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INTERNATIONAL BABY SELLING FOR ADOPTION, AND THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

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I. Introduction

The internationalization of selling babies from one country to parents of another has reached epidemic proportions. The evidence of such activity can be found in many sources, including United Nations reports, testimony of witnesses before legislative bodies and inquiry boards, and statements of officials who have had some dealings with adoptions and its related issues, as well as the mass media.¹

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1. See United Nations Report of the Economic & Social Council:

A lawyer was recently charged in Bogota with buying two children for \$600 each and then selling them illegally for adoption for \$10,000 each and was accused of having sold 500 Colombian and 100 Peruvian children in this way . . . [P]rivate adoption agencies in the Netherlands and the Federal Republic of Germany . . . offer babies from poorer countries for adoption by mail order. In May 1982 the Swiss federal authorities began an inquiry into allegations of a baby smuggling syndicate between Sri Lanka and Switzerland which charges Sw[iss] fr[ancs] 10,000 . . . for a baby, but pays Sw[iss] fr[ancs] 25 to its mother.

1 U.N. ESCOR (7th mtg.) at 49, U.N. Doc. E/1983/7 (1983). See also 39 U.N. ESCOR (25th mtg.) at 3-13, U.N. Doc. E/CN.4/Sub. 2/1987/25 (1987); 39 U.N. ESCOR (28th mtg.) at 6-13, U.N. Doc. E/CN.4/Sub. 2/1987/28 (1987); Johnson, *Baby Brokering: Desperate Girl's Case Reveals Shadowy World*, N.Y. Times, Oct. 29, 1987, at B1, col. 1; Smith, *Baby Farm: A Luxury Adoption Business*, TIME, Aug. 4, 1986, at 40; deSilva, *Sri Lankan Baby Trade Experiences An Export Boom*, The Financial Times, March 28, 1987, §1, at 2; Cole, *The Cost of Entering the Baby Chase*, N.Y. Times, Aug. 9, 1987, at F9, col.1.

Hearings were held in both the United States Senate and House of Representative to discuss this problem:

Alien Adopted Children, 1977: Hearings on H.R. 5804, H.R. 6488, H.R. 1956, and H.R. 871 Before the Subcomm. on Immigration, Citizenship and International Law of the Comm. on the Judiciary House of Representatives, H.R. 5804, 6488, 1956, 871, 95th Cong., 1st Sess. 31 (1977); Adoption And Foster Care, 1975: Hearings on Examination and Exploration of Existing and Proposed Federal Policies Affecting the Adoption of Children, and Their Placement in the Foster Care System, Baby Selling and Adoption of Children With Special Needs Before the Subcomm. on Children and Youth of the Committee on Labor And Public Welfare United

The complexity of the problem makes its solution difficult. It will remain an unsolved problem unless the international community takes a serious look at the problem and makes conscious efforts at curbing it.

The first part of this article examines the basic policies of the international community as reflected by the 1986 United Nations Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children With Special Reference to Foster Placement and Adoption Nationally and Internationally (Declaration 1986).² The first part concludes:

1. Although Declaration 1986 contains basic tenets dealing with general family welfare, foster placement, and adoption, it fails to directly address the problem of baby selling;

2. Declaration 1986's value as an instrument to curb baby selling is further decreased by the ambiguity of the principles it proposes; and

3. Because Declaration 1986 is a mere declaration, its enforcement, as in the case of other United Nations declarations, is not self-executory. Accordingly, there is the need for mechanics to ensure compliance and uniform practice.

The second part of this article assesses the value of Articles 10 and 11³ of the draft Convention on the Rights of the Child as the legal basis for the protection of children from being commercialized for adoption purposes. This part

States Senate, S. 1593, 94th Cong., 1st Sess. 979 (1975). See also H.R. 95-1301, 95th Cong., 2d Sess. 15 (1978).

At least two books have been written on the subject. See L. MCTAGGART, *THE BABY BROKERS* (1980); and N. BAKER, *THE BABYSELLING* (1978). These books were based on the authors' own investigations.

2. 1986 United Nations Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85, 41 U.N. GAOR Supp. (No. 53) at 265, U.N. Doc. 41/85 (1986) [hereinafter Declaration].

3. *Draft Convention on the Rights of the Child*, U.N. ESCOR (85th mtg.) at 5-6, U.N. Doc. E/1988/85 (1988) (draft Convention prior to the second reading) [hereinafter *draft Convention*].

concludes:

1. In most part, Articles 10 and 11⁴ of the draft Convention merely reiterate principles, without remedying their weaknesses, found in the Declaration;⁵

2. The wording of Articles 10 and 11⁶ of the draft Convention needs to be changed in order to be effective in serving their objectives; and

3. The Preamble of the draft Convention should make references to Declaration 1986,⁷ the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others,⁸ and the Convention on the Prevention and Punishment of the Crime of Genocide 1948.⁹

II. THE CURRENT INTERNATIONAL COMMUNITY'S POLICIES AS REFLECTED BY THE DECLARATION OF SOCIAL AND LEGAL PRINCIPLES RELATING TO THE PROTECTION AND WELFARE OF CHILDREN, WITH SPECIAL REFERENCE TO FOSTER PLACEMENT AND ADOPTION NATIONALLY AND INTERNATIONALLY 1986

A. *Background, Scope and General Characterization*

The basic policies of the international community with respect to children as reflected in the Geneva Declaration on the Protection of Children 1924,¹⁰ and the 1959 Declaration of

4. *Id.*

5. See Declaration, *supra* note 2, at 265.

6. See draft Convention, *supra* note 3, arts. 10, 11.

7. Declaration, *supra* note 2.

8. G.A. Res. 317(IV), 4 U.N. GAOR at 33, U.N. Doc. A/1251 & Corrs. 1 and 2 (1949).

9. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

10. Protection of Children Report of the Fifth Committee to the Fifth Assembly: Geneva Declaration on the Protection of Children, League of Nations A.107.124 IV (Geneva, Sept. 24, 1924).

the Rights of the Child¹¹ are clear: children should be protected and their basic rights are to be recognized. In 1959, the General Assembly of the United Nations proclaimed the International Year of the Child.¹² This proclamation of the International Year of the Child further emphasized the international community's recognition and need to provide services for and to protect the rights of children. The General Assembly's resolution on the International Year of the Child stressed the importance of long term plans and actions to improve the situation of the world's children, and emphasized the protection of the family.¹³

In 1978, the international community's efforts to protect children culminated in the United Nations sponsored Expert Group meeting on Adoption and Foster Placement of Children.¹⁴ The dual purposes of the United Nations' Expert Group Meeting were:

- (1) to draft a declaration of social and legal principles relating to adoption and foster placement of children nationally and internationally
- (2) to draft guidelines for the use of Governments in the implementation of the above principles, as well as suggestions for improving procedures within the context of their social

11. 1959 Declaration of the Right of the Child, G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No.16) at 19, U.N. Doc. A/4354 (1959).

12. *Id.* See also U.N. DEPT OF INTL ECONOMIC & SOCIAL AFFAIRS, REPORT OF AN EXPERT GROUP MEETING ON ADOPTION AND FOSTER PLACEMENT OF CHILDREN at 2, U.N. Doc. ST/ESA/99, U.N. Sales No. E.80.IV.1 (1980) [hereinafter EXPERT MEETING]. The General Assembly also authorized the Commission on Human Rights to draft a Convention on the Rights of the Child. G.A. Res. 41/116, 41 U.N. GAOR Supp. (No. 53) at 175, U.N. Doc. A/41/53 (1986).

13. See 1959 Declaration, *supra* note 11, at 12.

14. The Expert Group, comprised of representatives of all geographical regions, represented the main models of adoption and foster placement of children. Included were specialists working in both government and non-government organizations dealing with children available for adoption. Nine government organizations and 14 non-government ones were represented. EXPERT MEETING, *supra* note 12, at iii, 5.

development¹⁵

On December 3, 1986, the United Nations General Assembly adopted the text of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.¹⁶

Declaration 1986 contains 24 principles which provide basic tenets on general family and child welfare, foster placement and adoption.¹⁷ It generally reaffirms the principles which are either compatible or similar with principles in the existing statutes of certain member states.

The Preamble to Declaration 1986 reaffirms principle 6 of Declaration 1959 which states: "[t]he child shall, whenever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security[.]"¹⁸ The Declaration is also directed towards "[t]he large number of children who are abandoned or become orphans owing to violence, internal disturbance, armed conflicts, natural disasters, economic crises or social problems[.]"¹⁹ In its Preamble, Declaration 1986 states that the best interests of the child are of paramount consideration in all foster placement and adoption procedures.²⁰ However, the specific scope of Declaration 1986 is limited. This is because Declaration 1986 recognizes the existence of alternatives to foster care and adoption. Thus, the Preamble recognizes that "[u]nder the principal legal systems in the world, various

15. *Id.* at 3.

16. Declaration, *supra* note 2, at 265. Written comments from member states on the various drafts of Declaration 1986 mainly are concerned with minor amendments and reformulation of certain draft principles. Comments pertinent to baby selling problems are meager. Similarly, a few member states commented on intercountry adoptions.

17. *Id.*

18. *Id.* at 266.

19. *Id.*

20. *Id.*

valuable alternative institutions exist, such as the Kafala of Islamic Law, which provide substitute care to children who cannot be cared for by their own parents²¹ Moreover, the principles relating to foster care and adoption are only relevant in States "where a particular institution is recognized and regulated by the domestic law" and "[t]hat such provisions would in no way affect the existing alternative institutions in other legal systems."²²

Because the application of Declaration 1986 is limited to countries that recognize foster care and adoption, the value of its principles cannot be appreciated by the entire world community. Therefore, the selling of babies for adoption purposes in those countries cannot be resolved by applying the principles in Declaration 1986.²³ Additionally, the limitation goes against the practice of some Muslim countries. In Islam, adoption is not recognized. However, in recent years there has been an increase in legal adoptions in some Muslim countries. In Iraq, for example, there was a concept of "[a]doption by 'affiliation' of abandoned children, orphans, or children under nine years of age whose parents were unknown."²⁴ In Malaysia, *de facto* adoptions have been practiced since time immemorial under indigenous custom

21. *Id.*

22. *Id.* Upon reading the entire Preamble of Declaration 1986, one cannot help but be struck by the sensitivity of the Declaration to the opposition of member countries to fosterage and adoption. *Id.* The Preamble repeats as many as four times that the principles in the Declaration do not apply to countries where foster care and adoption are not recognized. *Id.*

23. It is to be noted, however, the buying and selling of babies do not only involve non-Muslim countries, they also involve Muslim countries. Causes of Concern. ICRM Vol. 1 No. 1 reported the following:

A Thai Embassy official in Malaysia revealed on 3/19/82 that "several hundred" Thai children had been sold in Malaysia and that the Embassy had to send them back to Thailand to be cared for It was alleged that the children had been taken to Malaysia by two methods: first, by stealing the children and selling them for \$800 or more to childless Chinese-Malaysia couples; second, by buying the children directly from their parents and sending them to Malaysia for adoption.

24. MILLER, *The Child Without a Family of His Own*, in EXPERT MEETING, *supra* note 12, at 22.

notwithstanding religious objection.²⁵ In Pakistan, adoption is used to place neglected babies and children with adoptive families.²⁶

The limitation is also inconsistent with the practice of some non-Muslim countries that have accepted adoption as a means of providing families to orphaned children. For example, Korea now uses adoption even though it was never previously practiced.²⁷

Declaration 1986 does not directly concern itself with eliminating baby selling. As noted earlier, its primary objective is to provide member states with standard principles of foster care and adoption. Its value as an instrument to curb baby selling is further lessened by the ambiguity of the principles it proposes.

B. Principles Concerning Welfare Services

It has been observed that baby businesses prosper on the inadequacies of child welfare systems in underdeveloped countries.²⁸ Section A of Declaration 1986²⁹ attempts to improve the child welfare system throughout the world by

25. Although the rights of an adopted child are limited as far as inheritance is concerned (because Islam only grants *inter alia* a natural child to inherit), there are other legal devices, not contrary to Islam, utilized to make provisions for an adopted child. See, e.g., A. IBRAHIM, *FAMILY LAW IN MALAYSIA & SINGAPORE* 264-66 (1978); HOOKER, *THE PERSONAL LAWS OF MALAYSIA* 50 (1976).

26. A letter to Expert Meeting from a member of a Pakistani voluntary organization, recognized by the Government that handles adoptions of neglected children. See EXPERT MEETING, *supra* note 12, at 22-23. According to an official of National Committee for Adoptions, it is possible to adopt children from Turkey and Saudi Arabia. Telephone interview with A. M. Merrill of National Committee for Adoption (Nov. 18, 1987).

27. See, Note, *infra* note 62, at n.12.

28. See EXPERT MEETING, *supra* note 12, at 27. In her comment on the draft Declaration, Finland implied that the inadequacy of the national child welfare services in some countries had led to the illegal transfer of thousands of children. *Draft Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally: Report of the Secretary-General*, U.N. Doc. A/37/146 at 22 (1982) [hereinafter *Draft Declaration on Social and Legal Principles*]. The Draft Declaration is contained in G.A. Res. 36/146, 36 U.N. GAOR Supp. (No. 51) at 193, U.N. Doc. A/36/51 (1982).

29. Declaration, *supra* note 2, at 265.

proposing general principles on family and child welfare. It recommends that "[e]very State should give a high priority to family and child welfare."³⁰ The Declaration's use of the terms "high priority" and not "top priority" impliedly recognizes that some countries do not yet consider child welfare an important matter. However, it is not economical to focus a program on the child and neglect other alternative programs which support or rehabilitate the natural family. Child welfare services have a broader effect when a child is assisted within the natural family. Declaration 1986 recognizes this view by emphasizing the importance of family welfare. It states that "child welfare depends upon good family welfare."³¹ The Declaration articulates the principle that "[t]he first priority for a child is to be cared for by his or her own parents."³² Governments are urged to "[d]etermine the adequacy of their national child welfare services and consider appropriate actions."³³ The improvement of adoption services will ensure that unwanted babies are placed with adoptive families as soon as possible. The role of governments in facilitating placement is extremely critical, particularly in underdeveloped countries where the responsibility of caring for children is shouldered by governments.³⁴ In the final analysis, the principles espoused by Declaration 1986 concerning child welfare are sound. The United Nations Secretary General reported that these principles were "[c]ompatible with existing statutes of certain Member States. No reservations were expressed regarding this section."³⁵

30. *Id.* at 266.

31. *Id.*

32. *Id.*

33. *Id.*

34. EXPERT MEETING, *supra* note 12, at 27.

35. See *Report of the Economic and Social Council: Draft Declaration on Social Principles Relating to Adoption and Foster Placement of Children Nationally and Internationally: Report of the Secretary General*, U.N. Doc. A/35/336 at 3 (1980) [hereinafter *Report*].

C. General Principles Concerning Adoptions

Another factor that has been identified as contributing to the wide proliferation of the baby selling business is the weakness of the adoption laws and procedures in developing countries.³⁶ Declaration 1986 attempts to strengthen adoption laws and procedures by proposing several principles as outlined below.

Article 13 provides that: "[t]he primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family."³⁷ This principle is based on the more modern concept which bases adoption practices primarily on the interests of the child.³⁸ This is emphasized by another principle which states that "[i]n all matters relating to the placement of a child outside the care of the child's own parents . . . , particularly his or her need for affection and right to security and continuing care, should be the paramount consideration."³⁹

The principles articulated by the Declaration do not support the practice of independent adoptions because the best interests of the adoptee are not of paramount

36. The weaknesses of adoption laws which are responsible for the black-market of babies are not confined to third world countries. For example, in the United States some have argued the law of some states which permits non-agency adoption accounts for the wide spread black market operation. However, one commentator votes that total elimination of private placement as a tool to eliminate illegal placement may actually have the opposite effect. Myers, *Independent adoption: Is the Black & White Beginning to Appear in the Controversy over Gray-Market Adoption?* 18 DUQ. L. REV. 629, 637 (1980). Black market activity might increase in response to demand for swift placement, a virtual impossibility when all children are placed through regulated activities. *Id.* at 632 n.26. Also, the disparity in degrees of stringency imposed by adoption laws in the various states also counts for the same. *Id.* at 631. The weaknesses of adoption laws in the third world countries can be illustrated by various restrictions imposed by the adoption legislation on the qualifications of the adoptive parent. See, e.g., Jamaican, Dominican Republic, Brazilian, and Guatamalan statutes as presented before the *U.S. Senate Hearings on Anti-Fraudulent Adoption Practices 1976*, *infra* note 94, at 6.

37. Declaration, *supra* note 2, at 266.

38. The traditional concept was focused on parents, on fulfilling their need by providing a child for them whereas the modern concept is focused on the child, on providing substitute and suitable parents for the child.

39. Article 5. See Declaration, *supra* note 2, at 266.

consideration.⁴⁰ Article 14 states: "[i]n considering possible adoption placements, persons responsible for them should select the most appropriate environment for the child."⁴¹

Query, however, what the term "persons responsible" mean. No definition is supplied. The principle inadequately illuminates the reader as to the identity of "persons." However, this principle should be read together with an earlier principle which states that "[p]ersons responsible for foster placement or adoption procedures should have professional or other appropriate training."⁴² Reading these principles together, Declaration 1986 is arguably against placement of adoptable babies by self-elected and untrained intermediaries in independent adoptions.⁴³

Another problem created by Article 14 is its use of the terms "most appropriate environment."⁴⁴ "Persons responsible" are given such a wide discretion to determine what is "the most appropriate environment" for the child.⁴⁵ The responses of member countries to this principle show that there is a tendency to impose obstacles to adoption.⁴⁶ Obstacles to adoptions, such as residency requirements have contributed to the illegal baby selling market.

Article 15 provides: "[s]ufficient time and adequate counselling should be given to the child's own parents, the prospective parents and, as appropriate, the child in order to reach a decision on the child's future as early as possible."⁴⁷

40. When illegal profits are made in black-market trafficking of infants, the essence of the transaction is not the welfare of the child, but gain for profit; Myers, *supra* note 36, at 630 n.11, 629-52. See also Article 21 of Declaration 1986 which allows adoptions by "an agent." Declaration, *supra* note 2, at 267.

41. Declaration, *supra* note 2, at 266.

42. *Id.*

43. However, see *infra* note 65 and the accompanying text.

44. *Id.*

45. *Id.*

46. Some countries suggested that specific recommendations be made regarding legal status of the adoptive parents, their age, capacity to assume parental function and financial resources. See Report, *supra* note 35, at 8.

47. Declaration, *supra* note 2, at 266.

This principle expounds the most desirable adoption practice, because it requires basic agency adoption practices such as homestudy. By itself, this principle opposes the practice of independent adoption.⁴⁸ Theoretically, this principle can help to eliminate baby selling.

D. Principles concerning Inter-Country Adoptions

In most countries, recent large scale inter-country adoption is a relatively new phenomenon. Hence, provisions in domestic adoption legislation concerning inter-country adoptions are either absent or inadequate.⁴⁹

48. This may not be compatible with the practice of some member states such as Sweden which resisted agreement to the Declaration and attempted to postpone ratification. G.A. Res. 442, 39 U.N. GAOR (Agenda Item 134) at 12, U.N. Doc. A/39/442 (1984).

49. The Responses of member states on intercountry adoptions revealed three types of attitudes: (1) A majority of member states did not care at all. These countries did not even bother to send their written reports to the Secretary General. According to statistics issued by the United States Immigration & Naturalization Services in 1983, children adopted by United States citizens came from 84 countries. However, there were only 30 countries that responded to the Secretary General's request for views on the drafts of Declaration 1986. This is illustrative of many countries' disinterest in the issue of intercountry adoption and the problems that come with it. Examples of countries whose children were heavily involved in intercountry adoptions but did not respond are Korea and India.

(2) Some Asian countries seemed to have accepted the fact that they could not take care of their homeless children and perceived intercountry adoption to be the best they could do for such children. In its comments on the draft Declaration, for example, the Philippines showed keen interest in the issue by actively taking part in the improvement of the policies and wording of the Declaration. *Draft Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally: Report of the Secretary-General*, U.N. Doc. A/38/389 at 24-27 (1983) [hereinafter *Draft Declaration*]. Thailand responded by expressing strong support for the adoption of the Declaration by the General Assembly and supplying guidelines for intercountry adoption of Thai children. *Report of the Secretary-General*, U.N. Doc. A/39/442 at 13 (1984) [hereinafter *Report of the Secretary-General*].

(3) Some Central and South American countries did not seem, on the whole, interested in addressing intercountry adoption issues. Some expressed concern about the danger of exporting children and preferred to seek a solution from the Commission on Human Rights. See, e.g., Argentina's comments on the Declaration, see *Draft Declaration on Social and Legal Principles*, *supra* note 30, at 5. See also Brazil's comments on the Declaration, see *Draft Declaration*, *supra*, at 8. Some believed that the children's countries of origin were in a better position to watch over the interests of the children. See e.g. El Salvador's comments on the Declaration, *Id.* at 13. Some, although they commented on other principles of the Declaration, refused to comment on intercountry adoption. See, e.g., Colombia's comments on the Declaration, see *Report of the Secretary-General*, *supra*, at 24-27. Others said as little as possible. See, e.g., Mexico's comments on the Declaration, see

Regarding inter-country adoptions, the object of Declaration 1986 is clear: "If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family."⁵⁰ The object is to promote national adoption and to decrease inter-country adoption. Too often children are placed for inter-country adoption without sufficient consideration being given to alternative plans which might be worked out for them in their own countries.⁵¹

Although there is a consensus regarding the superiority of national adoptions over inter-country adoptions, there is also a consensus regarding the superiority of inter-country adoption to foster care.⁵² Yet, Declaration 1986 gives priority to foster care over and above inter-country adoption; an inter-country adoption is only to be considered if "[a] child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin."⁵³ This principle is not only contrary to the specific recommendation of the Expert Group, but is also contrary to the Preamble of Declaration 1986 which provides that "[t]he child shall, wherever possible, grow up in the care and under the responsibility of his [sic] parents and, in any case, in an atmosphere of affection and of moral and material security."⁵⁴

The inevitability of inter-country adoption is nevertheless recognized. So are the abuses and tragedies

Draft Declaration, supra, at 24-27.

50. Declaration, *supra* note 2, at 266.

51. See EXPERT MEETING, *supra* note 12. Malta, for example, supported the principle by stating that the latter "should only be resorted to when possibilities of adoption within the countries are exhausted." *Draft Declaration on Social and Legal Principles, supra* note 28, at 57.

52. U.N. Dep't of Economic & Social Affairs, The Institutional Care of Children, at 1, U.N. Doc ST/SOA/31, U.N. Sales No. 1956.IV.6 (1956).

53. Declaration, *supra* note 2, at 266.

54. *Id.*

caused by unregulated inter-country adoptions.⁵⁵ In Article 18, the Declaration acknowledges the need to "[e]stablish polic[ies], legislation and effective supervision for the protection of children involved in inter-country adoption."⁵⁶ Declaration 1986, however, fails to address all of the substantive and procedural problems of baby selling discussed above. In fact, it suggests some approaches that are in contrast with approaches taken by countries to curb baby selling. The following discussion focuses on the failure of the principles provided by Declaration 1986 to curb baby selling.

E. Provisions Concerning Prohibition of Baby Selling

Declaration 1986 directly attempts to eradicate inter-country baby selling by embracing two methods. The first method is through supervisory adoptions, while the second method is through prohibiting illicit placements.

1. Supervising Inter-country Adoptions

The general provision concerning supervision is found in Article 18 which provides that: "[g]overnments should establish policy, legislation and effective supervision for the protection of children involved in intercountry adoption. Intercountry adoption should, whenever possible, only be undertaken when such measures have been established in the States concerned."⁵⁷

Declaration 1986 then proposes two methods through which inter-country adoptions can be supervised: by requiring inter-country adoptions be handled by competent authorities or agencies, and by requiring 'special precautions' be taken in intercountry adoptions handled by agents of the prospective

55. This has caused some countries with liberal intercountry adoption policies to assume control of all intercountry adoptions. See EXPERT MEETING, *supra* note 12, at 27.

56. Declaration, *supra* note 2, at 266.

57. *Id.*

parents.

a. Adoptions by Competent Authorities or Agencies

Article 20 provides that: "[i]n inter-country adoption, placements should, as a rule, be made through competent authorities or agencies with application of safeguards and standards equivalent to those existing in respect of national adoption. In no case should the placement result in improper financial gain for those involved in it."⁵⁸ As noted earlier, 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. Thus, it is crucial that only competent adoption agencies facilitate the placement of babies. Although Declaration 1986 requires "competency" on the part of authorities or agencies, it fails to define the term "competent."⁵⁹ The need to define "competent" is even greater because an agency which is "competent" need not be legally "competent" to place children in inter-country adoption. Article 20 does not require the agency to have authority by law to do so.⁶⁰

The Article proposes that "competent authorities or agencies" are to apply "safeguards and standards equivalent to those existing in respect to national adoption." There are two problems here. First, Article 20 assumes that there are already in existence safeguards and standards in all Member States. Second, even assuming that there are safeguards in existence, the safeguards provided under the domestic law to protect adopted children are not adequate to protect children placed in inter-country adoptions.

Nowhere in Declaration 1986 is the phrase "improper

58. *Id.*

59. When commenting on the draft Declaration the government of the United Kingdom has doubted the existence of any machinery in that country "for assessing the competency of adoption agencies to deal with intercountry adoption services." *Draft Declaration on Social and Legal Principles, supra* note 28, at 78.

60. Perhaps the phrase "competent under the law" should be added.

financial gain" defined. There are no guidelines as to what services should be paid for. For example, should agencies be allowed to demand a fee from the adoptive parents for finding the child? And if "finder's fees" are permissible, should there be a pay scale based on ability to pay? The permission to get "financial gain" itself is contrary to the spirit of adoption services which should, in effect, promote the welfare of society by promoting the welfare of the family.⁶¹

Article 20 also fails to include a guardianship provision.⁶² The inclusion of a guardianship provision is important to protect the child's interests. Accordingly, Article 20 is flawed because it fails to delineate the agency involved as the guardian which would be responsible for the child should the adoption fail.⁶³

b. Adoptions through an agent: Independent Adoptions

The Expert Group did not recommend independent adoptions.⁶⁴ However, Declaration 1986 does allow independent adoptions over and above adoption by competent authorities or agencies. Article 21 envisages independent

61. U.N. Doc. UN/TAO/SEM, at 1; U.N. Doc. ST/SA/17: STUDY OF ADOPTION OF CHILDREN AT 78-79.

62. See Note, *International Adoption: The Need for a Guardianship Provision*, 25 B.U. INTL L.J. 225 (1982). "A guardian has [t]he duty and authority to make important decisions in matters having a permanent effect on the [minor's] life . . . It includes but not necessarily limited . . . to authority to consent to marriage . . . , to represent the minor legal actions: and to make [significant] decisions [on behalf of the minor]." *Id.*

63. *Id.* at 244. In the United States, in case of failure of adoption, the Court may order (1) deportation back to country of origin, (2) wardship to the state, (3) placement under guardianship of Immigration and Naturalization Services; or (4) placement under guardianship of the agency handling the adoption. *Id.*

The commentator views that the "[m]ost favorable option grants agency guardianship of the child until placement with and adoption by suitable parents." *Id.* at 244. It is to be noted, however, in the draft Declaration there was provision specifying the need of the child to have legal guardian but it did not specify who had it. Principle 8 states "[t]he child should at all times have a name, nationality and legal representative." Declaration, *supra* note 2, at 266.

64. The draft Article states "[a]ll placements should be made by an authorized child placement agency or directly by the biological family with the assistance of an authorized child placement agency." EXPERT MEETING, *supra* note 12, at 11.

adoptions by providing: "[i]n inter-country adoption through persons acting as agents for the prospective adoptive parents, special precautions should be taken in order to protect the child's legal and social interests."⁶⁵

Independent adoptions generally facilitate the black market of selling children for purposes of adoption.⁶⁶ Article 21 seeks to control independent adoptions by recommending "special precautions" to be taken to protect the child's legal and social interests. There are two problems which arise here. First, who should take and provide the "special precautions," and second, what are "special precautions within the meaning of this Article?"⁶⁷

Although Article 21 does not seek to provide protection for the child, it does not seek to protect the interests of the adoptive and natural parents. However, it can be argued that its authors assumed that since the intermediary would be acting on behalf of the prospective parents because the intermediary is, in effect, an agent for those parents. Many intermediaries who act as agents of the adoptive parents have, however, defrauded or deceived them.⁶⁸ For example, intermediaries have charged adoptive parents exorbitant fees and provided false information regarding the background of the child to those parents.

Another serious flaw of Article 21 is that it does not at all expressly protect the legal and social interests of the natural parents.⁶⁹

65. Declaration, *supra* note 2, at 267.

66. See *infra* note 94 and accompanying text.

67. Only France commented on the draft of this principle. However her comment was confined to acknowledgement of the need to "take preventive measure." See *Draft Declaration on Social and Legal Principles*, *supra* note 28, at 35.

68. Many American citizens who advanced large sum(sic) of money, well in excess of \$10,000 to agents in foreign countries and lost them. *Senate Hearings on Anti-Fraudulent Adoptive Practices*, *infra* note 94, at 87.

69. See, e.g., 1 U.N. ESCOR (7th mtg.), U.N. Doc. E/1983/7 (1983). IRCM Vol. 1 No.1. Informore Sober los Derechos del Nino 1986 p.6 (where networks were set to approach pregnant women and convince them that their children would live better in foreign countries). Testimonies of several witnesses at the *Hearings on Adoption and Foster Care*, *supra* note 1, at 69-72 revealed that natural mothers who gave up their babies were subtly coerced by

2. *Prohibiting Illicit Placements of Children*

Declaration 1986 seeks to eradicate baby selling by prohibiting abduction and illicit placements of children. Article 19 provides: "[p]olicies should be established and laws enacted, where necessary, for the prohibitions of abduction and of any other act of illicit placement of children."⁷⁰

Article 19 fails to employ language mandating implementation of a strong policy against abduction and other illicit placement of children. This is so because Article 19 contains the word "should" instead of the word "must."⁷¹ In addition, the article uses the words "where necessary."⁷² This implies that there are situations where it is not necessary to prohibit abduction and illicit placements of children. Because language is the cornerstone of the law, the Declaration fails to use terms that reflect its strongest disapproval of policies which harm children.

Moreover, Article 19 is not compatible with the laws of most countries regarding abduction. Other countries not only prohibit abduction, but also make abduction a crime. In contrast, Article 19 merely seeks to eradicate abduction without expressly criminalizing it.

Article 19's treatment of illicit placement of children lacks penal sanctions for enforcement because it merely prohibits such placement. Accordingly, its drafters may not have believed that such placement is criminal.

Perhaps the most serious shortcoming of Article 19 is that it does not address the problems of inter-country abduction and other illicit placements of children. This is a crucial element which gave rise to the international black market of children. In their recommendation, the Expert

lawyers to place their babies in a family selected by the doctors and lawyers.

70. Declaration, *supra* note 2, at 266.

71. *Id.*

72. *Id.*

Group recommended that the United Nations "[e]ncourage, by all possible means, safeguards in order to avoid uncontrolled and illegal transfer of children for foster, placement and adop[tion], nationally and internationally."⁷³

In conclusion, Declaration 1986 directly fails to address the problem of baby selling. It is not an effective instrument to curb baby selling because of the ambiguity of the principles it proposes. Because Declaration 1986 is a mere "declaration," its enforcement, as in the case of other United Nations declarations, is not self-executory. Accordingly, there is the need for mechanisms to ensure compliance and uniform practice.

III: ASSESSMENT OF THE RELEVANT ARTICLES OF THE DRAFT CONVENTION: ARTICLES 10 AND 11

The Declaration's failure to deal with the problem of international baby selling was left unremedied by the draft Convention. The draft Convention has two Articles that deal with adoptions. They are Articles 10 and 11.⁷⁴ Article 10 provides:

- (1) A child permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance by the State.
- (2) The States Parties to the present Convention shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his family environment, or who in his best interests cannot be brought up or be allowed to remain in that environment shall be provided with alternative family care which could include,

73. EXPERT MEETING, *supra* note 12, at 12.

74. Draft Convention, *supra* note 3, arts. 10 and 11. Following the second reading, the Articles were renumbered and the text of the Articles changed.

inter alia, adoption, foster placement, or placement in suitable institutions for the care of children. When considering alternative family care for the child and the best interests of the child, due regard shall be paid to the desirability of continuity of a child's upbringing and to the child's ethnic, religious or linguistic background.⁷⁵

In essence this Article merely embodies the spirit of Declaration 1986 and summarizes Articles 4,⁷⁶ 5,⁷⁷ and 24.⁷⁸ Because a Convention, unlike a declaration, will legally bind signatory States, the repetition of the same principles in a Convention are needed in order to give the principles a legally binding force.

75. *Id.* art. 10 (emphasis in original text). After the second reading of the draft Convention the Articles were renumbered. Article 10, now Article 20, provides:

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws shall ensure alternative care for such a child.
3. Such care could include, *inter alia*, foster placement, Kafala of Islamic law, adoption, or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural or linguistic background.

Convention on the Rights of the Child: text of the draft convention as adopted by the Working Group at second reading, 45 U.N. ESCOR (54th-55th mtg.), U.N. Doc. E/CN.4/1988/29 (1988).

76. Article 4 provides: "[w]hen care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute-foster or adoptive family or, if necessary, by an appropriate institution should be considered." Declaration, *supra* note 2, at 266.

77. Article 5 provides: "[i]n all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration." *Id.*

78. Article 24 provides:

Where the nationality of the child differs from that of the prospective adoptive parents, all due weight shall be given to both the law of the State of which the child is a national and the law of which the prospective adoptive parents are nationals. In this connection due regard shall be given to the child's cultural and religious and interest.

Id. at 267.

Article 10 obligates States Parties to ensure that a child who is parentless, or who is in a similar situation to be provided with alternative family care in the form of adoption, foster care, or institutional placement. It then provides that in considering alternative family care for the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and the child's ethnic, religious or linguistic background.

Article 10 has no real value as a legal framework to curb the prevalence of black market babies. This deficiency is remedied by Article 11, paragraph 1 of which provides:

The States Parties to the present Convention shall undertake measures, where appropriate, to facilitate the process of adoption of the child. Adoption of a child shall be authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that if required the appropriate persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.⁷⁹

The above paragraph obligates Member States to: "[f]acilitate

⁷⁹. See *draft Convention, supra* note 3, art. 11. Compare old Article 11, now renumbered to Article 21, which provides:

States Parties which recognize and /or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

Second Reading, supra note 75, art. 21(a).

the process of adoption of a child; and require that adoption of a child to be authorized by competent authority."⁸⁰

1. *Facilitating Adoption Process*

By obligating States Parties to take measures to facilitate the process of adoption of a child, this paragraph encourages prospective adoptive parents to opt for legal options. Prospective parents usually turn to baby sellers because of the obstacles they face when they want to adopt a child. Because there is sufficient evidence which correlates the thriving market of adoptable babies in the black market and the obstacles to legal adoptions, States Parties' efforts at facilitating the process of adoption can certainly help alleviate the problem of baby selling.

2. *Adoption by Authorization of Competent Authority*

By requiring that adoption of a child be authorized only by competent authority, this provision could help to eliminate baby selling activities. However, in order to utilize the provision as a means to curb baby selling activities, it is important to determine who is a "competent authority." In Part I the commentator notes Declaration 1986 also fails to define "competent authority" and explains the implications of such a failure.⁸¹ It is proposed that the phrase be substituted by the phrase "authority competent under the law." This new phrase will cover "courts" because in most countries judicial jurisdiction in adoption cases is provided by statutes.

"The competent authority," according to this paragraph,⁸² determines "[i]n accordance with applicable law and procedures and on the basis of all pertinent and reliable

80. *Draft Convention, supra* note 3, art. 11.

81. *See supra* text accompanying note 59.

82. *See* text accompanying note 79; *draft Convention, supra* note 3, art. 11(1).

information . . . that the adoption is permissible"⁸³ It is submitted that it is here that this paragraph is seriously flawed. It is flawed because this paragraph bellies an assumption that the "applicable law and procedures" are sufficient to provide protection to children involved in adoption.⁸⁴ This assumption is not accurate in light of the weaknesses of adoption laws and procedures in developing countries, as well as developed countries that account, among other things, for the proliferation of baby selling businesses. And in Part I Article 20 of Declaration 1986 is also flawed because of the similar assumption.

In light of the above, it is crucial that the phrase "applicable law and procedures" be amended. It is proposed that the phrase be changed to "law and procedures which are based on universally recognized adoption principles."

The "competent authority" is also required to base its determination on "all pertinent and reliable information."⁸⁵ This requirement is an attempt to further provide protection to parties involved, particularly the child and the natural mother. In accordance with this requirement, the "competent authority" is under a duty to ensure, for example, that the consent of the natural mother is genuine and that she has not been cajoled to surrender her baby by the "blackmarketeer," and that the prospective adoptive parents' fitness to be "parents" has been assessed. This paragraph stresses the need for an "informed consent" on the part of the appropriate persons (hopefully the natural mater is included), by requiring they be given counselling under certain circumstances.⁸⁶ This principle expounds the most desirable adoption practices such as home study. By itself, this principle opposes the practice of independent adoption. Theoretically, this principle can help to eliminate baby selling. The principle can be found in

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

Article 15 of the Declaration.

In view of the above argument, it is proposed that the new paragraph 1 of Article 11 should read:

The States Parties to the present Convention shall undertake measures where appropriate to facilitate the process of adoption of the child. Adoption of a child shall be authorized only by authorities competent under the law, in accordance with law and procedures which are based on universally recognized adoption principles and on the basis of pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if required, the appropriate persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

Paragraph 2 of Article 11 of the draft Convention provides:

The States Parties to the present Convention shall take all appropriate measures to secure the best interests of the child who is the subject of inter-country adoption. States Parties shall ensure that placements are made by authorized agencies or appropriate persons under the adequate supervision of competent authorities, providing the same safeguards and standards that are applied in exclusively domestic adoptions. The competent authorities shall make every possible effort to ensure the legal validity of the adoption in the countries involved. States Parties shall endeavour, where appropriate, to promote these legal objectives by entering into bilateral or

multilateral agreements.⁸⁷

In sum, paragraph 2 obliges States Parties to take all appropriate measures to secure the best interests of the child who is the subject of inter-country adoption.

As stated earlier, in most countries recent large scale inter-country adoption is a relatively new phenomenon. Hence, provisions in domestic adoption legislation concerning inter-country adoptions are either absent or inadequate.⁸⁸ The authors of the draft Convention seem to recognize the inevitability of inter-country adoption by having an Article making reference to inter-country adoption. The authors of the draft Convention appear to be conscious about the abuses and tragedies caused by unregulated inter-country adoptions.⁸⁹ This policy can be adduced from the wording of paragraph 2 of Article 11 which requires States Parties to take "[a]ll appropriate measures to secure the best interests of the child who is the subject of inter-country adoption." The methods through which the draft Convention purports to protect the interests of the child involved are:

87. *Draft Convention, supra* note 3, art. 11(2). Article 11 was renumbered and is now Article 21, which provides:

- (b) recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in respect of national adoption;
- (d) take all appropriate measures to ensure that, in inter-country adoption, the placement of the child does not result in improper financial gain for those persons involved in it;
- (e) promote, where appropriate, the objectives of this article by concluding bilateral or multinational arrangements or agreements and endeavour within this framework to ensure that the placement of the child in another country be carried out by competent authorities or organs.

Second Reading, supra note 75, art. 21(b)(c)(d)(e).

88. See *supra* note 49 and accompanying text.

89. See MILLER, *supra* note 12, at 27.

1. By ensuring that placements are made by authorized agencies or appropriate persons under the adequate supervision of competent authorities;
2. By providing the same safeguards and standards that are applied in exclusively domestic adoptions; and
3. By requiring the States Parties to endeavour, where appropriate, to promote legal objectives by entering into bilateral or multilateral agreement.⁹⁰

Again, this provision merely restates the principles in Articles 18, 20, 21, and 23 of Declaration 1986⁹¹ more or less using the same language. An analysis of the Declaration's Articles in Part I has shown that these Articles themselves are ineffective to protect children involved in inter-country adoptions.

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. Thus, it is crucial that only authorized agencies make the placement of babies. However, the draft Convention does not specify that the "authorized agencies" have to be "adoption agencies."⁹² The need to specify "only" adoption agencies is even greater because only an adoption agency is competent to place children in inter-country adoption. This paragraph is also flawed because it permits "appropriate persons" to place children for adoption.

In Part I, it is noted that the Expert Group did not recommend independent adoptions.⁹³ This is because among other things, independent adoptions generally facilitate the selling and buying of children for adoption purposes.

90. See text accompanying note 87.

91. See Declaration, *supra* note 2, at 266-67.

92. See Convention, *supra* note 3, art. 11(2).

93. See text accompanying note 64.

Paragraph 2 of Article 11 seeks to control placement by "appropriate persons" by requiring that such placements be made under "the adequate supervision of competent authorities." There are three basic problems which arise here. First, who are "appropriate persons," second, what is "adequate supervision," and third, who is "competent authority" within the meaning of this paragraph? In view of the problems which may arise in any attempts to regulate independent adoptions, it is submitted that the draft Declaration allows only agency adoptions.

Eliminating independent adoptions may be considered a drastic measure to curb the black market of babies. Be that as it may, it is one of the more effective means to deal with the problem. The reasons are that there is evidence that most of the intermediaries involved in independent adoptions are "blackmarketeers." For example, in a study prepared by the office of Citizen services of the United States Department of State, it was found that intermediaries were responsible for black market adoptions in the Americas.⁹⁴ On the strength of that finding, the office of Citizen Services proposed that United States law should require a licensed agency.⁹⁵ The proposal to regulate independent adoptions by prohibiting intermediaries from making profit from placement of babies is not viable in light of the difficulties of determining whether the profit made is based on professional services or placement services.⁹⁶ The problem of ascertaining this is compounded when the professional like an attorney or a doctor is involved.⁹⁷ In independent adoptions, it is attorneys and doctors who are usually the villain intermediaries. The viability of regulating independent adoption is even more difficult in underdeveloped countries.

94. *Hearings on A Bill Entitled the "Anti-Fraudulent Adoption Practices Act of 1984" Before the Subcommittee on Courts of the Committee on the Judiciary U.S. Senate, 98th Cong., 2d Sess. 22999, at 88.*

95. *Id.*

96. *See, e.g., Matter of E.W.C., 89 Misc.2d 64, 77, 389 N.Y.S.2d 743, 752 (1976).*

97. *Meyers, supra* note 36, at 638.

This is so because poverty will make people succumb to intermediaries' tricks. There is consensus among experts and researchers that independent adoption is, in general, motivated by profit and mainly to serve the prospective parents. Because it does not provide standard adoption services such as homestudy investigation before or after placement, it is detrimental to the welfare of the child.⁹⁸

The paragraph then provides that in inter-country adoptions, States Parties are obligated to provide the "same safeguards and standards that are applied in exclusively domestic adoptions."⁹⁹ There are two problems. First, the paragraph assumes that there are already in existence safeguards and standards in all States Parties. However, most countries, as observed earlier, do not have adequate adoption laws which can provide safeguards even for children adopted within that country. Second, even assuming that there are safeguards in existence, the safeguards provided under the domestic law to protect adopted children are not adequate to protect children placed in inter-country adoptions.

In Part I, it is argued that a provision in the Declaration that has similar wording suffers from the same wrong assumption. Hence, it is crucial that the draft Convention rectify this flaw by providing more safeguards to protect children involved in inter-country adoption.

Finally, the paragraph obligates States Parties to ensure that the adoption is valid in the countries involved.¹⁰⁰ In order to ensure the validity of the adoption, the paragraph requires the States Parties to endeavour to "[p]romote these legal objectives by entering into bilateral or multilateral agreements."¹⁰¹ This principle is an improvement on the loosely worded Article 23 of the Declaration¹⁰² which only

98. See, e.g., U.N. Doc. UN/TAO/SEM, at 91. Both were against independent adoptions.

99. See text accompanying note 87.

100. *Id.*

101. *Draft Convention, supra* note 3, art. 11(2). See also text accompanying note 87.

102. See Declaration, *supra* note 2, at 267.

provides that "[i]n inter-country adoption, as a rule, the legal validity of the adoption should be assured in each of the countries involved." This principle not only ensures that the adopted child is guaranteed legal protections, but it also can indirectly help to the eliminate the black market of babies. This is so because States Parties who are under such obligation would not recognize illegal adoptions.

It is proposed that paragraph 2 of Article 11 be amended as follows:

The States Parties to the present Convention shall take all appropriate measures to secure the best interests of the child who is the subject of inter-country adoption. States Parties shall ensure that placements are by adoption agencies authorized by law, providing safeguards and standards designed for the best interests of the children involved. The competent authorities shall make every possible effort to ensure the legal validity of the adoption in the countries involved. States Parties shall endeavour, where appropriate, to promote these legal objectives by entering into bilateral or multilateral agreements.

Successful elimination of baby selling cannot be achieved without making the commercialization of babies a crime. Hence, it is important the the draft Convention obliges Member States to enact penal statutes to punish baby sellers.

In addition, passage of a national law making it a crime to accept anything of value for placing children for adoption across national lines is also imperative. For this purpose, a catchall provision for Article 18 provides the necessary legal framework. This Article is sufficient because it provides "[t]he States Parties to the present Convention shall take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of or traffic in children for any

purpose or any form."¹⁰³

IV. CONCLUSION: OTHER PROPOSALS

The draft Convention purports to guarantee children *all* their rights and protections. It is unreasonable to expect the draft Convention to deal with all aspects of adoption. Hence, two articles devoted to adoption seem to be proportionate.¹⁰⁴ However, these two Articles should be tightly worded so that adopted children are protected.

Other than improving on the two Articles, the draft Convention can provide more protection by inserting in the Preamble a reference to: the Declaration 1986,¹⁰⁵ the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution by Others of 1949,¹⁰⁶ and the Convention on the Prevention and Punishment of the Crime of Genocide 1948.¹⁰⁷ By so doing, States Members would be mindful of the detailed provisions of those instruments. The following is an explanation as to how they can help to eliminate baby selling activities.

A. The 1986 United Nations Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children

This Declaration, as noted earlier, is concerned with social

103. Draft Convention, *supra* note 3. This Article 18, now renumbered to Article 35, provides that:

"[S]tates Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of or traffic in children for any purpose or in any form." *Second Reading, supra* note 75, art. 35.

104. *See supra* note 74 and accompanying text.

105. *See supra* note 2. This proposal has been accepted by the Working Group. The preamble to the Convention on the Rights of the Child now makes reference to Declaration 1986. *Second Reading, supra* note 75 (Eleventh preambular paragraph).

106. *See supra* note 8.

107. *See supra* note 9.

and legal principles relating to the protection and welfare of children in general, foster placement and adoption. Although the Declaration fails to provide effective safeguards against baby selling, it has numerous good principles on family and child welfare. These principles can indirectly help to curb baby selling activities. It is also to be noted that although the Declaration, like other United Nations declarations, is not binding on Member States and is a mere statement of an international agreement on particular sets of values and ideals, the Declaration can serve as a framework for binding international agreements.

B. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution by Others of 1949

The Convention of 1949¹⁰⁸ was adopted to create and enact procedures to abolish and bring an end to practices which, in the word of its preamble, "[a]re incompatible with the dignity and worth of the human person and endanger the welfare of the individual the family and the community."¹⁰⁹ Specifically, the preamble mentions the institution of "[p]rostitution and the accompanying evil of the traffic in persons for the purpose of prostitution."¹¹⁰ However, the scope and intent of Convention 1949 are not limited to the suppression of the traffic in women and children for the purpose of prostitution. The Convention of 1949 only consolidates, and does not abrogate, the series of earlier international instruments relating to trafficking in human beings.¹¹¹ Additionally, the Convention 1949 does not limit, but instead expands, the scope of those earlier instruments.¹¹²

108. Convention For The Suppression Of The Traffic In Persons And Of The Exploitation Of Prostitution, *supra* note 8.

109. *Id.* at 33.

110. *Id.*

111. *Id.* (Third preambular paragraph).

112. *Id.* (Third and Fourth preambular paragraphs).

One of these instruments was the League of Nations International Convention of the Traffic in Women and Children of 1921 (Convention 1921).¹¹³

The intent of Convention 1921 was broader, and one of them was to obligate "[t]he High Contracting Parties to take all measures to discover and prosecute persons who are engaged in the traffic in children of both sexes"¹¹⁴

113. International Convention for the Suppression of the Traffic in Women and Children, *opened for signature*, September 30, 1921, 9 L.N.T.S. 417. The second paragraph of Convention 1949 read:

Whereas, with respect to the suppression of the traffic in women and children, the following international instruments are in force:

1. International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic, as amended by the Protocol approved by the Geneva Assembly of the United Nations on 3 December 1948,
2. International Convention of 4 May 1910 for the Suppression of White Slave Traffic, as amended by the above-mentioned Protocol,
3. International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children, as amended by the Protocol approved by the General Assembly of the United Nations on 20 October 1947,
4. International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age, as amended by the aforesaid Protocol.

114. *Id.* at 423 (Article 2). Further part of Convention 1921's Article 7 is now part of Article 17 of Convention 1949. It states that:

Parties to the present Convention undertake, in connection with immigration and emigration, to adopt or maintain such measures as are required in terms of their obligations under the present Convention, to check the traffic in persons of either sex for the purpose of prostitution. In particular they undertake:

1. To make such regulations as are necessary for the protection of immigrant or emigrant, and in particular, women and children, both at the place of arrival and departure and while *en route*

As stated earlier Convention 1949 expands the scope of the above-mentioned instruments. Furthermore Convention 1949 only supercedes provisions of the international instruments specified in its preamble only when Nation-parties became Parties to Convention 1949. Hence, Nation-parties that are not yet a party to Convention 1949 will remain to be bound by their obligations under Convention 1921. Article 28 of Convention 1949 provides as follow:

The provisions of the present Convention shall supersede in the relations between the Parties thereto the provisions of the international instruments referred to in sub-paragraph 1, 2, 3 and 4 of the second paragraph of the Preamble of which shall be deemed to be terminated when all the Parties thereto shall become Parties to the present Convention.

In sum, the Convention of 1949 can help to curb the illegal activity of trafficking in children for adoption. After all, the trafficking in children for the purpose of adoption, like the trafficking in person for the purpose of prostitution, is also incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.

C. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956.

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery was adopted in 1956.¹¹⁵ The Convention, as its lengthy title and preamble show, seeks to "supplement" and "augment" the Slavery Convention of 1926. The preamble also makes it clear that the Convention is an instrument of international legislation to give effect to the United Nations Universal Declaration of Human Rights.¹¹⁶ Article 1 of Supplementary Convention 1956 binds the contracting parties to:¹¹⁷

[T]ake all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition and abandonment of the following institutions and practices

(d) Any institution or practices whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for

115. Supplementary Convention on the Abolition of Slavery, September 7, 1956, 266 U.N.T.S. 40.

116. Universal Declaration of Human Rights, G.A. Res 217, 3 U.N. GAOR at 71, U.N. Doc A/810 (1948).

117. Supplementary Convention on the Abolition of Slavery, *supra* note 115, at 47.

reward or not, with a view to the exploitation of the child or young person or of his labor.

*D. Convention on the Prevention and
Punishment of the Crime of Genocide 1948*

This Convention¹¹⁸ protects, as a matter of course, the population against mass destruction or genocide. It also expressly provides protection for children by forbidding the forceful transfer of children from one group to another for the purpose of bringing about the disappearance of a given nationality.¹¹⁹

In light of the foregoing discussion, it is suggested that the following paragraph be inserted in the Preamble of the draft Convention:

Convinced that the problem of commercialization of babies for adoption and other purposes is now prevalent, recall the United Nations' Declaration on the Social and Legal principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally 1986, Convention for the Supression of the Traffic in Persons and the Exploitation of the Prostitution by Others 1949, and the Convention on the Prevention and Punishment of the Crime of Genocide 1948.

Selling babies for the purpose of adoptions is a thriving business. Because such dealings in human life is detrimental to human society, they should be thwarted by strong, strictly enforced law and equally stringent barriers to international trade. In this commentary, the examination of Declaration

118. See Convention, *supra* note 9.

119. *Id.* at 280.

1986 shows a lot needs to be done to curb baby selling activities. It is hoped that the Commentary will prompt the Working Group to consider incorporating appropriate policies so that commercialization of babies for inter-country adoptions can be deterred.