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# International Child Adoptions: Who Should Decide What Is in the Best Interests of the Family

Bridget M. Hubing

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# INTERNATIONAL CHILD ADOPTIONS: WHO SHOULD DECIDE WHAT IS IN THE BEST INTERESTS OF THE FAMILY?

BRIDGET M. HUBING\*

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\* Editor-in-Chief, NOTRE DAME J.L. ETHICS & PUB. POL'Y, 2000-2001; Thomas J. White Scholar 1999-2001; J.D. Candidate, Notre Dame Law School, 2001; B.A., Ripon College, Wisconsin, 1995. The author dedicates this Note to her family; particularly, her father Robert Hubing, her mother Bonnie Demler, and her sister Brenda Hubing. The author further dedicates this article to all the children in the world who do not have families to love and care for them as her family has done for her. The author wishes to thank Paolo G. Carozza, Patti Ogden, and Mary M. Penrose, Professors of Law, for reading her draft and contributing significantly to this final product. Lastly, the author wishes to thank especially Tracy Davis for her constant love, support, and encouragement throughout this writing process.

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## INTRODUCTION

Every year, millions of children throughout the world do not have families, homes, and basic care.<sup>1</sup> This Note will discuss the issues surrounding international child adoptions, primarily focusing on who should decide what is in the best interests of the child and families involved. Part I considers the problem of children without families and families without children. This consideration is followed by a proposal for the solution to be international adoptions. Part II discusses the history behind the utilization of international adoptions. This section particularly focuses on the effects of World War II, the Korean War, and

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1. Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 187 (1994).

other historical events causing a fluctuation in the number of international adoptions.

Part III questions what is in the best interests of the child and families involved. Arguments for and against international adoptions are critiqued. Other issues discussed include: single person adoptions, adoptions by gay and lesbian couples, and interracial adoptions. Part IV analyzes the international measures for the protection of children, including global declarations and conventions, as well as regional instruments. Included in this analysis is an evaluation of the United States' ratification of these international measures and what effects this has on international adoptions.

Part V demonstrates the national regulations of international adoptions by outlining the process currently utilized in the United States. This outline includes the foreign law of the child's native country, U.S. federal law as governed by the Immigration and Naturalization Service, and U.S. state law regulating adoptions. Finally, Part VI focuses on who should decide what is in the best interests of the child and families involved. This question leads to an explanation of the role of individual U.S. states, the rights of sovereign nations, and the scope of the governing authority of international bodies in this process. This Note concludes by expressing the necessity for international bodies to regulate international child adoptions.

## I. THE SOLUTION TO THE PROBLEM OF CHILDREN WITHOUT FAMILIES AND FAMILIES WITHOUT CHILDREN

There is only one viable solution to the problem of an overabundance of children who need families in some countries and families who need children in other countries—that solution is international adoption.

### A. *Children Who Need Families*

Although the problem of children without families is not unique to any particular country or region of the world, this epidemic exists primarily in poorer countries,<sup>2</sup> where wars or national disasters caused a devastating economic toll on families.<sup>3</sup> As a result, these families are unable to provide for their

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2. See Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIM. LAW. 181, 182 (1996).

3. See Liu, *supra* note 1, at 187 (citing MARY KATHLEEN BENET, *THE POLITICS OF ADOPTION* 121 (1976) (addressing the problem of mothers who were unwilling and unable to raise their half-American children); George de Lama, *Hope and Fear Battle for Latin Street Kids*, CHI. TRIB., July 3, 1989, at C1 (describing

children and are forced to abandon them out of need or shame, leaving an overabundance of children without families.<sup>4</sup> For example, there are up to seven million *meninos da rua* (children of the street) in Brazil,<sup>5</sup> one thousand of whom are murdered every year, mainly at the hands of "death squads and off-duty police officers who have been hired by shopkeepers to clean up the streets."<sup>6</sup>

Furthermore, there are many other factors that lead to children becoming orphans, including acts by political powers themselves. For instance, under the Ceausescu regime in Romania, women were forced to have five children for the nation,<sup>7</sup> which resulted in the healthy children being placed in over-crowded, state-run orphanages,<sup>8</sup> while the physically- or mentally-ill children being placed in state-run asylums, where they were treated like animals.<sup>9</sup> Likewise, many children who have been forced to flee their country have become displaced, unaccompanied, or separated from their parents.<sup>10</sup> It has been estimated that the majority of the 500,000 people who have recently fled Kosovo are children, some of whom have lost track of their parents' whereabouts.<sup>11</sup> Health crises have also left children without families. In Uganda, the AIDS epidemic killed a drastic proportion of the adult population, leaving millions of young children to fend for themselves; in some areas, as much as one in four children is an orphan.<sup>12</sup> These examples merely illustrate some of the factors contributing to the imbalance of children without families to the

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Latin American children living on the streets); *20/20: Nobody's Children* (ABC television broadcast, Apr. 27, 1990) (transcript on file with the Temple International and Comparative Law Journal) (describing Romanian children's living conditions in squalid orphanages)).

4. See Liu, *supra* note 1, at 187 (citing BENET, *supra* note 3, at 121; de Lama, *supra* note 3, at C1; *20/20: Nobody's Children*, *supra* note 3).

5. *Id.* (citing de Lama, *supra* note 3, at C1; Eugene Robinson, *Living in Brazil's Streets Imperils Millions of Youths*, WASH. POST, Oct. 10, 1990, at A17).

6. *Id.* (citing CNN: *Homeless Brazilian Kids Face Death Everyday* (CNN television broadcast, Jan. 28, 1993) (transcript on file with the Temple International and Comparative Law Journal)).

7. *Id.* at 187.

8. See *id.* (citing *20/20: Nobody's Children*, *supra* note 3).

9. See *id.* at 187-88 (citing *20/20: Shame of a Nation* (ABC television broadcast, Oct. 5, 1990) (transcript on file with the Temple International and Comparative Law Journal)).

10. See generally Goran Hakansson, *Sixteenth Annual International Law Symposium "Rights of Children in the New Millennium": International Adoption and Refugee Children*, 21 WHITTIER L. REV. 245 (1999).

11. See *id.* at 246.

12. Donatella Lorch, *Nation of Orphans: A Special Report; Uganda, Scarred by AIDS, Turns to Its Youth*, N.Y. TIMES, Feb. 23, 1993, at A1.

number of families looking to adopt children in these developing countries.

### B. *Families Who Need Children*

In recent decades, the number of families who need children has been increasing in industrial countries, such as the United States and other Western nations.<sup>13</sup> Individuals may want to adopt for a number of reasons; specifically, for infertile couples, gay and lesbian couples, and single persons, "adoption constitutes the major alternative to infertility treatment and infertility 'by-pass' arrangements such as donor insemination and surrogacy."<sup>14</sup> However, an increased use of contraception, legalization of abortion, and the tendency of single parents to keep their children have reduced the number of babies available for adoption in these countries.<sup>15</sup>

As a result, children are in high demand in areas where there are a large number of persons who desire to adopt as compared to the few children available for adoption.<sup>16</sup> Consequently, domestic adoption is not possible for many families. For example, it has been estimated that more than one million families are interested in adoption in the United States alone.<sup>17</sup> Here, the greatest desire is for healthy, white children;<sup>18</sup> however, the number of preferred children available in the United States does not meet this demand.<sup>19</sup> Therefore, families, particularly those potential adopters ranked low on domestic adoption agency eligibility lists, have a very limited chance of ever adopting a child in the United States.<sup>20</sup> This problem of families without children is not unique to the United States, but is seen in many industrialized countries around the world.

### C. *The Solution of International Adoptions*

The most logical solution to the disparity in the number of children without families and the number of families without

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13. See Barcholet, *supra* note 2, at 181.

14. *Id.* at 182.

15. See *id.* at 181.

16. See *id.* at 181-82.

17. Elizabeth Barcholet, *Where Do Black Children Belong? The Politics of Race Matching In Adoption*, 139 U. PA. L. REV. 1163, 1166 n.5 (1991).

18. See Elizabeth Barcholet, *International Adoption: Overview*, in ADOPTION LAW AND PRACTICE 10.02 [2] (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*, FAM. ADVOC., Fall 1981, at 31.

20. See Barcholet, *supra* note 2, at 182.

children is international adoption,<sup>21</sup> "[t]he process by which a married couple or single individual of one country adopts a child from another country."<sup>22</sup> When families are unable to adopt children domestically, many are willing to explore other alternatives, including traveling to the "four corners of the world."<sup>23</sup> An estimated 20,000 international adoptions take place worldwide every year.<sup>24</sup> Nearly half of these adoptions involve U.S. citizens as the adoptive parents.<sup>25</sup> On a national scale, international adoptions comprise approximately one-sixth of all non-relative child adoptions in the United States today.<sup>26</sup>

Although the United Nations has recognized the need for international adoptions, this solution has been met with some resistance from Third World countries who perceive the forfeiting of its children to industrial nations as "imperialistic."<sup>27</sup> Therefore, depending on the laws and regulations of the "sending country,"<sup>28</sup> as well as the "receiving country,"<sup>29</sup> international adoptions may be more difficult, risky, and expensive than domestic adoptions.<sup>30</sup> However, considering the results and the alternative of not otherwise being able to adopt a child, many prospective adoptive parents find the completion of international adoptions well worth the additional time and effort.<sup>31</sup>

## II. HISTORY OF INTERNATIONAL ADOPTIONS

The practice of international adoptions has fluctuated considerably throughout history; therefore, in determining who should decide what is in the best interests of the families

21. International adoption is also commonly referred to as intercountry adoption and transcountry adoption.

22. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, PUB., CHILDREN'S BUREAU, INTERCOUNTRY ADOPTION GUIDELINES 97 (1980).

23. See *When It Comes to Adoption, It's a Wide, Wide World*, BUS. WK., June 20, 1988, at 164 (Marc Frons & Suzanne Wooley, eds.); Michael S. Serrill, *Going Abroad to Find a Baby*, TIME, Oct. 21, 1991, at 86.

24. *New Rules Could Govern International Adoptions*, CHI. TRIB., May 28, 1993, at N22 [hereinafter *New Rules*].

25. *Id.*

26. NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK 61 (1989).

27. 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, 580-81 (1991).

28. The sending country is the child's native country.

29. The receiving country is the prospective parent's home country.

30. See LAURIE WISHARD & WILLIAM R. WISHARD, ADOPTION: THE GRAFTED TREE 111 (1979).

31. See Liu, *supra* note 1, at 191 (citing *20/20: Nobody's Children*, *supra* note 3).

involved, it is important to understand the past, including the causes and restrictions upon this practice.

### A. *World War II*

Virtually no international adoptions took place anywhere in the world prior to World War II.<sup>32</sup> After experiencing the aftermath of World War II, many people, primarily initiated by military forces stationed abroad, became aware of the problems that a large number of children were facing as a result of the war.<sup>33</sup> After alerting the government, an attitude began to arise in the United States to use adoption to "save" these foreign children, not only from those countries affected by World War II, but also from other countries where children had fallen victim to famine and other disasters.<sup>34</sup> As a result, in the United States, international adoptions of foreign children numbered zero before World War II and rose to nearly 20,000 per year in the 1990s.<sup>35</sup>

Some countries, such as the U.S.S.R., Great Britain, and France, were able to set up homes for their orphaned and displaced children.<sup>36</sup> However, other countries, such as the occupied nations of Germany, Japan, Italy, and Greece, did not set up homes for their children; therefore, these countries quickly became the main sources of children for the first wave of international adoptions.<sup>37</sup> Particularly, between 1948 and 1962, U.S. families adopted 1,845 German children, 2,987 Japanese children, and 840 Chinese children.<sup>38</sup> This phenomenon of international adoptions, as a result of World War II, became the milestone for adoptions across national borders.

### B. *Effects of the Korean War*

Despite the drastic increase in adoptions in the United States after World War II, international adoptions did not receive widespread attention until after the Korean War. This attention was due to a number of factors. First, U.S. soldiers were again exposed to the "plight" of numerous homeless children.<sup>39</sup> Sec-

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32. U.S. DEP'T OF JUSTICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (1986).

33. See BENET, *supra* note 3, at 120.

34. See *id.*

35. See *New Rules*, *supra* note 24, at N22.

36. See BENET, *supra* note 3, at 120.

37. See *id.*

38. ADOPTION IN WORLDWIDE PERSPECTIVE: A REVIEW OF PROGRAMS, POLICIES AND LEGISLATION IN 14 COUNTRIES 3 (R.A.C. Hoksbergen ed., 1986) [hereinafter ADOPTION IN WORLDWIDE PERSPECTIVE].

39. See Liu, *supra* note 1, at 192.



ond, the Korean government was very willing to grant international adoptions.<sup>40</sup> Third, a large number of the children were fathered by U.S. soldiers and became outcasts of Korean society.<sup>41</sup> As a result, between 1953 and 1981, U.S. citizens adopted 38,129 Korean children.<sup>42</sup>

Since the Korean War, international adoptions of Korean children by U.S. families persisted for over thirty years.<sup>43</sup> Although there was a sharp decline between 1985 and 1992, many families in the United States continued to adopt Korean children successfully.<sup>44</sup> However, in the mid-1970s, the Korean government started to limit the number of countries from which their citizens were allowed to adopt Korean children in order to reduce the number of international adoptions affecting Korea.<sup>45</sup> Subsequently, in 1996, the Korean government announced a ban on all international adoptions of Korean children by foreigners, including U.S. citizens.<sup>46</sup>

### C. *The Current Situation*

In 1995, China surpassed South Korea as the leading international source of foreign-born children for adoptions by U.S. citizens.<sup>47</sup> Due to China's one-child per family policy coupled with U.S. reports in recent years of the ghastly conditions in state-run orphanages, the number of Americans adopting Chinese children has dramatically increased over the last fifteen years.<sup>48</sup> Statistically, these international adoptions rose from a mere 16 adoptions in 1985 to approximately 3,500 adoptions in 1997.<sup>49</sup> Conversely, according to experts and officials, U.S. citizens

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40. See John E. Adams & Hyung Bok Kim, *A Fresh Look at Intercountry Adoptions*, 18 CHILDREN 214, 216 (1971).

41. See BENET, *supra* note 3, at 121.

42. Michelle van Leeuwen, Comment, *The Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Market of Infants from China)*, 8 PAC. RIM L. & POL'Y J. 189, 191 n.7 (1999) (citing Richard H. Weil, *International Adoptions: The Quiet Migration*, 18 INT'L MIGRATION REV. 2, 287 (1984)). The U.S. Refugee Relief Act of 1953 also facilitated this process. See BENET, *supra* note 3, at 121.

43. See BENET, *supra* note 3, at 123.

44. See generally Youn-Taek Tahk, *Intercountry Adoption Program in Korea: Policy, Law and Services*, in ADOPTION IN WORLDWIDE PERSPECTIVE, *supra* note 38.

45. See *id.* at 83.

46. See generally Arthur Higbee, *South Korea Plans to Ban Foreign Adoptions*, INT'L HERALD TRIB., Oct. 15, 1993.

47. See generally Sarah Jackson-Han, *Chinese Moves Put Foreign Adoption in Doubt*, AGENCE FRANCE PRESSE, Jan. 12, 1997.

48. See generally van Leeuwen, *supra* note 42.

49. See *id.* at 190 (citing Jackson-Han, *supra* note 47).

account for approximately eighty to ninety percent of the Chinese orphans adopted by foreign families.<sup>50</sup>

Despite adoption efforts by U.S. citizens, China's state-run orphanages remain overcrowded.<sup>51</sup> Statistically, it has been estimated that China's one-child policy has created approximately 100,000 orphans.<sup>52</sup> Therefore, China's minimal number of domestic adoptions calls for an international response for its growing number of abandoned children.<sup>53</sup> In fact, China currently has more children needing homes than will be adopted throughout the world.<sup>54</sup> The question remains: "As an international community, how do we address the plight of China's many abandoned children?"<sup>55</sup>

### III. WHAT IS IN THE BEST INTERESTS OF THE CHILD AND FAMILIES INVOLVED?

Although many scholars and activists argue that international adoptions are in the best interests of the child and families involved, others argue that international adoptions promote imperialism and exploitation of children.

#### A. *Arguments For International Adoptions*

As previously stated, international adoptions appear to be the best solution for the international problem of children without families and families without children. Overall, in contrast to foster care, orphanages, and life on the streets, adoption allows a child to receive a "loving, permanent home that is necessary to meet that child's physical and emotional needs."<sup>56</sup> Unfortunately, in the lesser-developed parts of the world, domestic adoption is not an option for child placement; therefore, international adoptions become a necessary and positive solution to the problem of children without families.<sup>57</sup>

Elizabeth Bartholet, a long-standing advocate of international adoptions, who is serving as a member of an advisory group to the U.S. State Department in connection with its role in

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50. *See id.*

51. *See van Leeuwen, supra* note 42, at 215.

52. *See id.* at 193 (citing *United States Adoption of Chinese Babies* (NBC Today Show Transcript, Mar. 20, 1997)).

53. *See van Leeuwen, supra* note 42, at 199.

54. *See* Mike Austin, *Increasingly, Adoption Hunt Taking Lawyers—and Parents—Far Afield*, CHICAGO DAILY L. BULL., May 9, 1996, at 2.

55. Van Leeuwen, *supra* note 42, at 203.

56. Stacie I. Strong, *Children's Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT'L L.J. 163, 170 (1995).

57. *See generally id.*

representing United States' interests in the Hague Conference negotiations and in developing and implementing legislation in the United States, argues:

The problems that should be seen as central to the international adoption debate are the misery and deprivation that characterize the lives of huge numbers of the children of the world. Millions of children die regularly of malnutrition and of diseases that should not kill. Millions more live in miserably inadequate institutions or on the streets.<sup>58</sup> Their situations vary: some institutions are worse than others; some "street children" maintain a connection with a family while others are entirely on their own. But there can be no doubt that overwhelming numbers of children in the poor countries of the world are living and dying in conditions which involve extreme degrees of deprivation, neglect, exploitation, and abuse.<sup>59</sup> These are the real problems of the children of the world. International adoption should be seen as an opportunity to solve some of these problems for some children. It should be structured to maximize this positive potential by facilitating the placement of children in need of nurturing homes with people in a position to provide those homes.<sup>60</sup>

In sum, the position taken on the side for international adoptions is simple: "international adoption saves lives,"<sup>61</sup> both

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58. Elizabeth Bartholet provides one eye-opening example of this tragedy:

Recent political moves resulted in closing down international adoption programs in Romania and China for significant periods of time. Although programs in both countries have now opened up again, adoption law reform in Romania has meant severe restrictions, limiting the number of children who are able to obtain homes. For many Romanian children, the alternative to international adoption is condemnation to what are at best cleaned-up versions of the institutional hellholes that were revealed to the world with the fall of the Communist regime. In China, ninety-eight percent of the children available for adoption are girls. The temporary close-down of international adoption there presumably left many Chinese children to the fate reserved for unwanted baby girls in China—death at birth, or placement in an orphanage, where death rates are said to range from twenty to ninety percent.

Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption & Reproduction*, 2 DUKE J. GENDER L. & POL'Y 5, 12 (1995).

59. General economic, health, and related conditions for children in Africa and Latin America have been getting worse in recent years, and this trend is likely to continue. UNICEF, *The State of the World's Children*, 1989.

60. Bartholet, *supra* note 2, at 196–97.

61. BENET, *supra* note 3, at 128.

in the true sense of the term and figuratively speaking. Instead of persons, who are living in countries where there is an overabundance of families needing children and fighting over the limited children who need families in their own country, prospective adoptive parents are able to reach out to children in need of a family.<sup>62</sup> Although questions are generally raised regarding whether transplanting a child from one country and culture to another is in the child's best interests, the bottom line is that these families are able to provide the children with love and support and an adequate standard of living.<sup>63</sup> "Accordingly, the emphasis is on meeting the child's basic needs, even if that did not occur in the child's home nation."<sup>64</sup>

### B. *Arguments Against International Adoptions*

Arguments against international adoptions are generally based on financial grounds, either at the national or personal level. On a personal level, arguments against international adoptions point to the "black market" of baby selling, which was produced by the high demand for children.<sup>65</sup> For example, in 1974, it is estimated that 5,000 children were sold in the United States for adoption purposes.<sup>66</sup> As a result, critics of international adoptions argue that the practice merely operates for improper financial gain and does not take into account the best interests of the child or families involved.<sup>67</sup>

On the national level, arguments against international adoptions mainly stem from "colonialist" or "imperialist" notions.<sup>68</sup> Developing countries view international adoptions as a redistribution of children from poor, developing nations to the rich, industrialized nations of the world.<sup>69</sup> "First you want our labor and raw materials; now you want our children," is a common response of developing nations to the practice of international adoption.<sup>70</sup> Elizabeth Bartholet criticizes this argument by making an argument for what is best for the global community:

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62. See Bartholet, *supra* note 2, at 183.

63. See *id.* at 208.

64. Liu, *supra* note 1, at 193.

65. See generally Kristina Wilken, *Controlling Improper Financial Gain in International Adoptions*, 2 DUKE J. GENDER L. & POL'Y 85 (1995).

66. 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, 305 (1990).

67. See Liu, *supra* note 1, at 194.

68. See Jane Rowe, *Perspectives on Adoption*, in ADOPTION: INTERNATIONAL PERSPECTIVES 6 (Euthymia D. Hibbs ed., 1991).

69. See Bartholet, *supra* note 2, at 182.

70. Liu, *supra* note 1, at 194-95 (quoting Rowe, *supra* note 68, at 6).

[International adoption] does tend to involve the adoption by the privileged classes in the industrialized nations, of the children of the least privileged groups in the poorest nations, the adoption by whites of black- and brown-skinned children from various Third World nations, and the separation of children not only from their birth parents, but from their racial, cultural, and national communities as well . . . . [However,] [t]he fact that these families are built across lines of racial and cultural difference can be seen as a good thing, both for the parents and children involved and for the larger community. These are families whose members must learn to appreciate one another's differences, in terms of racial and cultural heritage, while at the same time experiencing their common humanity.<sup>71</sup>

In sum, although international adoptions seem to be the most practical solution for the disparity of children without families in some countries and families without children in other countries, formidable arguments have been made against this practice. The positions taken against international adoptions tend to see the practice as one that satisfies the financial gain of others as opposed to viewing the practice as one of love for a child.<sup>72</sup> In either case, it cannot be said that the use of black markets is in the best interests of the child and families involved.<sup>73</sup> Likewise, families should not adopt a foreign child merely for the sake of imperialism by saving a child from "horrible living conditions," but rather because they desire to receive this child into their family.<sup>74</sup> However, it does not logically follow that just because the practice of baby selling on the black markets and adoption for the sake of imperialism needs to be put to a halt, that the practice of international adoptions is not what is in the best interests of the child.

### C. *Other Pertinent Issues*

There are a number of other pertinent issues that tend to arise in every country, especially in the United States, when discussing intercountry adoptions; namely, whether to allow single

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71. Barcholet, *supra* note 2, at 182-83.

72. See generally HOWARD ALTSTEIN & RITA J. SIMON, *INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE* (1991).

73. See Susan A. Munson, Comment, *Independent Adoption: In Whose Best Interest?*, 26 SETON HALL L. REV. 803, 830 (1996).

74. Liu, *supra* note 1, at 195 (citing ALTSTEIN & SIMON, *supra* note 72, at 93).

person adoptions, adoptions by gay and lesbian couples, and interracial adoptions.

### 1. Single Person Adoptions

A common reason for a person to decide to adopt internationally is due to a domestic adoption agency either deeming the person ineligible to adopt domestically or ranking the person very low on the waiting list.<sup>75</sup> Generally, domestic adoption agencies rank "young, happily married couples at the top of the waiting list; single, older, and disabled people in the middle; and homosexuals and severely disabled people at the bottom."<sup>76</sup> In sum, "[t]he standards an adoptive parent must meet in order to provide for the best interests of a particular child have historically reflected preference for marital, age, income, and religious participation requirements modeled after the ideal majoritarian family."<sup>77</sup>

The problem with these ranking systems is that it arbitrarily discriminates against persons who are single, older, disabled, gay, or of a different race because there is no empirical evidence to support any of these traditional parental eligibility criteria.<sup>78</sup> In regards to single parents, one study revealed comparably favorable social development adjustment and educational achievement performance between children adopted by single persons in comparison to children adopted by married couples.<sup>79</sup> Ironically, one of the reasons why there are fewer children available for adoption in the United States is due to an increase in the societal acceptance of single motherhood; therefore, fewer single mothers are putting their children up for adoption in the first place.<sup>80</sup>

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75. See Erika Lynn Kleiman, *Caring For Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 344 (1997).

76. *Id.* (citing Rosanne L. Romano, Comment, *Intercountry Adoption: An Overview for the Practitioner*, 7 TRANSNAT'L LAW. 545, 550 (1994)).

77. Stephanie Sue Padilla, *Adoption of Alien Orphan Children: How United States Immigration Law Defines Family*, 7 GEO. IMMIGR. L.J. 817, 821 (1993).

78. See Kleiman, *supra* note 75, at 345 (citing Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207 (1995)); Nancy S. Hochman, *Single and Following the Urge to Adopt*, N.Y. TIMES, NOV. 19, 1995, §13, at 1; OWEN GILL & BARBARA JACKSON, *ADOPTION AND RACE* 82-90 (1983)).

79. See Hochman, *supra* note 78, at 1.

80. See Kleiman, *supra* note 75, at 345-46 n.136 (citing Padilla, *supra* note 77, at 818).

Although single parent households are becoming increasingly common<sup>81</sup> and despite the vast array of U.S. state statutes expressly allowing adoption by single persons,<sup>82</sup> there remains great concern in intentionally placing a child in such a home through adoption.<sup>83</sup> The primary concern revolves around what is in the best interests of the child and particularly what would happen to the child if the parent becomes financially or physically disabled, or even dies, while the child is still a minor.<sup>84</sup> These concerns, although merited, are merely hypotheticals and do not take into account what is most important in determining what is in the child's best interests, which is to consider the child's alternative option of remaining in institutional care without even a single parent to love and care for him or her.

## 2. Adoptions by Gay and Lesbian Couples

There are six traditional arguments against adoptions, whether domestic or international, by gay and lesbian couples. First, children raised by homosexual parents are more likely to become homosexual than children raised by heterosexual parents.<sup>85</sup> Second, children of gay and lesbian parents are more likely to be sexually abused by their parents or their parents' friends than children of heterosexual parents.<sup>86</sup> Third, children of homosexual parents will have less stability in their lives than children of heterosexual parents because gays and lesbians are more promiscuous than straight people and do not form long-term committed relationships.<sup>87</sup> Fourth, children of homosexual parents will suffer adverse consequences because of societal bias

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81. See *Single Parents Head 25% of Families in U.S.*, N.Y. TIMES, Nov. 6, 1986, at C13. According to the census bureau, one-parent households made up 12.9% of all households with children in 1970 and by 1985, this number increased to 26.3%. See *id.*

82. See, e.g., IOWA CODE ANN. § 600.4 (West 1999); MD. CODE ANN., FAM. LAW § 5-309(b) (1999); N.J. STAT. ANN. § 9:3-43 (West 2000); N.Y. DOM. REL. LAW § 110 (McKinney Supp. 2001); TEX. FAM. CODE ANN. § 162.002 (West 1996).

83. See Myra G. Sencer, Note, *Adoption in the Non-Traditional Family—A Look at Some Alternatives*, 16 HOFSTRA L. REV. 191, 196 (1987).

84. See *id.* at 196–97.

85. See Elovitz, *supra* note 78, at 211–13 (discussing the argument that children raised by lesbian or gay parents are more likely to develop a same-sex orientation than children raised by straight parents).

86. See *id.* at 216 (noting that one prevalent stereotype is that there is a link between same-sex orientation and child sexual abuse).

87. See Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L.Q. 347, 357 n.65 (1991) (noting that the expression “‘gay lifestyle’ is apparently used to refer to the promiscuous, fast-lane bar and sex culture that constitutes but one gay lifestyle”).

against gays and lesbians.<sup>88</sup> Fifth, children of homosexual parents will not attain sufficient personal development as do many children of heterosexual parents.<sup>89</sup> Finally, children should not be brought up in homosexual homes because being gay or lesbian is immoral, unnatural, or otherwise threatening to the survival of humanity.<sup>90</sup>

While these arguments have been used for many years, empirical research reveals that "sexual orientation is unrelated to parental ability."<sup>91</sup> First, studies of children raised by homosexual parents have concluded that parental sexual orientation does not affect the child's own sexual orientation.<sup>92</sup> Second, statistically, heterosexual males comprise the vast majority of perpetrators of sexual abuse of children; not a single study of children raised by homosexuals reveals any evidence supporting a concern of sexual abuse in their homes.<sup>93</sup> Third, there is substantial evidence that homosexual couples do form life-long commitments, just as heterosexual couples do, providing children with stable homes.<sup>94</sup> Fourth, research indicates that social stigmatization due to a child's openly gay or lesbian parents occurs very sel-

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88. See *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (awarding custody to the maternal grandmother, finding that "living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the 'social condemnation' attached to such an arrangement, which will inevitably afflict the child's relationships with its 'peers and the community at large'" (quoting *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985))).

89. See Devjani Mishra, *The Road to Concord: The Conflict of Law Over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91, 93-94 (1996).

90. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 548-61 (1990) (discussing and responding to these ideological arguments).

91. Lisa Hillis, *Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?*, 6 IND. J. GLOBAL LEG. STUD. 237, 246 (1998).

92. See Elovitz, *supra* note 78, at 213 nn.31 & 33 (citing three studies which find that being raised by a gay or lesbian parent does not affect a child's sexual orientation).

93. See Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 199 (1995) (reviewing the social science literature pertaining to sexual orientation and child abuse and concluding that gay men are not more likely to molest children than are heterosexual men).

94. See Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 751 (1995) (concluding that commitments by homosexual partners "resemble compassionate marriages" by heterosexual couples).



dom;<sup>95</sup> when harassment does occur, it is relatively minor;<sup>96</sup> and furthermore, such teasing has no significant long-term effects on the child.<sup>97</sup> Fifth, studies reveal that children raised by homosexual parents adjust and perform just as well in social situations as children raised by heterosexual parents.<sup>98</sup> Finally, any ideological arguments that characterize homosexuality as immoral, unnatural, or threatening to the survival of humanity are completely unsupported.<sup>99</sup> Therefore, since none of these arguments can be justified empirically, "they should not be used to preclude gays and lesbians from becoming adoptive parents."<sup>100</sup>

Consequently, since these arguments are reduced to prejudice and have no basis in fact,<sup>101</sup> whether a child is to be adopted internationally by a homosexual couple should not be argued any differently than if the child was going to be adopted by a heterosexual couple. The best interests of the child and families involved remain the same whether the child is to be adopted by a heterosexual couple, a gay couple, or a lesbian couple.<sup>102</sup> Furthermore, due to the current, worldwide discrimination against homosexuals in domestic adoptions, such as laws and regulations restricting marriages between people of the same sex preventing homosexual couples from adopting jointly,<sup>103</sup> laws and regulations concerning international adoptions should in fact provide additional protection for potential homosexual parents.<sup>104</sup> In sum, "loving persons who happen to

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95. See Elovitz, *supra* note 78, at 215 n.47 (citing a study which found that "only about five percent of the children surveyed who had lived with an openly gay or lesbian parent experienced harassment by other children").

96. See *id.* at 215 nn.47-48 (citing two studies which found that teasing was relatively "minor and transitory").

97. See *id.* at 214-15 nn.40-46 and accompanying text (citing various studies that compared children raised by homosexual parents with children raised by heterosexual parents with respect to their self-esteem, self-concept, outlook, peer relationships, and relationships to adults and found no developmental differences in the two groups).

98. See Kleiman, *supra* note 75, at 345-46 (concluding that children raised by gays and lesbians do obtain sufficient personal development).

99. See Polikoff, *supra* note 90, at 548-61 (analyzing these ideological arguments and concluding that there is no sufficient basis to support such reasoning).

100. Mishra, *supra* note 89, at 94.

101. See generally Hillis, *supra* note 91; Mishra, *supra* note 89.

102. See Hillis, *supra* note 91, at 250.

103. See Evall, *supra* note 87, at 355 (discussing policies that disfavor adoption by unmarried couples).

104. See Hillis, *supra* note 91, at 252-56 (recommending ways to amend current rules and regulations on international adoptions to promote such adoptions by gays and lesbians).

also be homosexual have a place in the intercountry adoption process."<sup>105</sup>

### 3. Interracial Adoptions

Much of the debate about interracial adoptions, racial matching, and international adoptions has focused on the effects on children who are raised in families who differ from the child's race or ethnicity of origin.<sup>106</sup> Critics of interracial adoptions argue that children must struggle to acquire a positive racial identity when neither adoptive parent can provide a same-race role model.<sup>107</sup> They argue that children need to be raised by parents of the same race or ethnicity in communities of the same race or ethnicity in order to acquire a true, positive identity and to acquire the skills necessary to survive in a race-sensitive society.<sup>108</sup>

On the other side, proponents of interracial adoptions argue that acquiring a true, positive identity and survival skills is not contingent on being raised by parents of the same race or ethnicity, but on being raised by parents who are sensitive to the child's needs and on the child's ability to develop healthy, early attachments to his or her parents.<sup>109</sup> They argue that interracial adoption does not create a serious risk of harm to children, especially considering the effects of the alternative, which is prolonged delays in placement and foster care.<sup>110</sup> Unfortunately, there is no simple, empirical answer to the question of whether international adoptions that cut across racial or ethnic barriers are either "good" or "bad" for children.<sup>111</sup> Many ambiguities and underlying value choices are inherent in discussions of whether

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105. *Id.* at 256.

106. See ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 143 (1993) (addressing issues of transracial adoption and racial identity).

107. See, e.g., Marlon N. Yarbrough, *Trans-Racial Adoption: The Genesis or Genocide of Minority Cultural Existence*, 15 S.U. L. REV. 353, 355-56 (1988).

108. See, e.g., *id.* at 356.

109. See Bartholet, *supra* note 17, at 1213 (citing positive results in studies comparing transracially and intraracially adopted children).

110. See Arnold R. Silverman, *Outcomes of Transracial Adoption*, in *THE FUTURE OF CHILDREN: ADOPTION* 115 (David and Lucille Packard Foundation ed., 1993) (concluding that transracial adoption is a viable means of providing stable homes for waiting children and presents fewer risks to children than delayed placement and institutional care).

111. See Barbara Bennett Woodhouse, "Are You My Mother?": *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 113 (1995).

inracial or interracial adoptions better serve a child's needs for such things as racial identity and survival skills.<sup>112</sup>

It is important, however, to acknowledge that "children's individuality is nurtured and develops within the context of family, group and community."<sup>113</sup> This notion can help resolve many adoption dilemmas.<sup>114</sup> Specifically, by structuring the adoption process to preserve a child's long-term access to their cultural and racial heritage, while recognizing and protecting the child's short-term needs for security and nurture, we can structure an international adoption system that protects the best interests of the child and families involved even when cutting across racial, ethnic, and political lines.<sup>115</sup> Therefore, since there is no empirical evidence to support a case against interracial adoptions and any potential, negative effects of such adoptions can be avoided, interracial adoptions should be treated as same-race or same-ethnic adoptions when discussing international adoptions.

#### IV. INTERNATIONAL MEASURES FOR THE PROTECTION OF CHILDREN

When looking at the issue of international adoptions and what is in the best interest of the child, the most appropriate place to begin is the legal history of attempts at codifying the rights of the child through international instruments, including global declarations and conventions, as well as regional conventions and charters.

##### A. *Global Declarations and Conventions*

##### 1. The Universal Declaration of Human Rights

On December 10, 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights.<sup>116</sup> This Declaration unequivocally states in its Preamble that "[r]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."<sup>117</sup> Furthermore, Article 25(2) of the Declaration states that "[m]otherhood and childhood are entitled to special care and

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112. See generally Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994).

113. Woodhouse, *supra* note 111, at 129.

114. See *id.*

115. See *id.* at 127.

116. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. Doc. A/3 (1948).

117. *Id.* pmb1.

assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."<sup>118</sup>

Although Article 25(2) is the only article specifically mentioning children,<sup>119</sup> this Declaration is important for a number of reasons. First, all Member States to the United Nations, which makes up a vast majority of the nations in the world, have "tacitly accepted" this Declaration.<sup>120</sup> Second, it can be argued that "some, if not all, the rights and freedoms enunciated in the Charter have become accepted as customary international law."<sup>121</sup> Third, the provisions in the Universal Declaration of Human Rights have "served as a blueprint for constitutions of many newly independent" nations.<sup>122</sup> Furthermore, the Declaration as a whole has become the framework for many subsequent international human rights documents.<sup>123</sup>

## 2. Declaration of the Rights of the Child

The General Assembly of the United Nations adopted the Declaration of the Rights of the Child in 1959.<sup>124</sup> The General Assembly attempted to enumerate the rights of the child by calling "upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures progressively taken in accordance with the . . . principles"<sup>125</sup> contained therein. Principle 6 of the Declaration reads in pertinent part:

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever 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; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to

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118. *Id.* art. 25(2).

119. *Id.*

120. REBECCA M.M. WALLACE, *INTERNATIONAL LAW* 208 (3d ed. 1997).

121. *Id.*

122. *Id.*

123. Richard B. Bilder, *An Overview of International Human Rights Law*, *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 3, 7 (Hurst Hannum ed., 1999).

124. *Declaration of the Rights of the Child*, G.A. Res. 1386, U.N. GAOR, 14 Sess., U.N. Doc. A/4354 (1959).

125. *Id.*

children without a family and to those without adequate means of support.<sup>126</sup>

### 3. Convention of the Rights of the Child

The Convention of the Rights of the Child was adopted by the United Nations in 1989 and entered into force on September 2, 1990.<sup>127</sup> Member States adopting the Convention were urged to do so “[b]earing in mind that the need to extend particular care to the child has been stated . . . in the Declaration of the Rights of the Child adopted by the General Assembly . . . and recognized in the Universal Declaration of Human Rights.”<sup>128</sup> Thus, this Convention expanded many of the provisions of these former declarations concerning the rights of children by primarily focusing on what is in the best interests of the child.<sup>129</sup>

Specifically, the Convention on the Rights of the Child enumerates the child’s “right to know and be cared for by his or her parents.”<sup>130</sup> The Convention also states the types of alternative care a child should receive when this right is violated, including the possibility of adoption.<sup>131</sup> Article 21 of this Convention specifically addresses the role of Member States in the system of adoption as follows:

126. *Id.* princ. 6.

127. *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44 Sess., U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.

128. *Id.* pmb1.

129. *See id.* art. 3 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).

130. *See id.* art. 7 (“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”).

131. *See id.* art. 20. The Convention 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 ensure alternative care for such a child.

3. Such care could include, *inter alia*, foster placement, *kafalah* 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 and linguistic background.

States Parties that 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 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;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in 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 the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.<sup>132</sup>

4. 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

On December 3, 1986, the United Nations adopted 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.<sup>133</sup> This Declaration is the first to be particularly "[c]oncerned at the large

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132. *Id.* art. 21.

133. *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*, G.A. Res. 41/85, U.N. GAOR, 41st Sess., U.N. Doc. A/41/898 (1986).

number of children who are abandoned or become orphans owing to violence, internal disturbance, armed conflicts, natural disasters, economic crises or social problems."<sup>134</sup> Furthermore, the United Nations was "[c]onscious of the need to proclaim universal principles to be taken into account in cases where procedures are instituted relating to foster placement or adoption of a child, either nationally or internationally."<sup>135</sup>

Section C of this Declaration exclusively addresses the issue of adoption.<sup>136</sup> Article 13 states 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."<sup>137</sup> Furthermore, Article 17 proclaims a preference for finding the child an adoptive family in the child's home country and only "[i]f 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."<sup>138</sup> The remainder of the articles set forth guidelines for intercountry adoptions,<sup>139</sup> many of which were expanded upon in 1993 by the Hague Adoption Convention.

##### 5. Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption

The Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, otherwise known as the Hague Adoption Convention, was adopted on May 29, 1993 at The Hague and entered into force on May 1, 1995.<sup>140</sup> This Convention takes into account the principles set forth in the United Nations 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.<sup>141</sup> Member States agreed to the provisions "[r]ecognizing that 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."<sup>142</sup>

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134. *Id.* annex.

135. *Id.*

136. *See id.* arts. 13-24.

137. *Id.* art. 13.

138. *Id.* art. 17.

139. *See id.* arts. 18-24.

140. Hague Convention on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 (entered into force May 1, 1995).

141. *See id.*

142. *Id.*

As stated in Article 1 of the Convention on intercountry adoption, the objectives were the following:

- (a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;
- (b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- (c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.<sup>143</sup>

The Hague Adoption Convention explicitly sets out in the remaining articles the scope of the Convention,<sup>144</sup> the requirements for intercountry adoptions,<sup>145</sup> central authorities and accredited bodies,<sup>146</sup> procedural requirements in intercountry adoption,<sup>147</sup> recognition and effects of the adoption,<sup>148</sup> some general provisions,<sup>149</sup> and final clauses.<sup>150</sup>

143. *Id.* art. 1.

144. *See id.* chap. I, art. 2.

The Convention shall apply where a child habitually resident in one Contracting State ('the State of origin') has been, is being, or is to be moved to another Contracting State ('the receiving State') either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

*Id.*

145. *See id.* chap. II, art. 4 (enumerating the requirements of the State of origin); *id.* chap. II, art. 5 (enumerating the requirements of the receiving States).

146. *See id.* chap. III, arts. 6–13 (summarizing the requirements and duties of the Central Authority of the Contracting States).

147. *See id.* chap. IV, arts. 14–22 (outlining the procedure of international adoptions from the application process through to completion of the adoption process).

148. *See id.* chap. V, arts. 23–27 (declaring the recognition of the adoption and the resulting effects of the adoption). Article 24 specifically states, "The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child." *Id.* art. 24.

149. *See id.* chap. VI, arts. 28–42 (explaining various miscellaneous matters, including prohibitions placed on the natural parents and the adoptive parents of the child, the effects of the Convention on the laws of the State of origin and the receiving State, along with guidelines on the resolution of any conflicts of law, as well as, the general applicability of the Convention).

150. *See id.* chap. VII, arts. 43–48 (describing the signatory and ratification requirements and procedures).



### B. *State Ratification of International Conventions*

All of these global declarations and conventions have been adopted through the United Nations.<sup>151</sup> The Universal Declaration of Human Rights, the Declaration of the Rights of the Child, as well as 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 are all declarations. United Nations declarations are not legally binding upon the members; however, they are generally regarded as evidence of *opinio juris*, and if ratified by a large majority of Member States, are considered significant evidence of customary law by some commentators.<sup>152</sup>

In contrast, the Convention of the Rights of the Child and the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption are conventions. The effects

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151. Member States include: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Yugoslavia, Zambia, and Zimbabwe. *List of Member States*, at <http://www.un.org/overview/unmember.html> (last visited Mar. 3, 2001).

152. See LINDA MALONE, *INTERNATIONAL LAW: THE PROFESSOR SERIES* 36 (1998).

of these international conventions on international adoptions may vary considerably depending upon which States have signed and ratified the particular instruments.<sup>153</sup> Only those States that have signed and ratified the Convention are bound to its terms; States that have not signed a Convention and States that have signed but not *ratified* the Convention are not bound by its terms.<sup>154</sup> For example, the United States signed but did not ratify the 1994 Hague Adoption Convention until October 6, 2000, joining nine other countries;<sup>155</sup> therefore, the United States was not bound to the terms of this Convention when regulating international adoptions as either a sending State or receiving State until it ratified the Convention six years later.<sup>156</sup>

In sum, a major problem with relying on international law is that it is largely consensual—if State Parties do not agree to a particular convention, they may not be bound by its terms. Moreover, even if all States were bound by all conventions, enforcement mechanisms in international law are severely lacking. The International Court of Justice (ICJ) is the principal judicial organ of the United Nations; however, the ICJ hears relatively few cases because only States may be parties in contentious proceedings before the Court.<sup>157</sup> In other words, if a dispute arises during the international child adoption process, the families involved may not seek relief through the ICJ because they are private parties. Even in the unlikely event that a State would become involved on the families' behalf, the ICJ is limited in that the other State involved must consent to jurisdiction, which rarely occurs because States often prefer to settle disputes through political and diplomatic channels rather than through the ICJ.<sup>158</sup> Therefore, protection under international conventions is restricted at best.

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153. *See id.* at 13.

154. *See id.* at 13–14.

155. Member States that have ratified the Convention include: Costa Rica, Cyprus, Ecuador, Mexico, Peru, Poland, Romania, Spain, Sri Lanka and the United States of America; Member States that have signed but have not yet ratified the Convention include: Brazil, Burkina Faso, Canada, Colombia, Finland, France, Israel, Netherlands, Switzerland, United Kingdom of Great Britain and Northern Ireland, and Uruguay. *United Nations Treaty Collection*, at <http://untreaty.un.org> (last visited Mar. 3, 2001).

156. *See* MALONE, *supra* note 152, at 13.

157. *See id.* at 110.

158. *See id.*

### C. *Regional Conventions and Charters*

States may also be members of regional organizations, whose primary function is to promote cooperation among the Member States of the region.<sup>159</sup> Similar to the United Nations on a global level, these regional organizations have adopted conventions and charters affecting regional issues, including international adoptions. If an issue arises between Member States regarding one of these regional conventions, the regional organization has jurisdiction over the matter;<sup>160</sup> therefore, these instruments may have significant legal authority if both States are members of the regional organization and have ratified the pertinent convention.

#### 1. European Convention for the Protection of Human Rights and Fundamental Freedoms

The Council of Europe<sup>161</sup> adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms in Rome in 1950.<sup>162</sup> This Convention was meant to reinforce the basic human rights set forth in the Universal Declaration of Human Rights within the members of the Council of Europe.<sup>163</sup> The Convention states in its Preamble that “[b]eing resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”<sup>164</sup> have agreed to the provisions contained therein.

However, unlike the Universal Declaration of Human Rights, this European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain a single provision specifically addressing the rights of children.<sup>165</sup> Moreover,

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159. *See id.* at 99.

160. *See id.* at 100.

161. Member States include: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom. *The 41 Member States of the Council of Europe*, at <http://www.coe.fr/eng/std/states.htm> (last visited Mar. 3, 2001).

162. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, E.T.S. No. 005, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953.

163. *See id.*

164. *Id.* pmb1.

165. *See id.*

only two provisions deal with families in general, including Article 8, which addresses the "right to respect for private and family life,"<sup>166</sup> and Article 12, which pronounces that "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."<sup>167</sup>

## 2. American Convention on Human Rights

The Organization of American States<sup>168</sup> through the Inter-American Commission on Human Rights adopted the American Convention on Human Rights on November 22, 1969.<sup>169</sup> Similar to the European Convention on Human Rights, the American Convention was an attempt to provide an enforcement mechanism based on previous global declarations and regional instruments.<sup>170</sup> The Convention states in its Preamble that American nations agree to the principles contained therein:

Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.<sup>171</sup>

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166. *Id.* art. 8. The Convention provides:

1. Everyone has the right for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*Id.*

167. *Id.* art. 12.

168. Member States include: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, Suriname, St. Kitts and Nevis, Trinidad and Tobago, the United States of America, Uruguay, and Venezuela. *Organization of American States: Member States*, at <http://www.oas.org/EN/MSTATES/bckgrdme.htm> (last visited Mar. 3, 2001).

169. *American Convention on Human Rights*, Nov. 22, 1969, O.A.S. No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978.

170. *See id.* pmbl.

171. *Id.*

However, unlike the European Convention, this American Convention of Human Rights specifically declares the rights of the child by stating in Article 19 that “[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”<sup>172</sup> Furthermore, Article 17, enumerating the rights of the family, states the following:

(4) The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

(5) The law shall recognize equal rights for children born out of wedlock and those born in wedlock.<sup>173</sup>

### 3. African Charter on the Rights and Welfare of the Child

Besides the African Charter on Human and Peoples’ Rights,<sup>174</sup> the Organization of African Unity<sup>175</sup> is the only region that adopted a specific charter relating to children, called the African Charter on the Rights and Welfare of the Child in 1990.<sup>176</sup> African Member States of the Organization of African Unity entered into this Charter:

Reaffirming adherence to the principles of the rights and welfare of the child contained in the declaration, conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child;

172. *Id.* art. 19.

173. *Id.* art. 17.

174. *African Charter on Human and Peoples’ Rights*, June 26, 1981, OAU Doc. CAB/LEG/67/3, entered into force Oct. 21, 1986.

175. Member States include: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Côte d’Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sao Tome and Principe, Seychelles, Senegal, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe. *Organization of African Unity: Membership*, at <http://www.oau-oua.org/> (last visited Mar. 3, 2001).

176. *African Charter on the Rights and Welfare of the Child*, opened for signature July 11, 1990, OAU Doc. CAB/LEG/24.9/49, available at <http://www1.umn.edu/humanrts/africa/afchild.htm>.

and the OAU Heads of State and Government's Declaration on the Rights and Welfare of the African Child.<sup>177</sup>

Unlike the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights dealing with human rights in general, this Charter specifically enumerates the rights of the African child.<sup>178</sup> Member States accepted the principles contained therein "[r]ecognizing that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding."<sup>179</sup>

Furthermore, Article 24 of the Charter specifically addresses the duties of the nations in ensuring the rights of the child in adoption situations by providing:

States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

(a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;

(b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a 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 affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;

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177. *Id.* pmb1.

178. *See generally id.*

179. *Id.* pmb1.

- (e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;
- (f) establish a machinery to monitor the well-being of the adopted child.<sup>180</sup>

In sum, the Organization of African Unity has been the most successful regional entity to have codified children's rights, making the rights applicable to the entire region. However, all of the regional conventions and charters are severely limited when dealing with the issue of international adoptions because in most cases, these adoptions do not take place solely within the region. Only in the event that both the sending country and the receiving country are within the same region can these instruments regulate the international adoption; therefore, these concerns must be addressed at the international level.

## V. NATIONAL REGULATIONS OF INTERNATIONAL ADOPTIONS: THE PROCESS IN THE UNITED STATES

In order to understand fully the complexities of international adoption, it is beneficial to focus on one country's procedures. For example, in order to complete an international adoption and bring the child to the United States, the prospective adoptive parent(s) must fulfill the requirements established and regulated by three different sources of law, including: (1) the foreign country's law in which the child currently resides; (2) U.S. federal law as governed by the Immigration and Naturalization Service; and (3) the U.S. state law of the state of residence of the prospective adoptive parent(s).<sup>181</sup>

### A. *Foreign Law: The Child's Native Country*

The U.S. Department of State summarizes foreign regulations of the international adoption process on its internet website.<sup>182</sup> It states that "[a]lthough adoption procedures vary from country to country, most countries require that prior to any court action, a child placed for adoption be legally recognized as an orphan or, in the case where a parent is living, be legally and

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180. *Id.* art. 24.

181. See Bureau of Consular Affairs, *International Adoptions*, § II, at <http://travel.state.gov/int'ladoption.html> (last visited Mar. 3, 2001).

182. See generally *id.*

irrevocably released for adoption in a manner provided for under local foreign law."<sup>183</sup>

Furthermore, most countries require the full adoption of the prospective adoptive child in the foreign court after either the living parent(s) have released the child to the appropriate foreign authority or the law has declared the child to be an orphan.<sup>184</sup> Additionally, some countries allow simple adoptions, meaning that the foreign court grants guardianship of the child to the prospective adoptive parent(s).<sup>185</sup> This guardianship allows the prospective adoptive parent(s) to take the child out of the foreign country in order to be brought to the country of the prospective adoptive parent(s) for initiation of adoption proceedings.<sup>186</sup>

A few countries also allow the prospective adoptive parent(s) to adopt the foreign child through a third party without physically traveling to that country.<sup>187</sup> In this case, the U.S. State Department warns that "a foreign country's determination that the child is an orphan does not guarantee that the child will be considered an orphan under the U.S. Immigration and Nationality Act, since the foreign country may use different standards."<sup>188</sup> The U.S. State Department refers prospective adoptive parent(s) with questions regarding interpretation of specific foreign laws to foreign attorneys operating in the country where the adoption would take place.<sup>189</sup>

Most countries have additional requirements before they will allow the international adoption to proceed. For example, while some countries accept the "properly authenticated home study of the prospective adoptive parent(s) at face value," other countries require the prospective adoptive parent(s) to personally appear before the foreign court.<sup>190</sup> Similarly, some countries require one or both prospective adoptive parents to reside in the foreign country for a period of time, which may result in the prospective adoptive parent(s) spending considerable time in the foreign country awaiting the completion of the foreign adoption documents.<sup>191</sup> Additionally, several countries require the adop-

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183. *Id.*

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.*

188. *Id.*

189. *See id.*

190. *Id.*

191. *See id.*



tion agency or the foreign country's consul in the United States to conduct a "post-adoption follow-up."<sup>192</sup>

Finally, it is important to note the U.S. State Department's additional warning that "[a]doption opportunities, regulations, and even the social climate may change at any time, making it impossible to categorically state in which countries adoptions will proceed smoothly."<sup>193</sup> Therefore, it is necessary for all prospective adoptive parent(s) to thoroughly complete an up-to-date investigation of the native countries from which they wish to adopt before initiating the adoption procedure.<sup>194</sup>

#### B. *U.S. Federal Law: Immigration and Naturalization Service*

The U.S. State Department emphasizes that while the "legal custody or proper documentation for the child must be resolved in accordance with the law of the country of the child's nationality or residence . . . the child's ability to qualify for an immigrant visa as an orphan is determined by U.S. law."<sup>195</sup> The Immigration and Nationality Act (INA) is the U.S. immigration law governing the "issuance of visas to nationals of other countries, including children adopted abroad or coming to the United States for adoption."<sup>196</sup>

Under this Act, a child may be brought to the United States in two ways. First, under Section 101(b)(1)(E), the INA provides immigrant classification for "a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years . . . ."<sup>197</sup> This "two-year provision" is mainly for U.S. citizens, temporarily living abroad, who want to adopt a foreign child from the country in which they reside in accordance with the foreign laws of that country.<sup>198</sup>

Since most prospective adoptive parent(s) are unable to live abroad for two years, there is another method, which is used in a majority of international adoption cases.<sup>199</sup> Here, the child must first meet the definitional requirement of an orphan, contained in Section 1101(b)(1)(F) of the Act, in order to be eligible for

192. *See id.*

193. *Id.* § I.

194. *See id.*

195. *Id.* § III.

196. *Id.* § II.

197. Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(b)(1)(E) (2000).

198. *See* Bureau of Consular Affairs, *supra* note 181, § II.

199. *See id.*

classification as an immediate relative of a U.S. citizen.<sup>200</sup> The Immigration and Naturalization Service (INS) summarizes the INA's definition of orphan:

[A] foreign-born child is an orphan if he or she does not have any parents because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents. A foreign-born child is also an orphan if his or her sole or surviving parent is not able to take proper care of the child and has, in writing, irrevocably released the child for emigration and adoption.<sup>201</sup>

Furthermore, in order for the child to gain immigration benefits, an "orphan petition" must be filed before the child turns sixteen years of age.<sup>202</sup>

Section 204.3(a)(2) of the INA provides an overview of the processing and adjudication of most orphan cases:

Petitioning for an orphan involves two distinct determinations. The first determination concerns the advanced processing application which focuses on the ability of the prospective adoptive parents to provide a proper home environment and on their suitability as parents. This determination, based primarily on a home study and fingerprint checks, is essential for the protection of the orphan. The second determination concerns the orphan petition which focuses on whether the child is an orphan under section 101(b)(1)(F) of the Act. The prospective adoptive parents may submit the documentation necessary for each of these determinations separately or at one time, depending on when the orphan is identified. An orphan petition cannot be approved unless there is a favorable determination on the advanced processing application. However, a favorable determination on the advanced processing application does not guarantee that the orphan petition will be approved. Prospective adoptive parents may consult with the local Service office on matters relating to an advanced processing application and/or orphan petition.<sup>203</sup>

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200. See 8 U.S.C. § 1101(b)(1)(F).

201. Immigration and Naturalization Service, *How Do I Apply to Bring a Foreign-Born Orphan to the United States?*, at <http://www.ins.usdoj.gov/graphics/howdoi/fororphan.htm> (last visited Mar. 3, 2001) (citing 8 U.S.C. § 1101(b)(1)(F)).

202. See *id.*

203. Immigration and Nationality Act of 1952, 8 C.F.R. § 204.3(a)(2) (1995).

Therefore, under this section of the INA, although the prospective adoptive parent(s) must satisfy a number of other requirements before the INS will grant an orphan petition and issue a visa for the foreign child to travel to the United States, the two-year residency requirement no longer applies.<sup>204</sup>

Only after the foreign adoption is completed can the adoptive parent(s) apply for an immigrant visa, which is a process in addition to obtaining a visa to travel to the United States.<sup>205</sup> Therefore, in addition to approval of the orphan petition, the consular officer requires specific documentation to conduct a visa interview and to approve visa issuance.<sup>206</sup> In consideration of the immigrant visa, the officer must "review the [orphan petition], verify the child's status as an orphan, establish that the prospective parent(s) have legal custody, survey the child's medical condition and confirm that the child has the required travel documentation."<sup>207</sup> It is the responsibility of the adoptive parent(s) to see that all requirements for the immigrant visa are met.<sup>208</sup>

In the majority of cases, the consular officer simply confirms the documentation and proceeds with the final visa processing; however, if there are any unresolved issues, the consular officer must refer the case to the INS for review.<sup>209</sup> One of three things will occur:

- (1) INS can review the documentation, and reaffirm approval of the petition.
- (2) INS can review the documents and request that the consular officer conduct a field investigation to insure that no fraud or illegal activity was involved. The embassy or consulate reports its findings to the INS for a final decision.
- (3) INS can deny the petition.<sup>210</sup>

In the case of the INS denying a petition, the adoptive parent(s) have the option of appealing to the Associate Commissioner for Examinations, Administrative Appeals Office for a legal ruling.<sup>211</sup> The INS determination completes the U.S. immigration law regulations.

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204. See Bureau of Consular Affairs, *supra* note 181, § V.

205. See *id.* § III.

206. See *id.*

207. *Id.*

208. See *id.*

209. See *id.*

210. *Id.*

211. See *id.*

### C. U.S. State Law: The Parent's Home State

According to the U.S. State Department, the formal adoption of a foreign child in the foreign court is legally sufficient in the United States in most cases; however, a state court within the United States is not required to automatically recognize the foreign adoption decree.<sup>212</sup> The U.S. State Department is quick to note that “[t]his does not suggest that the United States does not respect foreign procedures or recognize the authority of the foreign country in relation to the child.”<sup>213</sup> Yet, the status of this foreign child can *always* be challenged in a state court until a domestic adoption decree is entered in a state within the United States.<sup>214</sup>

Therefore, as a precautionary measure, many adoption practitioners recommend that the adoptive parent(s) initiate a “re-adoption” procedure for the foreign child once they return to the United States in a state court within the state of residence of the adoptive parent(s).<sup>215</sup> After such a proceeding, the adoptive parent(s) can request that a state birth certificate be issued for the foreign child.<sup>216</sup> Subsequently, this birth certificate should be recognized by all other states within the United States under the Full Faith and Credit Clause of the U.S. Constitution,<sup>217</sup> minimizing the opportunities for the international adoption to be challenged.

Furthermore, re-adoption of the foreign child in the United States is required in some situations.<sup>218</sup> INA Section 204.3(f)(2), regarding children coming to the United States to be adopted, provides:

An orphan is coming to be adopted in the United States if he or she will not be or has not been adopted abroad, or if the unmarried petitioner or both the married petitioner and spouse did not or will not personally see the orphan prior to or during the adoption proceeding abroad, and/or if the adoption abroad will not be, or was not, full and final. If the prospective adoptive parents reside in a State with preadoption requirements and they plan to have the child come to the United States for adoption, they must submit evidence of compliance with the State's preadop-

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212. *See id.* § V.

213. *Id.*

214. *See id.*

215. *See id.*

216. *See id.*

217. *See* U.S. CONST. art. IV, § 1.

218. *See* Bureau of Consular Affairs, *supra* note 181, § V.

tion requirements to the Service. Any preadoption requirements which by operation of State law cannot be met before filing the advanced processing application must be noted. Such requirements must be met prior to filing the petition, except for those which cannot be met by operation of State law until the orphan is physically in the United States. Those requirements which cannot be met until the orphan is physically present in the United States must be noted.<sup>219</sup>

Prospective adoptive parent(s) should keep in mind that state law requirements are applicable even where the foreign country has issued a full and final adoption decree for the foreign child.<sup>220</sup> Therefore, the U.S. State Department warns prospective adoptive parent(s) to "determine in advance the requirements of their own particular state of residence."<sup>221</sup> In order to do this, the U.S. State Department suggests contacting either a state social services agency or an adoption practitioner within their state of residence to obtain this information.<sup>222</sup>

## VI. WHO SHOULD DECIDE?

Even though international law governs what is in the best interests of the child, many substantive and procedural problems arise in international adoptions when conflicts of law exist between the law and regulations of the sending country and those of the receiving country or between federal and state law within a country. Substantively, for example, what if a single person wishes to adopt a child from a country that only allows married couples to adopt children? Or, procedurally, for example, what if the sending country has determined that the child qualifies as an adoptable child before the receiving country has determined that the adopting persons are fit to be adoptive parents? Therefore, it is imperative to decide who should regulate international adoptions in order to adequately answer both substantive and procedural questions so that the international child adoption process is the least disruptive to the child and families involved.

### A. *States Within the United States*

Regulation of domestic child adoptions in the United States is a right reserved to the states because it is strictly a family law

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219. 8 C.F.R. § 204.3(f)(2).

220. See Bureau of Consular Affairs, *supra* note 181, § V.

221. *Id.*

222. See *id.*

issue;<sup>223</sup> however, some would argue that international adoptions should also be regulated at the federal level. This is largely because state adoption laws vary considerably from state to state, despite encouragement at the federal level to make these regulations uniform.<sup>224</sup> For example, some states allow homosexuals to adopt children, while other states explicitly prohibit adoptions by persons who happen to be gay or lesbian.<sup>225</sup> The latest attempt for national uniformity was the 1994 revised version of the Uniform Adoption Act of 1969,<sup>226</sup> which strives to provide some certainty in the vast pool of adoption law; however, after six years, Vermont remains the only state to have adopted this revised Act.<sup>227</sup>

Arguments, however, have been made that state regulation of international adoptions, as in domestic adoptions, has provided the most effective mechanism in which to ensure the best interests of the child. Since 1851, when Massachusetts became the first state to codify the common law rules regulating adoption,<sup>228</sup> the primary goal of adoption began to focus on ensuring the best interests of the child.<sup>229</sup> Arguments for state regulation were based on each state's inherent *parens patriae* powers to protect its vulnerable children by intervening in domestic matters, including adoption.<sup>230</sup>

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223. See Dan Berger, *Improving the Safety and Efficiency of Foreign Adoptions: U.S. Domestic Adoption Programs and Adoption Programs in Other Countries Provide Lessons for INS Reform*, 5 CORNELL J.L. & PUB. POL'Y 33, 41 (1995).

224. See *id.* at 42.

225. See generally Mishra, *supra* note 89.

226. See Uniform Adoption Act, 9 U.L.A. 1 (Supp. 1994).

227. See *id.* at Table of Jurisdictions; see also VT. STAT. ANN. tit. 15A, §§ 1-101 to 7-105 (1996).

228. See Janet Hopkins Dickson, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 924 (1991) (citing Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1042 (1979)).

229. See Sarah Clarke Wixson, *And Baby Makes Three: The Rights of the Child, the Adoptive Parents and the Biological Parents Under the Uniform Adoption Act*, 33 IDAHO L. REV. 481, 488 (1997).

230. See Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 427 (1993); Jonet, *supra* note 66, at 317.

'Parens patriae,' literally 'parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, . . . and in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents.

BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

Today, the bottom line is that when adoption laws vary from state to state, the inconsistencies in the law puts all of those involved in a vulnerable position, including the child, the biological parents, and the adopting parents.<sup>231</sup> Inconsistencies in the law lead to uncertainty; "[u]ncertainty breeds litigation and litigation takes time."<sup>232</sup> If the goal is to ensure the best interests of the child, it is important to protect the child from an unnecessary separation from the biological parents and against harmful delays in facilitating placement with the adoptive parents.<sup>233</sup> Perhaps Justice Bakes, a state supreme court justice, underscores this point best by stating, "Uncertainty . . . breeds litigation which, regardless of how the issues are ultimately decided by the courts, often results in tragedy for the child."<sup>234</sup> Therefore, it is only logical that these international adoptions are regulated at a level providing more consistency, namely at a global level, but at the very least at a national level.

### B. *Individual Nations*

In order to alleviate the complications that arise when conflicts of law exist, many argue that international adoptions should be regulated at purely a national level, as opposed to a state level. For example, one scholar, Lisa K. Gold, examines the problem in the following manner:

As the process exists, first, the sending countries subject prospective parents to exacting evaluations for parental fitness.<sup>235</sup> Second, inconsistencies between foreign and domestic law can cause an abandoned or unwanted child to be legally unadoptable.<sup>236</sup> Third, the U.S. government requirements of immigration, orphan status, and citizenship create substantial obstacles to adoption of foreign-born children. Finally, federal and state law inconsistencies cause further unnecessary difficulties.<sup>237</sup> This is

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231. See Wixson, *supra* note 229, at 482.

232. *Id.* at 510.

233. See *id.* at 497 (citing Uniform Adoption Act § 2-404(a), 9 U.L.A. 30 (Supp. 1994) (requiring consent after birth, and providing for revocation of consent within 192 hours after birth)).

234. *Id.* (citing *In re Andersen*, 589 P.2d 957, 970 (1978) (Bakes, J., dissenting), *overruled in part by In re Steve B.D.*, 723 P.2d 829 (1986)).

235. Lisa K. Gold, *Who's Afraid of Big Government? The Federalization of Intercountry Adoption: It's not as Scary as it Sounds*, 34 TULSA L.J. 109, 109 (1998) (citing BARTHOLET, *supra* note 106, at 33).

236. *Id.* (citing Strong, *supra* note 56, at 175).

237. *Id.* (citing Richard R. Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317, 318-20 (1988)).

largely due to the individual states' own criterion for concluding the adoption.<sup>238</sup>

Lisa Gold continues by offering and examining one solution that would simplify the process:

As the process could exist, first, the receiving country via the federal government, would administer a thorough home study to protect against baby brokering and ensure parental fitness. Second, the sending country would administer any and all procedures it requires and provide proof to the receiving country that it and its citizens have relinquished all claim[s] on the child. Third, the federal government through its embassies would finalize the adoption and citizenship requirements abroad.<sup>239</sup>

As a result, the current international adoption process within the United States would be simplified, resulting in less ambiguity and greater efficiency.<sup>240</sup>

The first situation that generates problems is when a conflict of law exists between the sending country and the receiving country. This typically occurs when the sending country relinquishes all rights to the child according to its rules and regulations; yet, the receiving country requires its own orphan standard to be fulfilled in order for the child to be adopted.<sup>241</sup> When the receiving country's requirements are inconsistent with the sending country's requirements, a situation results that is commonly referred to as "baby brokering."<sup>242</sup> For example, this problem often occurs in receiving countries, such as the United States, that have more stringent standards for consent or abandonment than those of most sending countries.<sup>243</sup> This problem can be eliminated if the orphan requirement was solely the responsibility of the sending country and regulated by neither the receiving country nor individual states within the receiving country.<sup>244</sup>

The second situation that generates multiple problems is when a conflict of law exists between the federal regulations of the receiving country and state laws within that country. Although state law generally governs adoptions due to its family law nature, federal law also governs international adoptions due

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238. *Id.* (citing Carlson, *supra* note 237, at 351-52).

239. *Id.* at 110.

240. *See id.*

241. *See* Carlson, *supra* note 237, at 341.

242. *See* Strong, *supra* note 56, at 174-75.

243. *See generally id.* at 172-76.

244. *See generally* Gold, *supra* note 235.



to its authority over immigration law matters.<sup>245</sup> Problems typically arise when the federal government of the receiving country, such as the United States, makes an initial determination as to the fitness of the prospective parents by conducting a home study, "a process for screening and preparing prospective adoptive parents."<sup>246</sup> Additionally, states are required to finalize the adoptions, where the state must determine what is in the best interests of the child by conducting an additional home study to determine "the compatibility of the [prospective parents] and the child."<sup>247</sup> However, allowing a state court to deny the domestic re-adoption of the child after the federal court granted the initial international adoption so late in the adoption process would be devastating to the child and families involved, defeating the whole purpose of home studies.<sup>248</sup> Therefore, either the state or federal government, not both, should regulate such activities.<sup>249</sup>

Lisa K. Gold comprehensively summarizes the federalization view in the conclusion of her article entitled, *Who's Afraid of Big Government? The Federalization of Intercountry Adoption*:

Intercountry adoption should be federalized because it would eliminate superfluous processes while still serving the best interest[s] of the child. By respecting sending countries' autonomy, eliminating the unnecessary orphan requirement, abolishing duplicative home studies, and burdensome court proceedings, the federal government can efficiently and effectively finalize intercountry adoptions and eliminate disastrous and traumatic results . . . . The federal government has taken the first step in establishing the home study regulations, and it can further facilitate the adoption process by granting citizenship, issuing visas and birth certificates, and awarding the final adoption decree—all through the convenience of the U.S. embassies. Executing intercountry adoption fully at the federal level will be less expensive, less time-consuming, more certain, and more efficient. All of the benefits of federalizing international adoption extend to both the sending and

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245. See Greg Waller, *When the Rules Don't Fit the Game: Application of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act to Interstate Adoption Proceedings*, 33 HARV. J. ON LEGIS. 271, 287-88 (1996).

246. Immigrant Petitions, 8 C.F.R. § 204.3(b), (e) (1998).

247. Carlson, *supra* note 237, at 353.

248. See *id.* at 353-54.

249. See generally Gold, *supra* note 235.

receiving countries, the prospective parents, and most importantly the children.<sup>250</sup>

Therefore, putting it that way, “when it involves the best interests of the children, who’s afraid of big government?”<sup>251</sup>

### C. *International Bodies*

Although the federalization of international adoptions makes for a more efficient process, it does not account for differences in standards for what is in the best interests of the child. For example, not all countries favor transracial, international adoptions.<sup>252</sup> The major advantage of an international regulation of international adoptions is that “it establishes a uniform set of minimum standards which member countries must follow in order to successfully complete an [intercountry adoption].”<sup>253</sup> The most recent international mechanism, the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, commonly referred to as the Hague Adoption Convention, states, “[T]hese standards are based on the rights and interests of all parties involved in transnational adoption,” including the child, the birth parents, and the adopting parents.<sup>254</sup>

The U.S. State Department is among many who strongly advocated for the adoption of the Hague Adoption Convention by pointing out a number of “[m]ajor advantages of the convention and its implementation.”<sup>255</sup> The Hague Adoption Convention:

- Provides, for the first time, formal international and intergovernmental approval of the process of intercountry adoption.
- Encourages intercountry adoption, as regulated by the Convention, as a means of offering the advantage of a permanent family to a child for whom a suitable family cannot be found in the child’s country of origin.
- Establishes a minimum set of uniform standards governing international adoptions. Every party country is

250. *Id.* at 130–31.

251. *Id.* at 131.

252. See generally Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 *YALE J.L. & FEMINISM* 101 (1998).

253. Jennifer M. Lippold, *Transnational Adoption from an American Perspective: The Need for Universal Uniformity*, 27 *CASE W. RES. J. INT’L L.* 465, 496 (1995).

254. *Id.*

255. Bureau of Consular Affairs, *Hague Convention on Intercountry Adoption*, at [http://travel.state.gov/adoption\\_info\\_sheet.html](http://travel.state.gov/adoption_info_sheet.html) (last visited Mar. 3, 2001).

able to promulgate or maintain further conditions and restrictions beyond those specified in the Convention.

- Establishes a Central Authority in each country to ensure that one authoritative source of information and point of contact exists in that country. In the U.S., authorities of other party countries and members of the American public will be able to look to the U.S. Central Authority for reliable information and assistance.
- Establishes reasonable certainty that adoptions decreed pursuant to the Convention will be recognized and given effect in all other party countries.
- Facilitates the adoption by U.S. adoptive parents of children from another party country by providing a justification for establishing a new category of children for immigration purposes. The Immigration and Nationality Act will be amended by the implementing legislation to establish a category of children adopted pursuant to the Convention, thereby streamlining U.S. visa procedures.<sup>256</sup>

Due to these and other advantages, the United States signed the Hague Adoption Convention on March 31, 1994, signaling its intention to proceed with ratification procedures.<sup>257</sup> Six years later, on October 6, 2000, former President William J. Clinton signed the "Intercountry Adoption Act of 2000," which will finally implement the Hague Adoption Convention in the United States.<sup>258</sup> After signing the bill, former President Clinton stated:

Adoption is an emotional event. With the complexities of international law and procedures, these cases are often overwhelming for the families involved. The Hague Convention and the implementing legislation will provide protections for children and parents engaged in intercountry adoption and will help ensure a standard of service that all families deserve.<sup>259</sup>

The main problem with any international mechanism is enforcement. For example, the Hague Adoption Convention's main requirement is that:

An adoption may take place only if: 1) *the country of origin* has established that the child is adoptable, that an intercountry adoption is in the child's best interests, and

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256. *Id.*

257. *See id.*

258. *See* William J. Clinton, President of the United States, *Statement by the President*, Federal Department and Agency Documents (Oct. 6, 2000).

259. *Id.*

that after counseling, the necessary consents to the adoption have been given freely, AND, [2]) the receiving country has determined that the prospective adoptive parents are eligible and suited to adopt, and that the child they wish to adopt will be authorized to enter and reside permanently in that country.<sup>260</sup>

As a result, applicability of the Hague Adoption Convention is dependent upon whether neither the sending nor the receiving country, one or the other country, or both countries are Member States to the Convention. In cases where neither country is a Member State to the Convention, this international mechanism would not bind the parties under international law.<sup>261</sup> In the case where one country is a Member State but not the other, the treaty may go so far as to prohibit the international adoption from even taking place.<sup>262</sup> It is only in the case where the international adoption is between two Member States to the Convention that the "treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>263</sup>

Therefore, since it is only where both countries are Member States to the international mechanism that international adoptions will be regulated under international law, it is paramount that all countries engaging in international adoptions ratify the Hague Adoption Convention.<sup>264</sup> It is important for developing countries, which typically have an abundance of children, and developed countries, which typically have a shortage of children, to cooperate in this endeavor, and signing on to this Convention is a positive step towards full cooperation. In sum, while the Hague Adoption Convention may not rectify every problem arising in international adoptions, it is currently the most comprehensive convention text we have that "seeks to develop international safeguards [to] (1) ensure that intercountry adoptions respect the best interests of the child and (2) establish a system for cooperation among the Contracting States that will guarantee that such safeguards are respected."<sup>265</sup>

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260. Bureau of Consular Affairs, *supra* note 255.

261. See MALONE, *supra* note 152, at 13.

262. See Lippold, *supra* note 253, at 499.

263. *Vienna Convention on the Law of Treaties*, May 23, 1969, art. 26, 1155 U.N.T.S. 331, entered into force Jan. 27, 1990.

264. See Lippold, *supra* note 253, at 499.

265. Lisa M. Katz, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT'L L. REV. 283, 326-27 (1995).

## CONCLUSION

International child adoption is the best solution to the world's problem of children without families and families without children. War, disease, and other disasters have left many of the developing countries around the world with an overwhelming surplus of children, who are left without homes and families to care for them. On the other hand, prosperity, technology, and other factors have left the industrialized countries around the world with a surplus of families looking to adopt children. International adoptions can tackle both of these problems simultaneously by providing an alternative that takes into account the best interests of the child and families involved, making it the most viable solution to this global problem.

Under the current system in the United States, persons wanting to complete an international adoption must satisfy the laws from three sources. First, the prospective adoptive parents must fulfill all of the requirements of the country in which the foreign child is from, particularly securing the release of the child. Second, the prospective adoptive parents must complete all of the Immigration and Naturalization Service's requirements in order to bring the child into the United States. Third, the prospective adoptive parents must meet all of the requirements of the state in which they reside in order to re-adopt the child in the United States.

Satisfying three different authorities of law can be confusing, expensive, and time consuming, not to mention even impossible in situations where there are conflicting regulations or where countries are restricting this practice. The solution to a more effective international child adoption system is two-fold: it is necessary for a convention text to condense the adoption process in order to complete these adoptions in a more efficient manner, as well as to accept a uniform set of standards in which to conduct the adoptions in order to protect the best interests of the child, the biological parents, and the adopting parents. Moreover, because this practice requires cooperation between the sending and the receiving countries, it is in the best interests of the child and families involved that a supervisory body be set up through the international community, not individual nations or states within a nation, to regulate international child adoptions.