BUREAU, INTERCOUNTRY ADOPTION GUIDELINES 97 (1980) [hereinafter INTERCOUNTRY ADOPTION GUIDELINES].

⁸ *Id.*

⁹ These terms are often defined in state statutes which regulate the adoption of children. See, e.g., N.Y. DOM. REL. LAW § 109 (McKinney 1994).

¹⁰ See PAT JOHNSTON, SPEAKING POSITIVELY: AN INFORMATION SHEET ABOUT ADOPTION LANGUAGE (1993) (on file with author).

¹¹ *Id.*

¹² *Id.*

¹³ *Adopting Internationally*, ADOPTION RESOURCES AND INFORMATION, Jan. 1993, at 27 (Adoptive Families of America ed.) [hereinafter *Adopting Internationally*].

successfully adopted by American couples.¹⁴ Approximately 20,000 intercountry adoptions are finalized each year, with nearly half of the adoptive parents being U.S. citizens.¹⁵ For instance, in 1991, U.S. couples adopted an estimated 9,000 children from abroad.¹⁶ That figure exceeded the total for all other "receiving countries."¹⁷ International adoptions reportedly account for more than ten percent of all non-relative U.S. adoptions.¹⁸

C. *Reasons for the Increase of Transnational Adoptions in America*

Several reasons exist for the prevalence of ICAs in the United States. The increasing acceptance of abortion and single parent families has reduced the number of domestic children available for adoption, especially healthy, Caucasian infants.¹⁹ Conversely, adoptable children in most "sending countries" outnumber native parents wishing to adopt.²⁰ Since the domestic market is limited while the foreign market is plentiful, prospective U.S. parents have turned to ICAs,²¹ as did Adam and Kate. Moreover, the waiting period for ICAs is shorter and couples may desire to adopt from the country of their ethnic origin.²² Humanitarian concerns for poor and war-stricken orphans, such as those from Romania, have also played a major role in the increase of ICAs in the United States.²³ In

¹⁴ *Id.*

¹⁵ *New Rules Could Govern International Adoptions*, CHI. TRIB., May 28, 1993, at N22.

¹⁶ Paul Houston, *Romania's Experience Spurs Adoption Treaty*, L.A. TIMES, Feb. 12, 1992, at A5.

¹⁷ *Id.* A "receiving country" is the country to which a foreign child is sent to be adopted. *Id.* For example, when Korea sends one of its national children to the United States to be adopted by an American couple, the U.S. is designated as the receiving country.

¹⁸ Elizabeth Bartholet, *International Adoption: Overview*, in ADOPTION LAW AND PRACTICE, 10-7 (J. Hollinger ed., 1988).

¹⁹ See Dean E. Hale, *Adopting Children from Foreign Countries: A Viable Alternative for Clients Who Are Stymied by the American Scene*, 4 FAM. ADVOC. 30, 31 (1981); Jane Michaels, *Foreign Adoption: It's a Growing Phenomenon*, CHI. TRIB., Sept. 25, 1988, at D3.

²⁰ Hester, *supra* note 5, at 1273. A "sending country" is the country from which a national child is sent to be adopted abroad. For example, when Korea sends one of its national children to the United States to be adopted by an American couple, Korea is designated as the sending country. See *id.* at 1272.

²¹ Hale, *supra* note 19, at 31.

²² *Adopting Internationally*, *supra* note 13, at 27.

²³ See Houston, *supra* note 16. After the 1989 fall of the Communist government in Romania, the media exposed the abhorrent conditions to which the country's orphans

addition, certain state and agency requirements render U.S. couples ineligible to adopt children domestically. States and public or private agencies base their adoptive parental requirements on, *inter alia*, age, marital status, length of marriage, previous divorce, ability to conceive, health, family size, income, religion, and any disabilities.²⁴ U.S. couples who fail to meet these domestic criteria may satisfy the parental criteria required by a foreign country's international adoption laws.²⁵

IV. CONFLICTS OF LAW: STATE V. STATE

A. State Adoption Process

In the United States, the establishment and administration of the legal and procedural systems applicable to the adoption process are vested solely in the independent states, in their traditional role of regulating the welfare of children.²⁶ Thus, adoption is a state-created statutory status. A variety of methods exists for couples to pursue adoption in the United States. Primary methods include public agency adoption, private agency adoption, and independent adoption. Several advantages and disadvantages are associated with each method.

1. Public Agency Adoption

Public agencies place mainly minority infants, older children, or children with special needs, such as abused, neglected, or medically impaired children.²⁷ "Public agencies often have more flexible parent

were subjected. In a humanitarian response, Westerners "flocked to Romania to adopt these needy children." *Id.* The lax adoption laws in Romania, however, created a black market in the illegal selling of orphans to Westerners. Eventually, the adoption situation became so chaotic that "the new Romanian government was forced to suspend all adoptions until new laws [could be implemented.]" *Id.* For a comprehensive discussion of the Romanian adoption tragedy, see Howard E. Bogard, Comment, *Who Are the Orphans?: Defining Orphan Status and the Need for an International Convention on Intercountry Adoption*, 5 EMORY INT'L L. REV. 571, 573 (1991).

²⁴ See LOIS GILMAN, *THE ADOPTION RESOURCE BOOK* 23 (1984); Colleen Alexander Roberts, *Adoption Sources and Options*, in *ADOPTION RESOURCES AND INFORMATION* 3-5 (Adoptive Families of America ed., 1993); Michaels, *supra* note 19.

²⁵ See generally Hale, *supra* note 19, at 32.

²⁶ See generally Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 295 (1989). Under the doctrine of *parens patriae*, the state must care for those who are unable to care for themselves, such as minor children who lack proper care and custody from their parents. For a comprehensive definition of *parens patriae*, see BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). See *infra* note 47.

²⁷ Roberts, *supra* note 24, at 3.

requirements than private agencies regarding [age, income, marital status, number of current children, and religious affiliation.]”²⁸ Public agencies require only a minimal fee for placement of a child.²⁹ Public adoption agencies, though, suffer from certain drawbacks, such as overworked and understaffed personnel.³⁰ These problems create a long waiting period of several years for adoptive parents,³¹ as was discovered by Adam and Kate in their public agency experience.

2. Private Agency Adoption

Private agencies place more Caucasian babies and healthy infants than do public agencies, and they often have international adoption programs.³² The waiting period is usually less than that associated with public agencies.³³ Private agencies may be either sectarian or non-denominational. Private sectarian agencies tend to place more restrictive requirements on potential parents than do private non-denominational agencies, especially regarding religious affiliation and marital status.³⁴

Fees, however, are substantially less for adoptions arranged through private sectarian agencies, ranging from a few hundred dollars to \$8,000.00³⁵ Adoptions arranged through private non-denominational agencies may cost as much as \$20,000.00³⁶ Private non-denominational agencies provide more services to birthparents than do private secular agencies, and thus have higher “operational costs” that are passed on to prospective adoptive parents in the form of higher fees.³⁷ Regardless, adoptions arranged through either type of private agency cost a considerable amount more than adoptions arranged through public agencies.

3. Independent Adoption

Independent or private adoption is the most widely used adoption method in the United States.³⁸ In independent adoptions, the placement of the child to be adopted is either made directly between the birthparents

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* This problem is often attributed to lack of funding.

³¹ *See id.*

³² *Id.* at 3-4.

³³ *See id.* at 4.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 5.

and the adoptive parents, or through an intermediary, such as an adoption attorney.³⁹ Thus, independent adoptions occur without the involvement of a licensed agency.⁴⁰ Prospective parents are afforded a more active role in this method of adoption since they are permitted to assist in the search for the birthmother.⁴¹ Independent adoptions often involve a good deal of time. The adoptive parent requirements are, however, less strict than those imposed by public or private agencies.⁴² But this is a very expensive method of adoption with all legal matters left solely to the adopting couple and/or the intermediary.⁴³ If the birthmother ultimately decides to raise her child herself, the adoptive couple is often still responsible for all expenses incurred, and must start their search from the beginning again,⁴⁴ as was the case with Adam and Kate. Moreover, independent adoptions are accused of being one of the main factors contributing to the creation of illegal black market baby trading. This is attributed to the fact that intermediaries are often motivated solely by self-interest and profit.⁴⁵ In accordance with U.S. public policy against illegal baby trading, states must either regulate or prohibit independent adoptions.⁴⁶

B. State Regulations Governing Domestic Adoption

1. Domestic Intrastate Adoption

In regulating adoption, the state "assumes . . . a role as *parens patriae*" in its duty to protect the best interests of the child.⁴⁷ In this

³⁹ Hartfield, *supra* note 26, at 303-04.

⁴⁰ *Id.*

⁴¹ Roberts, *supra* note 24, at 5.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ "Baby selling is the result of the work of intermediaries who are not trained to provide adoption services and who are merely motivated by profit [I]ndependent adoptions generally facilitate the selling and buying of children for adoption purposes." Ahilemah Jonet, *International Baby Selling for Adoption and the United Nations Convention on the Rights of the Child*, 7 N.Y.L. SCH. J. HUM. RTS. 82, 106 (1989) [hereinafter Jonet I].

⁴⁶ For examples of state statutes outlawing or regulating independent adoptions, see *infra* notes 50-51.

⁴⁷ Ahilemah Jonet, *Legal Measures to Eliminate Transnational Trading of Infants for Adoption: An Analysis of Anti-Infant Trading Statutes in the United States*, 13 LOY. L.A. INT'L & COMP. L.J. 305, 317 (1990) [hereinafter Jonet II]. BLACK'S LAW DICTIONARY states that *parens patriae* refers to the traditional role of the state as sovereign and guardian of persons under legal disability, such as children who lack custody. The term is based on the principle that the state must care for those who cannot care

role, all states strive to achieve the twin goals of having every adoption be socially desirable and legally incontestable.⁴⁸ However, states seek to accomplish these two common goals with variant and conflicting laws.⁴⁹

Generally, two categories of intrastate adoption statutes exist in the United States. Either states enact statutes outlawing independent adoptions⁵⁰ or, more commonly, statutes regulating independent adoptions.⁵¹ The latter statutes regulate independent adoptions in the following ways: 1) restricting persons who may place adoptees or limiting their involvement; 2) requiring investigation by appropriate authorities before placement may occur; 3) requiring full disclosure of costs in court; 4) mandating court approval permitting placement before an intermediary may place a child; and, 5) prohibiting service fees, excluding medical, legal, or reasonable living costs.⁵² If such statutes are violated, grave consequences may result as illustrated in the following cases.

In *In re Anonymous*, the New York Family Court nullified an adoption and ordered the child returned to his birthmother or an authorized agency, since two provisions of the New York Social Welfare Law governing the placement of children for adoption were violated by an attorney acting as an intermediary in the independent adoption.⁵³ In this tragic case, the infant's birthmother was approached by a well-intentioned attorney who helped place the baby with the adoptive couple, in accordance with the birthmother's wishes and without receiving any personal compensation for the transaction.⁵⁴ The court found, however, that the attorney failed to qualify as an "authorized agency" under the require-

for themselves. See *supra* note 26.

⁴⁸ ROBERTA HUNT, REPORT: OBSTACLES TO INTERSTATE ADOPTION 9 (1972).

⁴⁹ *Id.*

⁵⁰ In an effort to curb illegal baby trading only six states including Connecticut, Delaware, Georgia, Massachusetts, Michigan, and Minnesota outlaw independent adoptions, allowing only licensed agencies and state welfare departments to place children in adoptive homes. *Jonet II*, *supra* note 47, at 306-07. See CONN. GEN. STAT. ANN. § 45(a)-727(a)(1) (West Supp. 1994); DEL. CODE ANN. tit. 13, § 904 (1993); GA. CODE ANN. § 19-8-24 (Michie 1991); MASS. GEN. LAWS ANN. ch. 210, § 11A (West 1987); MICH COMP. LAWS § 710.54 (West 1993); MINN. STAT. ANN. § 257.05 (West 1992).

⁵¹ *Jonet II*, *supra* note 47, at 306-07. For an example of a state statute regulating independent adoptions, see N.Y. DOM. REL. LAW § 115 (McKinney 1994); N.Y. SOC. SERV. § 374 (McKinney 1994).

⁵² *Jonet II*, *supra* note 47, at 312.

⁵³ *In re Anonymous*, 261 N.Y.S.2d 439, 442 (N.Y. Fam. Ct. 1965). Please note that several cases involving minor children, such as this one, use the name "Anonymous" to protect the minor's identity.

⁵⁴ *Id.* at 440.

ments of New York Social Welfare Law section 371.⁵⁵ Consequently, the court ruled that the child's placement was made in derogation of New York Social Welfare Law section 374, which mandates that only authorized agencies may place children for adoption, and was therefore illegal.⁵⁶

That decision was followed by the New York Supreme Court in *Anonymous v. Anonymous*.⁵⁷ In this case, which addressed the additional issue of the minor birthmother's valid consent to the adoption, the court ordered that the adopted child be returned to his birthmother, since the same two sections of the New York Social Welfare Law governing adoption (sections 371 and 374) were violated by an attorney acting as an intermediary in the independent adoption.⁵⁸ The court held that the attorney who arranged the adoption did not qualify as an authorized agency under section 371, and that therefore, the child had not been placed in accordance with section 374.⁵⁹ Although the New York Supreme Court expressed its sympathy to the adoptive parents, it justified its decision to return the child based on the precedent set in *In re Anonymous* and on New York State's public policy of protecting the interests of unwanted children and preventing the illegal trading of babies.⁶⁰

In *New Jersey v. Wasserman*, the New Jersey Appellate Court criminally penalized the defendant, a sixty-six year old woman, for violating provisions of the New Jersey statute governing the placement of children for adoption.⁶¹ The court found Ms. Wasserman guilty of placing a child for adoption without proper authority, in violation of New Jersey Statute section 2A:96-6, and of placing a child for adoption in return for monetary consideration, in violation of New Jersey Statute section 2A:96-7.⁶² The appellate court upheld the five year prison sentence imposed upon her by the lower court.⁶³ In dicta the court stressed the important public policy functions served by the New Jersey adoption laws, of protecting the birthparents, the prospective or adopting parents, and "most important of all, the child's best interest and welfare."⁶⁴

The above cases demonstrate that adoptions may be denied and

⁵⁵ *Id.* at 441.

⁵⁶ *Id.* at 442.

⁵⁷ *Anonymous v. Anonymous*, 439 N.Y.S.2d 255 (N.Y. Sup. Ct. 1981).

⁵⁸ *Id.* at 261.

⁵⁹ *Id.*

⁶⁰ *Id.* See *In re Anonymous*, 261 N.Y.S.2d at 440.

⁶¹ *New Jersey v. Wasserman*, 183 A.2d 467, 469 (N.J. Super. Ct. App. Div. 1962).

⁶² *Id.*

⁶³ *Id.* at 470.

⁶⁴ *Id.* at 472.

criminal penalties enforced for violations of state statutes governing intrastate adoptions. These internally applied state statutes also govern the interstate transfer of children for adoption. The movement of children across state lines for adoption purposes occurs under four circumstances: 1) matching effort between two separate state agencies; 2) moving family situation where adoptive parents change state residence before the adoption is complete; 3) independent placement; and, 4) direct placement.⁶⁵

2. Domestic Interstate Adoption and the ICPC

When a child is transported across state borders to a recipient state whose adoption laws differ from the child's state of origin, conflicts arise in the areas of valid consent, transfer, or continuation of guardianship over the child, continuing jurisdiction, financing costs, services available to support the placement, and agency administration.⁶⁶ In an effort to remove these interstate adoption problems and to facilitate the process, the Council of State Governments drafted the Interstate Compact on the Placement of Children (ICPC) in 1960.⁶⁷

Since then, the ICPC "has been enacted in identical form in forty-nine U.S. states."⁶⁸ The primary goal of the ICPC is to make interstate adoption resemble intrastate adoption as much as possible, while preserving the child's best interest as the paramount concern.⁶⁹ The ICPC consists of ten articles "designed to accomplish four objectives": 1) maximization of placement opportunity; 2) maximization of information for the receiving state; 3) information maximization for the sending agency; and 4) "resolution of jurisdictional conflicts."⁷⁰ The articles address, *inter alia*, definitions, conditions for placement, jurisdictional issues, and penalties for noncompliance.⁷¹ In addition to its text, the ICPC rec-

⁶⁵ HUNT, *supra* note 48, at 6. "Independent placement" refers to independent adoptions arranged through an intermediary. "Direct placement" refers to independent adoptions arranged directly between the birthparents and prospective adoptive parents. *Id.*

⁶⁶ *Id.* at 9. See also Hartfield, *supra* note 26, at 295.

⁶⁷ Council of State Governments, *The Interstate Compact on the Placement of Children*, reprinted in ROBERTA HUNT, CHILD WELFARE LEAGUE OF AMERICA, INC. Appendix IV (1972) [hereinafter ICPC].

⁶⁸ Hartfield, *supra* note 26, at 293 n.1. The ICPC has not been enacted into law, as of yet, in either New Jersey or the District of Columbia.

⁶⁹ ICPC, *supra* note 67, at 293.

⁷⁰ ICPC, *supra* note 67, at art. I. The ICPC uses the term "sending agency" instead of "sending state." Sending agency is a more expansive term than sending state. See *infra* note 76. See also Hartfield, *supra* note 26, at 296.

⁷¹ ICPC, *supra* note 67, at arts. II, III, IV, V.

ommends enabling legislation for states to enact in order to effectuate the ICPC.⁷² The Enabling Act has been adopted in substantial form by all member states to the ICPC.⁷³

The ICPC was intended to extend the "jurisdictional reach" of the sending agency into the receiving state, much like long arm statutes,⁷⁴ so that the sending agency could retain control over the child and could investigate proposed placements and supervise placements once accomplished.⁷⁵ This intention is illustrated in Article V, which mandates that jurisdiction over a child placed in another state remains with the sending agency, as if "the child had remained in the sending agency's state."⁷⁶

Each interstate adoption that occurs under the auspices of the ICPC requires a signed Interstate Compact Agreement, which acts as a legally binding contract between the sending party and the receiving state regarding the child's placement.⁷⁷ In the sending state, the ICPC requires appointment of a *guardian of the person* of the child to be responsible for the ultimate planning and financing of the child until a final adoption decree is entered.⁷⁸ The court-appointed guardian is vested with the power to consent to the adoption and may not be the child's birthparents or prospective adoptive parents.⁷⁹

The interstate adoption process is initiated by filing a Request for Placement with the Compact Office in the sending state, which ensures that the sending state's statutes and rules, such as termination of parental rights, have been properly complied with. The request is then forwarded to the Compact Office in the receiving state.⁸⁰ In the receiving state the prospective adoptive couple must arrange for a home study by a licensed adoption agency.⁸¹ If the receiving state Compact Office approves the

⁷² ICPC, *supra* note 67.

⁷³ See Hartfield, *supra* note 26, at 293. For examples of state statutes adopting the ICPC, see ILL. ANN. STAT. ch. 750, para. 50/4.1 (Smith-Hurd 1993); OHIO REV. CODE ANN. §§ 2151.39, 5103.20-5103.28 (Baldwin 1993).

⁷⁴ Long arm statutes allow state courts to exercise personal jurisdiction over nondomiciliary persons. BLACK'S LAW DICTIONARY 942 (6th ed. 1990).

⁷⁵ ICPC, *supra* note 67, at art. I(c), (d). See also Hartfield, *supra* note 26, at 296.

⁷⁶ ICPC, *supra* note 67, at art. V(a). "Sending agency" is defined in the statute under article II(b) as a "party state, officer or employee thereof; . . . court of a party state; a person, corporation, association, charitable agency or other entity which sends, brings or causes to be sent or brought any child to another party state." *Id.*

⁷⁷ James M. Lestikow, *There are Special Rules for Bypassing Adoption Agencies*, 4 FAM. ADVOC. 27 (1981).

⁷⁸ *Id.* at 27-28.

⁷⁹ *Id.* at 28.

⁸⁰ ICPC, *supra* note 67, at art. III(a), (b). See also Lestikow, *supra* note 77, at 28.

⁸¹ Lestikow, *supra* note 77, at 28.

home study and the request, the request is returned to the sending state Compact Office for final approval.⁸² If approved, the Compact Agreement authorizing placement is then presented to the court in the receiving state, even though under Article V the adoption may be finalized in either the sending or receiving state.⁸³ After the final adoption decree is entered, the Compact Offices in both states close their files and the Compact Agreement is legally terminated.⁸⁴

Placement of a child with the prospective adoptive family without full compliance with the ICPC's terms constitutes a violation of both the sending and receiving states' laws.⁸⁵ Article IV mandates that if ICPC conditions are not met, the infringement acts as a violation of the child placement laws of both states involved, and may be punishable "in either jurisdiction in accordance with its laws."⁸⁶

In re the Adoption of T.M.M. illustrates the harsh application of this Article.⁸⁷ In *T.M.M.*, a birthmother residing in Mississippi arranged for the private adoption of her child, through an intermediary, by a couple residing in Montana.⁸⁸ After the birthmother executed a parent's consent document in Mississippi, which was required to terminate her parental rights, the couple took physical custody of the child and returned to Montana.⁸⁹ The couple then filed an adoption petition in Montana, without furnishing the appropriate public authority (the Montana Department of Social and Rehabilitation Services (SRS)) with a prior written notice of their intention to bring the child to Montana from Mississippi for adoption purposes, as required by Article III(b) of the ICPC.⁹⁰ The couple also failed to await written notification by the Montana SRS that the proposed placement was in the best interests of the child, as required

⁸² ICPC, *supra* note 67, at art. III(c), (d). *See also* Lestikow, *supra* note 77, at 28.

⁸³ ICPC, *supra* note 67, at art. V. *See also* Lestikow, *supra* note 77, at 28.

⁸⁴ Lestikow, *supra* note 77, at 28.

⁸⁵ *Id.* at 27.

⁸⁶ ICPC, *supra* note 67, at art. IV.

⁸⁷ *In re the Adoption of T.M.M.*, 608 P.2d 130 (Mont. 1980). *See also* New Jersey v. Segal, 188 A.2d 416 (N.J. Super. 1963) (The defendant, an attorney acting as the intermediary, placed an infant born in New Jersey with a couple living in Pennsylvania. The court held the adoption illegal since the defendant was unauthorized to place children for adoption and had received monetary consideration for the transaction, in violation of New Jersey's adoption placement statute. (N.J.S. 2A:96-6, 2A:96-7). The court ordered the child returned to his natural parents and sentenced the defendant to three to five years in prison.)

⁸⁸ *T.M.M.*, 608 P.2d at 131.

⁸⁹ *Id.*

⁹⁰ *Id.* at 132; ICPC, *supra* note 67, at art. III(b).

by Article III(d) of the ICPC.⁹¹ As a result of the prospective adoptive couple's failure to comply with ICPC requirements, the Montana Supreme Court ordered the child removed from their custody in Montana and returned to the birthmother in Mississippi.⁹² Under Article IV, an ICPC violation may further constitute "full and sufficient grounds for the suspension or revocation of a license . . . held by the sending agency which empowers or allows it to place, or care for children."⁹³

Although a novel attempt to cure the difficulties associated with interstate adoption, the ICPC is wrought with problems which impede the ICPC's main goal of interstate uniformity. These problems include: 1) noncompliance with the ICPC's terms, which are often unintentional due to ignorance of the ICPC's existence;⁹⁴ 2) ambiguous definitions, as evidenced in the broad definition of "sending agency";⁹⁵ 3) underinclusiveness in the conditions for placement because the ICPC only prescribes compliance with the receiving state's placement laws;⁹⁶ and, 4) inadequate and unspecific sanctions for violations.⁹⁷ As a result, the ICPC often fails in accomplishing its stated goals and procedures, to the detriment of all parties involved in the interstate adoption process.⁹⁸

C. State Regulations Governing Transnational Adoption

States, in accordance with their traditional role of preserving the welfare of children in domestic adoptions, also regulate transnational adoptions. State laws determine whether "a foreign adoption decree is recognized on the basis of whether the adoption was legal in the sending state, whether U.S. constitutional requirements were met, and whether the adoption is consistent with state law and public policy."⁹⁹ ICAs, like domestic adoptions, may be processed by U.S. based agencies that help facilitate adoptions here and abroad, or by direct placement in which adopting parents either take an active role in locating the child and expediting the process or seek an intermediary for assistance.¹⁰⁰

It is logical to infer that fifty separate U.S. states' adoption laws will

⁹¹ *T.M.M.*, 608 P.2d at 133; ICPC, *supra* note 67, at art. III(d).

⁹² *T.M.M.*, 608 P.2d at 134.

⁹³ ICPC, *supra* note 67, at art. IV.

⁹⁴ Hartfield, *supra* note 26, at 302-03.

⁹⁵ *Id.* at 309-10.

⁹⁶ *Id.* at 315-16.

⁹⁷ *Id.* at 318-19.

⁹⁸ *See generally id.* at 302-19.

⁹⁹ Hester, *supra* note 5, at 1278.

¹⁰⁰ *See Hale, supra* note 19, at 31; Roberts, *supra* note 24, at 4-5.

inevitably differ from foreign countries' adoption laws. The conflicts of law which arise between U.S. states and foreign nations in the area of adoption result in a vast array of problems, some of which were exemplified in the Adam and Kate adoption scenario.

One of the most significant problems plaguing international adoptions involving the United States today is recognition of the child's adoption status between the sending and receiving states.¹⁰¹ For example, in *Barry E. v. Ingraham*, petitioners, New York state residents, secured a Mexican decree of adoption for a child already in their possession and were seeking a new birth certificate for the child from the New York court.¹⁰² The New York Court of Appeals refused to acknowledge the Mexican court's adoption decree, stating that it "lacked any foundation under Anglo-American concepts of jurisdiction to effect a change in the infant's status."¹⁰³ The court further held that "comity will not be accorded a foreign judgment if it violates a strong public policy of the State," as the court found the Mexican order had.¹⁰⁴ In dicta, the court explained New York State's public policy regarding adoption of children, stating:

[T]he State's vital social interest in the welfare of its children is one of its strongest public policies. To lend an imprimatur to an adoption, predicated upon insufficient jurisdictional foundations and a questionable perfunctory examination into the interests of the child, would be an inexcusable abdication of the State's role as *parens patriae*. It could also, it is feared, open the door to the mercenary trading of children.¹⁰⁵

Likewise, in *Doulgeris v. Bambacus*, the Virginia Supreme Court refused to accord comity to a Greek adoption decree based on the finding that Greek adoption laws give primary consideration to the best interests of the adoptive parents, and not the child.¹⁰⁶ The court held that such a law contradicts and offends the public policy of Virginia, whose adoption laws give "primary consideration [to] the welfare and best interests of the child."¹⁰⁷

Another prominent problem with ICAs is the failure of prospective

¹⁰¹ See Hester, *supra* note 5, at 1298.

¹⁰² *Barry E. v. Ingraham*, 371 N.E.2d 492, 493 (N.Y. 1977).

¹⁰³ *Id.* at 494.

¹⁰⁴ *Id.* at 496.

¹⁰⁵ *Id.*

¹⁰⁶ *Doulgeris v. Bambacus*, 127 S.E.2d 145, 147 (Va. 1962). This case involved a proceeding instituted by the administrator of the estate of James Odessett, whose father adopted plaintiff under the laws of Greece, to determine the heirs at law and next of kin of the estate of deceased. *Id.*

¹⁰⁷ *Id.* at 149.

parents to comply with U.S. state adoption requirements. If adoptive parents fail to adhere to state requirements regulating ICAs, severe consequences may result. For example, the case *In re the Adoption of Pyung B.* involved a New York couple who tried to adopt an orphan from Korea.¹⁰⁸ After the Korean child was in their possession in the United States, the couple petitioned the New York Family Court to secure an adoption order.¹⁰⁹ The court refused to grant the adoption order since it found the couple violated New York preadoptive requirements by failing to apply for an order of a required preadoption investigation to determine if the placement would be in the best interests of the child, as prescribed by section 115-a of New York's Domestic Relations Law.¹¹⁰ The court reasoned that the dual purpose of the statute was "to satisfy Federal immigration requirements as well as to prevent the tragedy of a child's coming to New York State from a foreign country only to have the petition denied on the ground that the adoption would not be in the child's best interest."¹¹¹ As a result of the couple's state statute violation:

[I]t is the unpleasant duty of this court to deny this petition for adoption on the grounds that it is premature . . . The court does this to protect the interests of both the child and the adoptive parents from future attack on the adoption, on the grounds that petitioners failed to satisfy the State requirements which are mandated and must be obeyed.¹¹²

Further conflicts of law problems associated with transnational adoption are discussed in Section VI.B. In addition to having to adhere to U.S. state adoption requirements, prospective adoptive couples in the United States must also comply with federal regulations when adopting a child from a foreign land.

V. CONFLICTS OF LAW: FEDERAL V. STATE

A. Federal Agencies Governing ICAs

In addition to state laws, transnational adoptions are subject to U.S. federal legislation. The federal agencies responsible for administering and regulating legislation affecting ICAs are the Immigration and Naturaliza-

¹⁰⁸ *In re the Adoption of Pyung B.*, 371 N.Y.S.2d 993, 995 (N.Y. Fam. Ct. 1975).

¹⁰⁹ *Id.* at 995.

¹¹⁰ *Id.* at 996-97. New York's Dom. Rel. Law § 115-1, subd. 6 specifically requires a preadoption investigation by an authorized agency in private placement adoptions. *Id.* (citing N.Y. DOM REL. LAW § 115-a, subd. 6 (McKinney 1988)).

¹¹¹ *Id.* at 996.

¹¹² *Id.* at 997 (citing N.Y. DOM. REL., LAW § 115-a, subd. 6 (McKinney 1988)).

tion Services (INS) of the Justice Department¹¹³ and the Office of Visa Services (Visa Services) of the State Department.¹¹⁴ These two agencies preside over matters concerning U.S. nationality and citizenship.

These agencies have Congressional authority to determine the eligibility status of foreign children for immigration into the United States as orphan adoptees,¹¹⁵ and to issue these adoptees visas.¹¹⁶ Specifically, the INS administers U.S. immigration and naturalization laws under the auspices of the U.S. Immigration and Naturalization Act (INA).¹¹⁷ The INS processes and approves the I-600 Form called the "Petition to Classify Orphan as an Immediate Relative," a mandatory requirement for foreign children who want to be adopted in the United States.¹¹⁸ After the I-600 Petition is approved by the INS, the Office of Visa Services, part of the Bureau of Consular Affairs, conducts a mandatory overseas investigation of the foreign child as part of the visa processing.¹¹⁹ If the investigation, which is conducted like a home study,¹²⁰ is favorable, then Visa Services issues visas to foreign adoptees who have met the federal standards so that they may reside in the United States.¹²¹

B. Federal Regulations Governing ICAs

1. Title 8, United States Code, Section 1101

The INS controls the immigration of foreign children entering the United States for adoption under the auspices of the INA.¹²² In order to be eligible for adoption in the United States, foreign children must meet the INA's preferential visa status of an "immediate relative," as classified

¹¹³ Immigration and Naturalization Act, 8 U.S.C. § 1101 (1988 & Supp. IV 1992) [hereinafter Immigration and Naturalization Act]. See also INTERCOUNTRY ADOPTION GUIDELINES, *supra* note 7, at 6.

¹¹⁴ 8 U.S.C. § 1154 (Supp. IV 1992). See also INTERCOUNTRY ADOPTION GUIDELINES, *supra* note 7, at 6.

¹¹⁵ Immigration and Naturalization Act, *supra* note 113, § 1101.

¹¹⁶ 8 U.S.C. § 1154 (Supp. IV 1992).

¹¹⁷ Immigration and Naturalization Act, *supra* note 113, § 1101.

¹¹⁸ Hester, *supra* note 5, at 1293. See also 8 U.S.C. § 1151 (Supp. VI 1994); 8 C.F.R. § 204.1(a) (1994).

¹¹⁹ 8 U.S.C. § 1154(d) (Supp. IV 1992).

¹²⁰ A "home study" is the report on the prospective adoptive parents' ability to care for the child to be adopted. The study is conducted by an authorized agency which evaluates the financial, physical, mental, and moral capabilities of the prospective parents to properly educate and rear the child, plus details the parents' residence and planned living accommodations for the child. 8 C.F.R. § 204.3(c)(2)(iii)(A) (1994).

¹²¹ 8 U.S.C. § 1154(b) (Supp. IV 1992).

¹²² Immigration and Naturalization Act, *supra* note 113, § 1101.

in the I-600 Form.¹²³ If a foreign child is deemed an immediate relative, he or she may then be admitted into the United States for adoption.¹²⁴ In order to satisfy the basic elements of the INA, the foreign adoptee must be an "orphan,"¹²⁵ the adoptive parents must be determined capable of caring for the adoptee through a home study,¹²⁶ and the adoption must be valid under both the laws of the sending and receiving states.¹²⁷

The most restrictive portion of the INA is the definition of "orphan," which the foreign child must fulfill in order to be adopted in the United States. Under the Act, an orphan is defined as a child who is without living parents, or has been abandoned, or has one living parent who has irrevocably released any and all legal rights to the child in writing.¹²⁸ Consequently, if the child has two living parents, he or she will not be considered an orphan under the U.S. definition, even if the parents voluntarily surrendered the child for adoption. This creates the unfortunate situation where children who are "legally adoptable under the laws of sending states, and under the laws of virtually all of the states in the United States, may not be brought into this country by prospective parents."¹²⁹ Further, the definition is ambiguous since the terms used to define "orphan," such as "disappearance, abandonment, desertion, separation, proper care," are not clearly defined themselves.¹³⁰ The INS now permits advance processing for ICAs, under the I-600A Form, which allows prospective parents to begin paperwork before a child is located so that the processing work on the adoptive parents is complete before the child is found.¹³¹ Advance processing facilitates the waiting period for prospective parents and prevents the tragic situation where a child who is legally adoptable under the laws of the sending state, but who is ineligible for immigration into the United States, is deported back to the sending state by the INS,¹³² as was the situation with Adam and Kate.

¹²³ 8 U.S.C. § 1151 (Supp. VI 1994).

¹²⁴ Immigration and Naturalization Act, *supra* note 113, § 1101.

¹²⁵ 8 U.S.C. § 1101(b)(1)(F) (1988). This provision defines an orphan as a child who is "under the age of sixteen at the time the petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing proper care and has in writing irrevocably released the child for emigration and adoption." *Id.*

¹²⁶ 8 U.S.C. § 1154(d) (Supp. IV 1992).

¹²⁷ See Hester, *supra* note 5, at 1282.

¹²⁸ 8 U.S.C. §§ 1101(b)(1)(F), 1154(d) (1988 & Supp. IV 1992).

¹²⁹ See Hester, *supra* note 5, at 1284.

¹³⁰ *Id.* at 1285.

¹³¹ 8 U.S.C. § 1151 (Supp. VI 1994).

¹³² See *Johns v. U.S. Dep't of Justice*, 653 F.2d 884 (5th. Cir. 1981) (holding the

The INS scrutinizes prospective adoptive parents' personal backgrounds in the application process. Sporadic employment records, appearance on welfare records, criminal records, delinquent rent payments, failure to comply with U.S. state adoption laws, and even apparent difficulty in caring for any present children, discovered through a mandatory home study, have been used by the INS as grounds for denying advance processing of ICA petitions filed by prospective adoptive parents.¹³³ Petitioners may appeal such unfavorable rulings to the INS Appellate Board.¹³⁴

2. Title 8, United States Code, Section 1154

Once INS approves the I-600 Form and all the necessary authenticated documentation on both the foreign child and the prospective parents has been completed, including a favorable home study on the prospective parents, Visa Services conducts an orphan investigation on the foreign child to be adopted as part of the visa processing.¹³⁵ The purpose of the investigation is to confirm that the foreign child meets the U.S. federal definition of orphan, is legally free for adoption according to the rules of the sending state, and does not have any illness or disability undisclosed in the orphan petition.¹³⁶ If the orphan investigation is favorable, the foreign child is eligible for a visa as an immediate relative.¹³⁷ If the investigation concludes that the foreign child does not meet the federal status of an orphan, then the petitioner(s) may either withdraw the adoption petition or submit proof in revocation proceedings to rebut the unfavorable conclusion.¹³⁸ If the investigation uncovers an undisclosed illness or disability, petitioners are notified of the child's condition and may decide whether or not they still wish to adopt the child.¹³⁹

INS has discretion to execute deportation proceedings of a four-year-old child adopted as an infant by an American couple in Mexico after the birthmother claimed her consent to the adoption was invalid.). Hester, *supra* note 5, at 1291.

¹³³ See *In re* T-E-C, 10 I. & N. Dec. 691 (1964) (INS denied orphan petition because petitioners were struggling financially and had failed to obtain a preadoption certificate required by the laws of their state of residence). Hester, *supra* note 5, at 1292. See also *In re* Russell, 11 I. & N. Dec. 302 (1965).

¹³⁴ 8 U.S.C. § 1151 (Supp. VI 1994).

¹³⁵ 8 U.S.C. § 1154 (Supp. IV 1992).

¹³⁶ Hale, *supra* note 19, at 32.

¹³⁷ 8 U.S.C. § 1154 (Supp. IV 1992).

¹³⁸ IMMIGRATION AND NATURALIZATION SERVICES, U.S. DEP'T OF JUSTICE, M-249Y, THE IMMIGRATION OF ADOPTED AND PROSPECTIVE ADOPTIVE CHILDREN 32 (1990).

¹³⁹ *Id.* at 16-17.

Once a visa is issued by Visa Services and the child arrives in the United States, he or she is considered a lawful permanent resident, subject to U.S. laws pertaining to aliens, until naturalization occurs and citizenship is granted under the auspices of the INA.¹⁴⁰ Before naturalization may occur, the adoption must be finalized. The adoption may be finalized in a U.S. court or by reconfirming the adoption through a second adoption hearing.¹⁴¹

C. *Federal v. State Regulations Governing ICAs*

Although states are empowered to create and administer adoption laws regulating ICAs, federal immigration laws preempt any conflicting state requirements.¹⁴² Although the federal preemption doctrine in no way renders state adoption laws invalid, immigration decisions can prevent a foreign child from being eligible for adoption in the United States.¹⁴³

For example, in *Matter of Russell*, the INS denied an adoption petition to adopt three Philippine children based on the prospective adoptive couple's inability to sufficiently supervise their teenage daughter while the family was stationed on a U.S. Naval Base in the Philippines, even though the Californian couple had satisfied California's preadoption requirements, had received a favorable home study and overseas investigation report, and had obtained a final adoption decree from the Philippine government.¹⁴⁴ The court analogized that if the couple was unable to supervise their own daughter, who was a disciplinary problem while on the Naval Base, they would likewise be unable to properly care for the three Philippine children.¹⁴⁵ Besides having to meet U.S. state and federal adoption requirements, U.S. couples wishing to adopt children from abroad must also satisfy foreign jurisdictions adoption requirements.

¹⁴⁰ Immigration and Naturalization Act, *supra* note 113, § 1101. For case law interpreting the naturalization requirements for foreign-born children adopted in the United States, see *In re Wong*, 224 F. Supp. 155 (S.D.N.Y. 1963) (holding naturalization of Korean-born child adopted by U.S. couple is allowed, even though only one adoptive parent is a U.S. citizen).

¹⁴¹ Hale, *supra* note 19, at 33.

¹⁴² See Hester, *supra* note 5, at 1306.

¹⁴³ *Id.* at 1307.

¹⁴⁴ *In re Russell*, 11 I. & N. Dec. 302-03 (1965). This case is still cited by the INS as controlling precedent.

¹⁴⁵ *Id.* at 305.

VI. CONFLICTS OF LAW: NATION V. NATION

A. *Transnational Adoption in General*

The conflicts of law problems concerning adoption, which occur between the laws of U.S. states, and between the laws of U.S. states and federal legislation, are compounded by the diverse adoption laws among foreign nations. The national laws and administrative procedures which govern transnational adoptions in separate countries are vastly different and highly complex.¹⁴⁶ These diverse methods are attributed to cultural, societal, political, and religious differences among nations.¹⁴⁷

In the United States, ICAs, like domestic U.S. adoptions, may be arranged by direct placement, often assisted by an intermediary such as an adoption attorney, or by U.S. based agencies with international adoption programs.¹⁴⁸ Typically, ICAs in the United States, however, are handled by private adoption agencies.¹⁴⁹ Prospective adoptive parents have the option of using a local agency that directly places children from abroad or a non-local agency with an international adoption program.¹⁵⁰

In order to be eligible to adopt a foreign child, prospective U.S. parents must fulfill the criteria of three diverse jurisdictions: the foreign sending state, the U.S. federal government, and the receiving U.S. state in which they reside.¹⁵¹ Each jurisdiction determines the child's status for adoption and the capability of the adoptive parents to provide for the child.¹⁵² U.S. state and federal regulations have already been discussed in this Note.¹⁵³ Through its national adoption laws, the sending state decides if the ICA is possible, whether the adoption is valid, if foreign persons are eligible to adopt their national children, and whether the adoption should take place in the sending state or in the receiving state.¹⁵⁴ An adoption proceeding which occurs in the sending state often requires the adoptive parents to travel to the sending state at their own expense,¹⁵⁵ as exemplified in the Adam and Kate adoption scenario.

¹⁴⁶ See Hale, *supra* note 19, at 31.

¹⁴⁷ Hester, *supra* note 5, at 1278, 1281. See also Hale, *supra* note 19, at 32.

¹⁴⁸ See Hale, *supra* note 19, at 31.

¹⁴⁹ *Adopting Internationally*, *supra* note 13, at 27.

¹⁵⁰ GILMAN, *supra* note 24, at 67.

¹⁵¹ Hester, *supra* note 5, at 1277.

¹⁵² *Id.*

¹⁵³ See *supra* Sections IV, V.

¹⁵⁴ Hester, *supra* note 5, at 1277. See Hale, *supra* note 19.

¹⁵⁵ See Hale, *supra* note 19, at 31.

B. Problems with Regulations Governing ICAs

There are several risks and roadblocks associated with transnational adoptions, in addition to having to fulfill the diverse jurisdictional requirements. These problems include war, changes in governments, changes in adoption laws and procedures, illegal baby trading, undisclosed medical histories, and racism.

1. The International Political Climate

ICAs present special concerns if no formal diplomatic relations exist between sending and receiving states, as is the current situation between the United States and Vietnam.¹⁵⁶ U.S. couples are beginning to look to Vietnam as a source for international adoptions, but the prospects remain dim since the United States and Vietnam lack formal diplomatic relations.¹⁵⁷ War and political upheavals may also impede the international adoption process. For instance, when the Sandinistas overthrew the Somoza government in Nicaragua, ICAs from Nicaragua were terminated.¹⁵⁸ Prospective parents must remember that transnational adoption is a "privilege," not a "right," and is possible only when a country is willing to relinquish one of its national children under specific conditions.¹⁵⁹ Consequently, nations may abruptly change their ICA requirements, rendering adoptive parents ineligible to adopt, as was the situation with Adam and Kate when they tried to adopt from the Philippines. Further, nations may terminate ICA privileges without notice, as Romania did in 1991.¹⁶⁰

2. The International Black Market Baby Trade

Black market baby trading is another serious problem involved in

¹⁵⁶ Wendy S. Tai, *Adoptions of Vietnamese Children Could Resume Soon*, STAR TRIB., Jan. 29, 1992, at 1B. Formal diplomatic relations may soon be established between the United States and Vietnam, as evidenced by President Clinton's removal of a "nineteen year trade embargo against Vietnam and proposed establishment of liaison offices in Hanoi and Washington," in February, 1994. See *Vietnam and U.S. Move Another Step Closer*, PLAIN DEALER (Cleveland), Feb. 18, 1994, at 15A.

¹⁵⁷ Tai, *supra* note 156.

¹⁵⁸ GILMAN, *supra* note 24, at 64.

¹⁵⁹ Michaels, *supra* note 19.

¹⁶⁰ *Id.* See also *Adopting Internationally*, *supra* note 13, at 27. See *supra* note 23 and accompanying text for further explanation of the situation in Romania.

ICAs that has existed since the inception of transnational adoption.¹⁶¹ The internationalization of baby trafficking has been created by weak adoption laws in developing nations, and by corrupt intermediaries who are driven by personal financial gain.¹⁶² These intermediaries coerce birthmothers to relinquish legal rights to their babies with financial inducements, as was the case with Moyana's birthmother.¹⁶³

Romania was forced to suspend all ICAs soon after the 1989 fall of Nicolae Ceausescu and his Communist government due to the uncontrollable black market baby trade that resulted from the ensuing political pandemonium.¹⁶⁴ *In re Jose L.* further illustrates the problems created by baby trafficking in the international black market.¹⁶⁵ In this case, the New York Family Court denied petitioners a preadoption certificate to bring a Chilean child to the United States for adoption.¹⁶⁶ Petitioners had contacted a woman in Pennsylvania and gave her \$10,000.00 to facilitate the adoption of the Chilean child.¹⁶⁷ Although a Chilean court had already granted petitioners guardianship of the child, the New York court denied the adoption petition since the transactions underlying the application resulted in financial gain to certain parties involved, in violation of New York adoption laws and public policy.¹⁶⁸

3. Time and Cost Restraints

Transnational adoptions require time, patience, and money. ICAs can take as little as six months or as long as a few years for completion.¹⁶⁹ As a result of the wait, adoptive parents are not likely to receive newborn infants as adoptees. ICA costs can range anywhere from \$5,000.00 to more than \$20,000.00.¹⁷⁰ These costs include home study fees, domestic agency or intermediary fees, foreign agency or intermediary fees, and travel expenses.¹⁷¹ Prospective parents should also anticipate extend-

¹⁶¹ See *Psst! Babies for Sale!*, TIME, Oct. 12, 1991, at 88.

¹⁶² *Jonet I*, *supra* note 45, at 90, 106.

¹⁶³ See GILMAN, *supra* note 24, at 64; Houston, *supra* note 16; *Psst Babies for Sale!*, *supra* note 161.

¹⁶⁴ See *supra* note 23 and accompanying text.

¹⁶⁵ *In re Jose L.*, 483 N.Y.S.2d 929 (N.Y. Fam. Ct. 1984).

¹⁶⁶ See *id.* at 930.

¹⁶⁷ *Id.* at 930.

¹⁶⁸ *Id.* at 930-31. See *supra* Section IV.B.1 for explanation of New York State's public policy regarding adoption.

¹⁶⁹ See Hale, *supra* note 19, at 31.

¹⁷⁰ See *Adopting Internationally*, *supra* note 13, at 27; Julie Rubin, *Adoption Dreams Come True in Russia*, L.A. TIMES, Nov. 29, 1992, at B1.

¹⁷¹ Hester, *supra* note 5, at 1275. For a comprehensive breakdown of possible ICA

ed travel abroad since it is a prerequisite under certain countries' ICA laws, as it is with most Latin American states.¹⁷² ICAs require a voluminous amount of paperwork since several jurisdictions are involved. In the U.S., couples wishing to adopt foreign children must submit proof of U.S. citizenship, proof of marriage and divorce if applicable, fingerprints, any criminal conviction records, and a favorable home study, along with the petition for adoption.¹⁷³ All necessary documentation must be authenticated as genuine, an often expensive and lengthy process.¹⁷⁴

4. Medical Information

It is common in transnational adoptions for adoptive parents to be uninformed or misinformed about medical histories and problems of the birthparents and child, thus prohibiting adoptive parents from making an informed decision about the adoption.¹⁷⁵ Children with serious diseases, such as hepatitis, tuberculosis, and AIDS, may slip through routine exams.¹⁷⁶ These diseases can be dangerous to both parents and the child if undetected.¹⁷⁷ Moreover, the lack of medical information prohibits parents from making an informed choice about whether they are physically, emotionally, and financially capable of handling a child with special needs.¹⁷⁸ In *Prince v. Illien Adoptions Int'l*, an adoptive mother sought compensatory damages for medical expenses incurred and emotional trauma suffered in a wrongful adoption suit.¹⁷⁹ The defendant agency arranged for plaintiff to adopt a child from India.¹⁸⁰ Throughout the adoption process, plaintiff informed the agency that although she would accept a child with certain treatable medical conditions, she specifically did not want to adopt a deaf child.¹⁸¹ Nevertheless, after defendant arranged the adoption and plaintiff had gained custody, it was discovered that the child was deaf.¹⁸² Further, the child required heart and eye sur-

fees for adoptive U.S. parents, see GILMAN, *supra* note 24, at 74.

¹⁷² GILMAN, *supra* note 24, at 72; Hale, *supra* note 19, at 31.

¹⁷³ GILMAN, *supra* note 24, at 102.

¹⁷⁴ Hester, *supra* note 5, at 1287.

¹⁷⁵ See generally Renee Cordes, *Parents Kept in the Dark Find Ray of Hope in Wrongful Adoption Suits*, TRIAL MAG., Nov. 1993, at 12.

¹⁷⁶ See Andrew Holtz, *International Adoptions*, Transcript #79-3 (CNN television broadcast, Aug. 17, 1991) available in LEXIS, News Library, SCRIPT File.

¹⁷⁷ *Id.*

¹⁷⁸ Cf. Cordes, *supra* note 176, at 12.

¹⁷⁹ *Prince v. Illien Adoptions Int'l*, 806 F. Supp. 1225, 1227 (D. Md. 1992).

¹⁸⁰ *Id.* at 1227.

¹⁸¹ *Id.* at 1226-27.

¹⁸² *Id.* at 1227.

gery.¹⁸³ Defendant agency failed to inform petitioner about any of the child's severe medical problems.¹⁸⁴ As a result, plaintiff incurred great medical expenses for the child's treatment and suffered emotional distress, resulting in psychiatric treatment and the ultimate removal of the child.¹⁸⁵

VII. THE NEED FOR AN UNIFORM INTERNATIONAL ADOPTION LAW

A. *Reasons for the Urgent Need*

The lack of uniformity in the international realm of adoption creates conflicts of laws between nations, culminating in the numerous problems previously discussed. The introduction of a uniform system of laws governing international adoption will help combat these serious deficiencies present in the current system, and will help to promote a more efficient, less costly, and less lengthy process. With the increasing global interest in ICAs, especially in the United States, it is imperative that such a uniform system be implemented in the most expedient way possible, so that adoptive parents will not have to suffer the pitfalls experienced by Adam and Kate.

B. *Attempts at Uniformity*

Recognizing the need for consistency among national adoption laws, several entities have attempted to create uniform instruments. The ICPC has already been examined as such an instrument.¹⁸⁶ This section discusses other attempts to create uniform instruments.

1. The U.S. Intercountry Adoption Guidelines

In 1977, the Children's Bureau¹⁸⁷ developed the Intercountry Adoption Guidelines (Guidelines) as an aid to all U.S. parties involved in adopting a child from abroad, in recognition of the need to rectify problems created by divergent U.S. state and foreign country adoption laws, and to ensure equal protections to foreign-born children adopted in

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See id.* The merits of plaintiff's claim against the international adoption agency were not resolved by the federal district court. In the decision, the court only denied the agency's Motion to Dismiss for Lack of Jurisdiction, holding that the merits of plaintiff's claim should be decided in Maryland. *Id.* at 1227, 1231.

¹⁸⁶ *See supra* Section IV.B.2.

¹⁸⁷ The Children's Bureau is a federal agency established under the U.S. Dep't of Health, Education and Welfare. 42 U.S.C. § 191 (1988).

the United States.¹⁸⁸

The Guidelines consist of four chapters containing subsections. Chapter One provides an overview of ICAs.¹⁸⁹ Chapter Two contains administrative guidelines which "set forth statements of good practice that describe the administration of intercountry adoption programs and services and the roles and responsibilities of the various parties involved," including the INS, Office of Visa Services, U.S.-based international child-placing agencies and agents, and adoptive parent support groups.¹⁹⁰ Chapter Three discusses legal considerations for prospective U.S. couples wanting to adopt a foreign child.¹⁹¹ The final chapter provides ICA service guidelines that address information sharing, preplacement, placement, post-placement, and post-adoption services.¹⁹²

Although the Guidelines are an important starting point for encouraging national uniformity in ICAs in the United States, they are merely voluntary.¹⁹³ Further, they are subservient to existing federal regulations governing ICAs.¹⁹⁴

2. The U.N. Adoption Declaration

In 1985, a group of appointed family & child welfare experts drafted a set of guidelines on the foster placement and adoption of children for the U.N. Economic and Social Council.¹⁹⁵ After further debate, the guidelines were adopted in 1986 as a U.N. General Assembly Resolution entitled "The Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption" (U.N. Adoption Declaration).¹⁹⁶

The U.N. Adoption Declaration, consisting of twenty-four articles, acknowledges the legitimacy of ICAs and holds the best interests of the child as the overriding concern.¹⁹⁷ However, the Declaration promotes

¹⁸⁸ INTERCOUNTRY ADOPTION GUIDELINES, *supra* note 7, at vii.

¹⁸⁹ *Id.* at 1-12.

¹⁹⁰ *Id.* at 13-38.

¹⁹¹ *Id.* at 39-42.

¹⁹² *Id.* at 43-84.

¹⁹³ *Id.* at xiii.

¹⁹⁴ *See supra* Section V.

¹⁹⁵ United Nations Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, G.A. Res. 41/85, U.N. GAOR, 41st Sess., Supp. No. 53, at 265, U.N. Doc. 41/85 (1986), *reprinted in* 26 I.L.M. 1096 (1987) [hereinafter U.N. Adoption Declaration].

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at arts. V, XVII.

national adoption over transnational adoption and only regards "intercountry adoption . . . as an alternative means of providing the child with a family."¹⁹⁸ The Declaration even prioritizes national foster care over adoption of the child by a foreign couple.¹⁹⁹ Although the U.N. Adoption Declaration offers considerations regarding ICAs, it establishes no specific guidelines and imposes no sanctions for violations.²⁰⁰ Moreover, the U.N. Adoption Declaration is a mere *declaration* and therefore is not considered to be legally binding.²⁰¹ Thus, the U.N. Adoption Declaration is a policy-oriented tool, and unworkable as a uniform method to regulate transnational adoption.

Nevertheless, the U.N. Adoption Declaration served as a catalyst for the recently drafted Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, by the Hague Private International Law Conference.²⁰²

3. The Hague Convention

The 1993 Hague Convention, compiled over a five-year period by sixty-six nations, including the United States, attempts to standardize the ICA process among all nations who become parties to the treaty. Since the treaty is a *convention*, rather than a *declaration*, signatory states will be legally bound by its provisions.²⁰³

VIII. THE HAGUE CONVENTION GOVERNING TRANSNATIONAL ADOPTION

A. Legislative History

The purpose of the Hague Private International Law Conference, as enunciated in its organic statute, is to "work for the progressive unification of the rules of private international law, . . . [and to] facilitate both the relationships between private parties across international borders and international legal transactions."²⁰⁴ Further, the Conference is "developing into a worldwide centre in the service of international judicial and administrative co-operation in the field of private law, and particularly in

¹⁹⁸ *Id.* at art. XVII.

¹⁹⁹ *Id.*

²⁰⁰ See Jonet I, *supra* note 45.

²⁰¹ *Id.* at 100.

²⁰² Hague Convention, *supra* note 6.

²⁰³ Jonet I, *supra* note 45, at 100.

²⁰⁴ Hague Convention, *supra* note 6, at Part D. The Hague Private International Law Conference held its first session in 1893.

the area of child protection.²⁰⁵

The seventeenth session of the organization, at which the Hague Convention was drafted, occurred May 10-29, 1993.²⁰⁶ In 1988, the Hague Conference decided to prepare a convention on the international unification of ICAs in order to protect the interests of the children and both sets of parents involved, and to resolve the widespread abuses common in ICAs.²⁰⁷ Three two-week preparatory sessions of the Conference were held to identify and address ICA issues and to prepare a draft convention.²⁰⁸ This draft convention served as the initial working document at the seventeenth session.²⁰⁹ In addition, two other international documents were instrumental in framing the Convention: 1) The U.N. Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption²¹⁰ and 2) The U.N. Convention on the Rights of the Child, adopted in 1988, which regards ICAs as a last resort.²¹¹

The U.S. delegation to the Conference "included a family and comparative law professor, and representatives of Adoptive Families of America, Inc., the American Academy of Adoption Attorneys, the National Council for Adoption," the American Public Welfare Association, the INS, the State Department, the American Bar Association, and two adoptive mothers appointed by the White House.²¹² The U.S. delegation to the seventeenth session was led by James L. Ward and Peter H. Pfund, Assistant Legal Advisor for Private International Law at the U.S. State Department.²¹³

Unfortunately, legislative history on the Hague Convention is limited since it was drafted only one year ago. Currently, no legislative action has been taken on the Convention in the United States.

B. Provisions of the Hague Convention

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ U.S. DEP'T OF STATE, press release, 1993 HAGUE CONVENTION ON INTERCOUNTRY ADOPTION 1 (June, 1993) (on file with author).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ U.N. Adoption Declaration, *supra* note 197. *See supra* Section VIII.B.

²¹¹ United Nations Convention on the Rights of the Child, U.N. ESCOR, 85th mtg., at 5-6, U.N. Doc. E/1988/85 (1988), *reprinted in* 28 I.L.M. 1448, 1461 (1989).

²¹² U.S. DEP'T OF STATE, *supra* note 207, at 1.

²¹³ Lois R. Melina, *Hague Treaty Hopes to Solve Problems in Intercountry Adoptions*, ADOPTED CHILD, Aug. 1993, at 1-2.

The Hague Convention consists of five Parts, seven Chapters, and forty-eight Articles.²¹⁴ The treaty establishes a specific legal framework and ICA policy with minimum standards and procedures for countries to follow.²¹⁵ It was designed to ensure the recognition of transnational adoptions, simplify and expedite the ICA process, "promote genuine cooperation among the signatories," and stop black market baby trading.²¹⁶ The new law aims to protect the interests and rights of all parties involved in ICAs.²¹⁷

Specifically, the treaty's Preamble addresses the child's need to be nurtured in a family environment, and accordingly recognizes that each state "should take . . . appropriate measures to enable the child to remain in the care of [his or her] family of origin," but if that is not feasible, "intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin."²¹⁸ Unlike the U.N. documents on which it is premised, the new treaty favors international adoption over national foster care.

In Chapter One of the of the treaty, which contains Articles 1 through 3, expresses the scope of the Convention. Article 1 states the three main objectives of the Convention: 1) establish ICA safeguards to protect the rights and best interests of the child; 2) establish cooperation among member states in order to preserve those safeguards and prevent the "abduction, sale, or traffic of children"; and, 3) secure recognition of the adoption status among the contracting states.²¹⁹ The Convention applies only to adoptions which "create a permanent parent-child relationship," but ceases to apply if the conditions of the treaty are not fulfilled before the child reaches eighteen years of age.²²⁰

Chapter Two, which contains Articles 4 and 5, sets the requirements for ICAs. "Competent authorities" of the state of origin (sending state) are charged with the duties of determining whether the child is legally adoptable; whether transnational adoption is in the child's best interests; and, ensuring that the persons, institutions, and authorities involved have given their legal consent to the adoption freely, in writing, and without

²¹⁴ Hague Convention, *supra* note 6.

²¹⁵ Melina, *supra* note 215, at 1.

²¹⁶ *Id.* See also Houston, *supra* note 16; *International Law on Children's Adoption Passed*, XINHUA GENERAL OVERSEAS NEWS SERVICE, June 2, 1993, available in LEXIS, News Library, Non-US File.

²¹⁷ Heather Stern Little, *Treaty Helps Foreign Adoptions*, USA TODAY, May 26, 1993, at 13A.

²¹⁸ Hague Convention, *supra* note 6, at Preamble.

²¹⁹ *Id.* at art. 1.

²²⁰ *Id.* at arts. 2(2), 3.

any financial inducement.²²¹ Competent authorities of the receiving state are charged with the duties of determining whether the adoptive parents are “eligible” and “suitable”; ensuring that the adoptive parents have received any necessary counseling; and, determining whether the child will be authorized to “enter and reside permanently” in the receiving state.²²² All of the above duties must be discharged before an ICA can take place under the treaty.

Chapter Three of the Convention, which contains Articles 6 through 13, concerns the creation of a Central Authority and other accredited bodies to handle ICAs within each country. Article 6 requires all states to establish a Central Authority (CA) in their country, having delegable and non-delegable duties.²²³ The non-delegable functions of the CA include fully cooperating with other CAs; promoting cooperation among national competent authorities involved in ICAs; providing information regarding the specific adoption laws of their states; and, eliminating any impediments to the Convention’s application, as far as possible.²²⁴ CA functions which can be delegated to public authorities and accredited bodies include preventing improper financial or other gain in connection with ICAs; “collect[ing] and exchang[ing] information” regarding the child and adoptive parents; “facilitat[ing] and expedit[ing]” adoption proceedings; and, “promot[ing] the development of . . .counselling and post-adoption services.”²²⁵ Articles 10 and 11 deal with the accreditation and composition of accredited bodies.²²⁶ Article 12 allows an accredited body in one state to act in another member state if “the competent authorities of both States have authorized it to do so.”²²⁷

Chapter Four, which consists of Articles 14 through 22, describes the procedural requirements of ICAs under the treaty. To initiate the transnational adoption process, prospective adoptive parents must apply to the CA in their state of residence.²²⁸ If the CA in the receiving state decides that the parents are eligible and suitable to proceed with an adoption, it shall prepare a report to transmit to the CA in the sending state CA, which provides information about the prospective parents’ identity, eligibility, background, family and medical history, social environment, reasons for adopting, and the characteristics of the children for whom

²²¹ *Id.* at art. 4(a), (b), (c)(2-3).

²²² *Id.* at art. 5.

²²³ *Id.* at art. 6(1).

²²⁴ *Id.* at art. 7.

²²⁵ *Id.* at arts. 8, 9(a), (b), (c).

²²⁶ *Id.* at arts. 10, 11.

²²⁷ *Id.* at art. 12.

²²⁸ *Id.* at art. 14.

they are qualified to care.²²⁹ If the CA in the sending state decides that the child is adoptable and the envisioned placement is in the best interests of the child, it shall prepare a similar report to transmit to the CA in the receiving state which provides information about the child's identity, adoptability, background, social environment, family and medical history, and any special needs of the child.²³⁰ These reports parallel the home study approach used in ICAs in the United States. Along with the report, the CA in the sending state shall transmit to the CA in the receiving state proof of parental consents and reasons for its recommendation of the placement.²³¹ If the CAs in both the sending and receiving states agree that the transfer may proceed, and all other conditions have been met, the prospective parents will be allowed to adopt the child.²³²

If the adoption is to take place in the receiving state after the child has arrived, and the CA in the receiving state feels that the continued placement of the child is not in his or her best interests, the CA may stop the planned adoption and must subsequently provide alternative care for the child.²³³

Article 22 permits the delegable CA functions to be performed by accredited bodies or public authorities, but it also permits non-accredited authorities, such as agencies, lawyers, or social workers to perform those duties.²³⁴ However, member states do have the option to declare that they only want their adoptions handled through a receiving state's public authorities or accredited bodies.²³⁵ Thus, this article has the potential to substantially regulate and limit independent international adoptions.

The recognition and effects of the adoption are contained in Chapter Five of the Convention, which consists of Articles 23 through 27. Article 23 announces that adoptions performed in accordance with the treaty's conditions must be recognized by all member states.²³⁶ However, Article 24 contains an exception clause which allows contracting states to refuse to acknowledge a valid adoption "only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child."²³⁷ Chapter 5 also details exactly what recognition entails.²³⁸

²²⁹ *Id.* at art. 15.

²³⁰ *Id.* at arts. 16(1)(a), (d).

²³¹ *Id.* at art. 16(2).

²³² *Id.* at art. 17.

²³³ *Id.* at art. 21(1)(a), (b).

²³⁴ *Id.* at art. 22(1), (2).

²³⁵ *Id.* at art. 22(4).

²³⁶ *Id.* at art. 23(1).

²³⁷ *Id.* at art. 24.

²³⁸ *Id.* at art. 26.

In Chapter Six, Articles 28 through 42, discusses general provisions. Topics covered in this section include, *inter alia*, preservation of information, expenses, violations, and how the treaty's terms apply to nations with two or more systems of adoption laws, such as the United States.²³⁹ Article 32 expressly prohibits parties involved in ICAs from improper financial gain and denounces unreasonable costs and expenses associated with ICAs, in a direct effort to help stop the international black market baby trade.²⁴⁰ Although certain declarations are allowed to the treaty, such as in Article 22, no reservations are permitted.²⁴¹ A Special Commission shall convene at regular intervals to review the practical operation of the Convention.²⁴²

The final clauses of the Convention are contained in Chapter Seven, consisting of Articles 43 through 48. These articles explain basic house-keeping duties such as ratification, accession, enforcement, and denouncement procedures to be followed by signatory states.²⁴³

C. *Advantages of the Hague Convention*

The major advantage of the Hague Convention is that it establishes a uniform set of minimum standards which member countries must follow in order to successfully complete an ICA. These standards are based on the rights and interests of all parties involved in transnational adoption. One major progressive step of the treaty is that it preferences international adoption over national foster care, unlike its predecessors.²⁴⁴ This is an advancement for foreign adoptees whose interests will be better served in a stable, permanent family than in several temporary families or in institutional care.

Another progressive step of the Hague Convention is that it acknowledges and attempts to abolish the black market baby trade that plagues ICAs by forbidding exorbitant costs and expenses and by prohibiting improper financial gain to all parties involved in the transaction.²⁴⁵

Further, the treaty creates a CA through which ICAs are to be handled.²⁴⁶ The existence of a main coordinating adoption body in each country will facilitate and expedite the ICA process by establishing

²³⁹ *Id.* at arts. 30-33, 35-38.

²⁴⁰ *Id.* at art. 32(1), (2).

²⁴¹ *Id.* at art. 40.

²⁴² *Id.* at art. 42.

²⁴³ *Id.* at arts. 43-48.

²⁴⁴ *See supra* notes 197, 214.

²⁴⁵ Hague Convention, *supra* note 6, at art. 32.

²⁴⁶ *Id.* at ch. III.

consistency within and among party nations by decreasing waiting periods, costs, confusion, and redtape; by increasing the availability of information; and, by making it easier for each nation to internally monitor the ICA process.

Also, the Convention rejects the notion of reservations.²⁴⁷ This is advantageous since a reservation by one country would encourage multiple reservations by other countries, thus rendering the treaty inoperable. Moreover, if the treaty is deemed unworkable in light of modern day political realities, a monitoring board has been established under the treaty to review the treaty's operation and to suggest improvements.²⁴⁸

D. Problems of the Hague Convention

The main problem with the Hague Convention is the enforceability of the treaty's provisions. Since no specific enforcement mechanism or appellate review process has been established under the treaty, the treaty's operation depends on each member nation's good faith and, according to drafter Peter Pfund, the "willingness of adopting parents to report an impropriety . . . to the central authority in that country."²⁴⁹ Although the treaty directs the CA in each member state to ensure that appropriate measures are taken when the treaty's provisions are violated the treaty is wholly silent on what constitutes appropriate measures, how the CA is to implement those measures, which state's (either the sending or receiving state's) CA is supposed to take action, and, within what period of time the CA has to act. Unfortunately, the lack of any enforcement or review body under the treaty leaves much room for noncompliance abuses.

Another problem of the treaty is the lack of a definitions section. This oversight may result in ambiguity, causing member states to misinterpret some of the treaty's conditions. For example, Chapter Three allows CAs to delegate some functions to accredited authorities,²⁵⁰ but fails to define exactly what an accredited body is and what its ethical standards are. Further, it is unclear which body decides whether these standards have been met. Although Chapter Six addresses the problem of international black market baby trading and attempts to thwart it by denouncing excessive costs and expenses, and by prohibiting involved parties from

²⁴⁷ *Id.* at art. 40.

²⁴⁸ *Id.* at art. 42.

²⁴⁹ Melina, *supra* note 215, at 4. Article 33 of the Hague Convention directs that violations of the treaty's provisions be reported to the member state's CA, which is responsible for ensuring that appropriate measures are taken. Hague Convention, *supra* note 6, at art. 33.

²⁵⁰ Hague Convention, *supra* note 6, at arts. 8, 9.

deriving "improper financial gain,"²⁵¹ the treaty fails to define the term "excessive," or what constitutes "improper" financial gain. Such ambiguity has the potential to undermine the uniformity upon which the treaty is based.

The treaty allows member states to refuse to recognize an ICA if the state finds it to be "contrary to its public policy" regarding adoption, however, it fails to define "public policy."²⁵² This exception has the potential to create a giant loophole for countries to use and abuse in denying ICAs. A nation's public policies regarding adoption often conflict,²⁵³ thus resulting in a breakdown of uniformity. The treaty does little to reconcile this conflict. Since public policy regarding adoption is not required to be registered with the Hague Private Law Conference, member states may abruptly change their stated policy in order to use ICAs as a political weapon. Such action would be detrimental to all parties involved in ICAs. Countries' public policies regarding adoption are almost an impossible concept to reconcile; however, due to the variant social, political, economic, and religious philosophies among nations upon which their internal laws are based. The treaty attempts to counter this potential problem by endorsing the child's best interests and welfare as the overriding concern.

A further problem with the Hague Convention is that it fails to coordinate parental adoption requirements among nations. Again, these requirements are difficult to reconcile due to existing social and religious differences. Also, competent adoption agencies currently involved in ICAs fear possible termination from the international adoption process under the treaty. Pfund has stated, however, that this fear is unfounded because agencies providing reasonably adequate services should be afforded accreditation.²⁵⁴

Regardless of the possible problems, the benefits of the Hague Convention far outweigh the weaknesses. The Convention provides the most comprehensive plan for adoption uniformity to date. The treaty, like any other multilateral treaty, cannot be expected to be perfect at its inception. Imperfections in the ICA process under the treaty must be tolerated to promote and protect the child's best interests and welfare. Moreover, these imperfections may be corrected as the new process is implemented under the direction of the monitoring board.

²⁵¹ *Id.* at art. 32.

²⁵² *Id.* at art. 24.

²⁵³ See *supra* note 106 and accompanying text.

²⁵⁴ Melina, *supra* note 215, at 2.

IX. ANALYSIS

A. *Need for the U.S. to Sign the Hague Convention*

In light of all the problems associated with ICAs, it is imperative that the Hague Convention be implemented. The treaty will affect all future ICAs involving the United States, whether or not the United States becomes a party member.²⁵⁵ The United States must become a signatory to the Hague Convention in order to coordinate its state and federal adoption regulations with those of other countries. If the United States fails to become a member, the treaty may prohibit U.S. couples from adopting children from member states.²⁵⁶

Moreover, the United States was instrumental in drafting the treaty. Ratifying it would be a logical next step in endorsing the entire ICA process along with U.S. views and concerns regarding ICAs which formed the major premises of the document.²⁵⁷ Most importantly, since the United States undertakes more ICAs than any other country in the world, not ratifying the treaty might collapse the whole process and "any hope for reform in intercountry adoption will end."²⁵⁸ For these reasons, it is crucial for the United States to become a member state to the Hague Convention.

B. *Current Status of the Hague Convention in the United States*

In order to ratify the treaty in the United States, the Senate must approve it and the President must sign it.²⁵⁹ In the Senate, the Foreign Relations Committee will hold hearings to make an article-by-article legal analysis of the Convention's provisions, and then make a recommendation to the full Senate.²⁶⁰ Further, an Administration Bill, prepared by interested agencies proposing federal implementing legislation needed to effectuate the Convention's provisions will be introduced in both the House and the Senate.²⁶¹ After this legislation has been passed, and the Senate has given its consent, the President will be free to sign the treaty.²⁶²

The State Department has already begun discussions on federal

²⁵⁵ U.S. DEP'T OF STATE, *supra* note 207, at 1.

²⁵⁶ Melina, *supra* note 215, at 3.

²⁵⁷ *See id.*

²⁵⁸ *Id.*

²⁵⁹ U.S. CONST. art. II, § 2, cl. 2.

²⁶⁰ U.S. DEP'T OF STATE, *supra* note 207, at 2.

²⁶¹ *Id.*

²⁶² *Id.*

implementing legislation and plans to hold future interagency discussions.²⁶³ The State Department's Study Group on Intercountry Adoption met in October, 1993, to discuss the treaty.²⁶⁴ The Hague Convention is currently still pending in the State Department.²⁶⁵

C. *Suggestions for Additional Provisions to the Hague Convention*

Although the Hague Convention is a workable model for a uniform international adoption system, additional provisions would improve this framework. The following reforms should be adopted.

1. Medical Disclosure

First, adoptive parents should be allowed full access to the birthparents' and adoptee's medical histories and problems in order for them to make an informed decision about whether they can physically, emotionally, and financially handle adopting a child with special needs. Although the Hague Convention requires disclosure of medical information,²⁶⁶ the provision fails to detail what information must be contained in the medical history report and how thorough the report must be. The provision's scope must be expanded to ensure medical disclosure to the greatest extent possible.

Both birthparents and adoptees should undergo extensive medical examinations in the sending state to test for a checklist of detectable problems, including venereal diseases, AIDS, genetic and hereditary diseases, and other severe physical and emotional disabilities. These medical examinations should occur before the child is sent to the receiving state to assure full disclosure of medical information. Costs should be equally split between the sending and receiving states.

Further, copies of the medical records should be preserved at both the CA in the sending state and the CA in the receiving state until the child attains the age of majority, determined in accordance with the receiving state's law of majority. If severe disabilities are found, the prospective adoptive parents should be given the option to reject the proposed adoption within one month of being informed about the medical

²⁶³ *Id.* at 3.

²⁶⁴ Peter Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise* 28 FAM. L. Q. 53, 71 (1994).

²⁶⁵ Dep't. of State, Secretary of State's Advisory Committee on Private International Law: Annual Review and Developments in Private International Law, 59 Fed. Reg. 22, 192 (1994).

²⁶⁶ Hague Convention, *supra* note 6, at arts. 15(1), 16(1)(a).

problems, so that another suitable adoptive family may be located as soon as possible for the child.

2. Limited Costs

Second, a ceiling cap should be placed on costs associated with ICAs in order to decrease unreasonable expenses, and to discourage the international black market baby trade. It is outrageous that ICAs can cost over \$20,000.00. Such costs degrade the concept of adopting a needy child, and turn children into valuable commodities which can be bought and sold. Exorbitant costs allow adoptable children to be placed with the highest bidder, which does not necessarily correlate with a child's best interests.

Countries should no longer require travel abroad to secure an ICA. However, prospective adoptive parents should still be afforded that option at their own expense. ICA costs, including all service and processing fees and medical examination expenses, should be reduced to reflect the fees charged by nations' local adoption agencies, which are usually low. These costs should be allowed latitude so they can be adjusted based on a country's national economic condition. One definite cost cannot be placed on all ICAs. In any case, ICA costs should not be allowed to exceed \$8,000.00.²⁶⁷ Optional travel expenses and further medical costs are excluded.

3. Appellate Review Board

Third, an Appellate Review Board should be established in each member country to the Hague Convention to review enforcement problems and adoption denials, and to impose sanctions for treaty violations. If the CA in each state is encumbered with the additional task of acting as an enforcement and appeal mechanism, as the treaty now provides,²⁶⁸ the CAs will become unduly burdened. Consequently, backlogs, which are counterproductive for all parties involved, will result. Moreover, serving a dual function combining administrative and appellate review duties may create conflicts of interest within CAs. Therefore, a separate Appellate Review Board must be established in order to deal with these problems effectively, and in a timely manner. The implementation of an Appellate

²⁶⁷ The \$8,000.00 ceiling figure should be imposed since it represents the middle spectrum of fees associated with private agency adoptions in the United States. Imposing a ceiling figure associated with U.S. public agency adoptions would be too low to be realistic to cover all expenses involved in international adoptions.

²⁶⁸ Hague Convention, *supra* note 6, at art. 33.

Review Board will hopefully deter noncompliance with the treaty's provisions. It will also serve the important function of allowing prospective adoptive couples to appeal and rebut unfavorable decisions.

A petition or appeal should be brought in whichever nation the enforcement problem or adoption denial occurred. Costs should be borne individually by the parties to the suit. Each country's Appellate Review Board should function in accordance with its national laws. Each nation's applicable laws and legal procedures should be documented and filed with the Hague Private Law Conference for easy reference by other member states.

Further, an overall coordinating Appellate Review Board should be established at the Hague to act as a type of Supreme Court. The Supreme Appellate Review Board would decide ICA problems that arise under the Hague Convention which occur within and between member states, in accordance with the treaty's provisions. Appeals to the Supreme Appellate Review Board should only be heard after they have first been litigated in the appropriate Appellate Review forum. The Supreme Appellate Review Board should function like the International Court of Justice.²⁶⁹

4. Post-placement Services

Finally, mandatory post-placement services should be established in each member country to ensure that the parent-child relationship is working in favor of the adoptee's best interests and welfare. These services should be coordinated under the authority of the CA in each member state, and be provided by accredited bodies authorized under the CA. The accredited bodies should monitor the progress of the adoptive family for one year. At the end of one year, the CA should make a recommendation to the appropriate Appellate Review Board in the receiving state, based on the accredited body's observations and findings. If the recommendation is unfavorable, the Board should address the problem accordingly by ordering extended counseling for the family through post-placement services, or by taking the extreme measures of removing the child and placing him or her with another suitable adoptive family. Post-placement support services should be made available to all members of ICA families. These post-placement services should be subsidized by each member state. Adoptive families should be afforded the opportunity to continue these post-placement services after the one-year time limit, at

²⁶⁹ The operations of the International Court of Justice may be found in its organic statute. The I.C.J. Statute was annexed to the Charter of the United Nations, 59 Stat. 1031, signed at San Francisco on June 26, 1945. The Statute is set forth in 59 Stat. 1055 (1945), T.S. no. 993, at 1275.

their own expense.

X. CONCLUSION

International adoption should be a simple, selfless, and rewarding experience for all parties involved in the transaction. Unfortunately and tragically, it is not, due to the variant jurisdictional laws regulating adoption among nations. In order to combat and cure the numerous problems and pitfalls associated with ICAs, the Hague Convention, which introduces a workable uniform international adoption law, must be universally implemented.

The four suggested reforms recommended above must be incorporated into the present Hague Convention in order to offer member countries the most conclusive and enforceable uniform adoption law possible. Any extra administrative costs or burdens imposed by the additional provisions, such as the Appellate Review Board, must be tolerated in order to promote the best interests of all parties involved in ICAs, those of especially the adopted child. If the Hague Convention is ratified by member states along with the proposed reforms, the number of unfortunate Adam and Kate situations will be drastically reduced.

