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COMMENT

INTERNATIONAL ADOPTION: A STEP TOWARDS A UNIFORM PROCESS

I. INTRODUCTION

The desire to parent is one of the strongest drives known to mankind.¹ The inability to fulfill that need can be one of the most disheartening experiences.² In their quest to become parents,³ many Americans who are biologically unable to conceive have turned to international⁴ adoptions.⁵

Among the tragic consequences of World War II was the significant number of orphaned and abandoned children in need of homes.⁶ International adoption on a large scale was the remedy to this problem.⁷

From being a solution to a particular problem, . . . intercountry adoption not only continued at an ever accelerating pace up to the present, but also acquired a distinct character: from the 1950s

1. ELLEN PAUL, *ADOPTION CHOICES - A GUIDEBOOK TO NATIONAL AND INTERNATIONAL ADOPTION RESOURCES*, at xvii (1991).

2. *Id.* Perhaps parenting is, more than a privilege, a right as interpreted from the United Nations' Declaration on Human Rights which guarantees the right to found a family. Terence Shaw, 'Crisis' Over Foreign Adoption, *THE DAILY TEL.*, May 6, 1991, at 4.

3. The desire to become parents is the primary reason for Americans turning to international adoptions; others who are sympathetic to the plight of the overwhelming number of underprivileged children overseas have also engaged in the process of adopting abroad. Paul K. Driessen, *Immigration Laws, Procedures and Impediments Pertaining to Intercountry Adoptions*, 4 *J. INT'L L. & POL'Y* 257-258 (1974).

4. International, intercountry, and foreign will be used interchangeably throughout this Comment.

5. See Driessen, *supra* note 3, at 257-258; Pamela Ruth Zeller, *Latin American Adoptions in Connecticut - Is There Any Room For Lawyers?* 10 *BRIDGEPORT L. REV.* 115 (1989).

6. Francisco J. Pilotti, *Intercountry Adoption: a view from Latin America*, in *ADOPTION IN WORLDWIDE PERSPECTIVE* 143, 144 (R.A.C. Hoksbergen ed., 1986).

7. *Id.* at 143.

on, the process has involved countries with unequal levels of socioeconomic development and populations of different racial composition.⁸

The current trend is that most adoptable children come from less developed countries⁹ while the adoptive parents are citizens of more developed nations.¹⁰

Foreign adoption in the United States grew an average of eleven percent annually between 1968 and 1986, reaching a high of more than 10,000 in 1986.¹¹ In 1991, the number of children adopted by U.S. citizens declined to 9,008, with the highest number of children (3,194) coming from Asia, the second highest (2,761) coming from Europe¹², and the third highest (1,949) coming from South America.¹³

Numerous factors have contributed to the desirability and increased interest in foreign adoption.¹⁴ Such factors include: 1) a decline in the number of healthy American babies due to the increased availability of abortion and contraceptive use; 2) the increasing number of unwed mothers now keeping their babies due to the decreased stigma; 3) society's acceptance of adoption by single persons; 4) the increased number of Americans who postponed marriage and childbearing, only to find they are una-

8. *Id.* at 144.

9. *Id.* Asia, Latin America, and more recently, Romania and Russia. See Jane Truedell Ellis, *The Law and Procedure of International Adoption: An Overview*, 7 *SUFFOLK TRANSNAT'L L. J.* 361 (1983).

10. *Id.* Primarily, North America and Europe.

11. In 1970, foreign children accounted for only two percent of adoptions; in 1986, they accounted for approximately twenty-two percent, and about half of all the adopted infants. Robert Matthews, *Adoption*, *THE ECONOMIST*, July 12, 1986, at 8.

According to Mary Beth Seader, Vice President of the National Committee for Adoption, "the number of children coming from other countries to the United States for adoption doubled between 1982 to 1986 - from 5,207 to over 10,000." However, since 1987 there has been a slight drop because South Korea, where most of the children come from, changed its practice of allowing foreigner adoptions of its children without any regulations. Shrona Foreman, *Thousands of children are waiting to be adopted*, *USA TODAY*, Apr. 17, 1990, at 11A.

12. Out of the 2,761 coming from Europe, a prominent 2,552 children came from Romania. STATISTICS DIVISION, U.S. IMMIGRATION AND NATURALIZATION SERVICE, *IMMIGRANT-ORPHANS ADOPTED BY U.S. CITIZENS BY SEX, AGE, AND REGION AND COUNTRY OF BIRTH FISCAL YEAR 1991*, 2-3 (1993).

13. *Id.*

14. Jane Michaels, *Foreign Adoption It's a Growing Phenomenon*, *CHI. TRIB.*, Sept. 25, 1988, at 3.

ble to conceive; 5) the shorter waiting period for a foreign adoption (six months to one year, compared to as long as ten years for a healthy American Caucasian child); 6) the procedural "red tape" and stringent requirements for domestic adoption complicated by the involvement of United States adoption agencies in the adoption process; and 7) Americans' increased acceptance of people from other cultures.¹⁵

International adoption is not suitable for everyone. Often a photo and a short history of the child is the only information available to adoptive parents. The process requires flexibility through the application and waiting period. The legal requirements of a foreign country can change without notice and sources can become scarce at any time. The adoptive family must also have an appreciation of and a willingness to accept a child from a different racial background. As a biracial family, it must be sensitive to issues of racial identity and heritage. Although the family is not required to raise the child in his native culture, it is hoped that the adoptive parents will foster the child's own cultural identity.¹⁶

This Comment will review the international adoption process in the United States and the conflict of laws issues innate to the process. First, the adoption process in Latin America, Romania, and Russia will be examined, due to the current prominence of those countries in the international adoption scene.

15. *Id.*

16. *Id.* The Convention on the Rights of the Child is the first convention to address the need to protect the child's identity. 28 I.L.M. 1448, 1451 (1989). The disappearance of children during Argentina's repressive political regime was the impetus for Article 8 of the convention which states:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

Convention on the Rights of the Child, Nov. 20, 1989, Annex to GA Res 44/25, 28 I.L.M. 1456, 1460 [hereinafter Annex].

Furthermore, the U.S. Department of Health, Education and Welfare's Guidelines for adopting internationally state that parents must recognize the need to support the child's cultural, racial, and ethnic identity, extending into adulthood. AMERICAN PUBLIC WELFARE ASS'N, INTERCOUNTRY ADOPTION GUIDELINES 8, 47 (1980) [hereinafter U.N. Guidelines].

Second, the federal, state, and foreign elements that impact on the adoption process will be summarized. Third, the conflict of laws issues that arise because of inconsistencies between the state and foreign procedures will be examined. Next, the role of international treaties and conventions in the international adoption process will be reviewed. Finally, the new Convention adopted by the Special Commission of the Hague Convention will be analyzed. In conclusion, it is suggested that active participation and collaboration is required by all the countries involved in the intercountry adoption process to meet the needs of homeless children and adoptive parents.

II. THE ORIGINS OF THE CHILDREN

A. *Latin America*

Latin America has become a major supplier of children available for adoption.¹⁷ For Latin American countries, intercountry adoption introduces a relatively new phenomenon.¹⁸ These children have recently become available for international adoption due to economic, religious, and cultural conditions that prevent their placement within those countries.¹⁹

Intercountry adoption of Latin American children has caused concern, misunderstanding, and sometimes distress over foul dealing.²⁰ Latin American countries are often reluctant to allow foreign adoption because of their own ethnocentric bias.²¹ Also, these countries do not want to appear to the rest of the world as unable or unwilling to care for their own children.²² In addition, the Latin American governments regard international adoptions with disfavor because of the international press' continuous harangue against abuses of the adoption process with

17. Pilotti, *supra* note 6, at 143.

18. JAMES A. PAHZ, *ADOPTING FROM LATIN AMERICA: AN AGENCY PERSPECTIVE* 15 (1988).

19. Richard R. Carlson, *Transnational Adoption of Children*, 23 *TULSA L.J.* 317 (1988).

20. Pilotti, *supra* note 6, at 143. *See, infra* note 23, for an example.

21. Driessen, *supra* note 3, at 258. "[A] reaction little different from that which most Americans would display upon seeing our own orphaned children taken away to be raised in a non-American society." *Id.*

22. PAHZ, *supra* note 18, at 16. *See also* Driessen, *supra* note 3.

stories of unscrupulous entrepreneurs selling babies.²³

The direct result of these concerns of Latin American governments has been the enactment of stricter adoption laws. For example, in October 1990, the Brazilian Congress adopted the new "Statute of the Child"²⁴ which will make it more difficult for foreign couples to adopt Brazilian children.²⁵ The statute provides that children can only be adopted legally through Brazil's juvenile courts.²⁶ However, the enactment of this statute did not deter illegal adoptions because of the availability of an estimated seven million children who remain homeless.²⁷

Colombia is representative of the international adoption process in Latin America.²⁸ In January 27, 1990, a new Colom-

23. Pahz, *supra* note 18, at 15. See, e.g., Martina Crowley, *Trade in babies booms in Peru*, SUNDAY TIMES, June 16, 1991, available in LEXIS, Nexis Library, ("[T]rafficking in children has risen dramatically since austerity measures aimed at controlling the economy plunged millions into abject poverty").

24. John Follain, *Brazil Child Trafficking Ring Fights Off Italian Justice*, THE REUTER LIBR. REPORT, May 10, 1991, available in LEXIS, Nexis Library, Reuter File.

25. *Id.*

26. *Id.*

27. *Id.* In 1987, El Salvador and Honduras temporarily suspended foreign adoptions until new laws were enacted. Vivienne Walt, *Foreign Adoptions Open New World of Love*, NEWSDAY, Nov. 6, 1988, at 19. As of September 28, 1993, no new adoption law has been enacted.

On May 11, 1992, the Second Minors Court of Santiago and the Second Minors Court of Pudahuel in Chile temporarily suspended the processing of foreign adoptions. INT'L ADOPTION — CHILE, U.S. DEP'T OF STATE, CA/OCS/CCS, May, 1992.

In Ecuador, the government enacted the "Codigo de Menores" (Code of Minors) which included a detailed section pertaining to the adoption of Ecuadorian minors by foreigners, imposing various restrictions. Reglamento General para la Adopcion de Menores Ecuatorianos con Disposiciones Especiales para la Adopcion por parte de Connacionales y Extranjeros Residentes fuera del Ecuador [Special law for the adoption of Ecuadorean minors by foreigners not residing in Ecuador], Codigo de Menores, Ecuador, June, 1990 ch. 1, art. 2, [Ecuadorean court must issue the decree and the prospective parents must personally file the adoption petition].

Furthermore, in Bolivia, the Bolivian Juvenile Commissions', the Family Courts' and the regional Directorates for Minors' careful application of Bolivian regulations concerning adoption is a result of changes in Bolivian adoption law and practice in the last decade in an attempt to fight illegal trafficking in children. INT'L ADOPTION — BOLIVIA, U.S. DEP'T OF STATE, CA/OCS, July, 1992.

28. Most Latin American countries require adoptive parents to adopt the child in his/her native country. See *infra* note 56. Requirements for a Colombian adoption include: parental age - at least one of the adoptive parents must be between twenty-five and fifty years old; length of marriage - five years or more; single applicants - single women are acceptable for children over six years old; adoptive parents length of stay in Colombia - seven to ten days (during this week's stay, the adoptive parents will process

bian adoption law went into effect.²⁹ The law eliminates private adoption in favor of a system in which children may be placed for adoption only through the Colombian Family Welfare Institute and approved Colombian adoption agencies. The new law requires that every child must leave Colombia with a final adoption decree.³⁰ It also requires that both adopting parents be physically present when the adoption is presented to a family court judge in Colombia.³¹ Those Latin American governments that have legislated that all adoptions proceed through a government agency have eliminated many complications and costs. "Though working through a bureaucracy makes the adoption more cumbersome and slower, it removes the profit incentive from private attorneys and baby-brokers and makes the process safer for the adopting family."³²

B. Romania

Another country which has experienced drastic changes in its international adoption process is Romania. Romania's adoption industry flourished after the overthrow of the dictator Nicolae Ceausescu in December 1989, when the plight of tens of thousands of children in dilapidated public institutions received

the child's passport, medical examination, and immigrant visa application); documents required (application; first two pages of the previous two years 1040 Tax Form; certified copies of birth certificates for both spouses; certified copies of marriage certificate; certified copies of divorce decree(s), if applicable; three personal references; letter of employment; statement of good health from physician; personal statement of financial resources; bank statement for each bank account; FBI finger prints and clearance; approved home study from a licensed U.S. Agency; power of attorney to a Colombia attorney; and photographs of each spouse, any children in the family, front exterior of the home and child's proposed room); number of children allowed in home at placement - unspecified; and description of children - all ages (in practice, newborns are assigned to younger couples, and older children are assigned to older couples). PAUL, *supra* note 1, at 561. An exception to the general policy that the children be adopted in their birth country is the Dominican Republic, which gives legal guardianship to a United States citizen with the intent to adopt the child in the United States. INT'L ADOPTION—DOMINICAN REPUBLIC. U.S. DEP'T OF STATE, CA/OCS, July, 1992.

29. INT'L ADOPTION — COLOMBIA, U.S. DEP'T OF STATE, CA/OCS/CCS/ARA, Aug. 1992, at 1.

30. *Id.* After the initial processing is completed, the adopting process is estimated to take up to six weeks to be finalized. *Id.*

31. *Id.*

32. PAHZ, *supra* note 16, at 18.

extensive media coverage.³³

Prior to his overthrow in 1987, Ceausescu had refused to grant passports to more than two-hundred and fifty orphans waiting to be adopted by foreigners.³⁴ The difficult living conditions in Romania forced many women to send their children to live in orphanages. Ceausescu had banned abortion in Romania and by the time of his execution during the revolution, some 130,000 children were found to have been abandoned.³⁵ After his overthrow, unwanted children became a valuable commodity and entrepreneurs began to sell babies to Americans. In fact, in the last couple of years Romania has become the leading source of foreign adoptions by Americans.³⁶

On July 17, 1991, amendments to the Romanian adoption laws changed the procedures for adoption of Romanian children by foreigners. The amendments' purpose is twofold: 1) to eliminate private adoptions; and 2) to give priority to Romanian families in order to encourage domestic adoptions. Romania is trying to implement an organized, Government-controlled system modeled after those of other nations serving as major sources of children for international adoption.³⁷

The new amendments prohibit private adoptions by requiring foreigners to go through agencies in their own countries that have been authorized by the Romanian Adoption Committee.³⁸

33. Joan D. Ramos, *Ethical Questions About Adoption of Romanian*, SEATTLE TIMES, Apr. 1, 1991, at A7.

34. Aurora Mackey, *Americans Go Abroad for Adoption; Families: More Would-be Parents are Taking in Foreign-Born Children, Primarily Because of their Availability. The Obstacles However, Can Be Great*, L.A. TIMES, Jan. 18, 1990, at E1.

35. Roxana Dascalu, *New Romanian Law will Jail Baby-Traders for up to Five Years*, THE REUTER LIBR. REPORT, May 16, 1991, available in LEXIS, Nexis Library, Reuter File.

During the Ceausescu era, women were subjected to mandatory pregnancy tests and punished for not having children (at least five were expected from every loyal Romanian couple). Ramos, *supra* note 33.

36. Carol Lawson, *Doctor Acts to Heal Romania's Wound by Baby Trafficking*, N.Y. TIMES, Oct. 3, 1991, at C1.

According to the Immigration and Naturalization Service, 2,287 Romanian children were adopted by Americans from October 1, 1990 to September 4, 1991. *Id.*

37. *Id.*

38. There are currently five American adoption agencies authorized by the Romanian government to assist Americans in locating a child: Holt International Children's Services in Eugene, Oregon; Life Adoption Services, Inc. in Tustin, California; Welcome House Adoption Services in Doylestown, Pennsylvania; World Association for

Furthermore, the new law provides that the agency that represents the interests of the adoptive parents and the adoption committee will locate a child. This will eliminate the immediate need for the prospective parents to travel to Romania.³⁹ Romanian courts will only consider a child for adoption who is registered with the Romanian Adoption Committee.⁴⁰ The new law also requires a six-month waiting period before an international adoption can become final. During that six month period, efforts will be made to find the child an adoptive Romanian family. Only if those undertakings are unsuccessful will the child become finally eligible for foreign adoption.

The penalty for breaking the new law is one to five years in prison. United States immigration officials have issued an advisory warning alerting Americans that they may be subject to criminal prosecution if they attempt to evade the Romanian law by removing children from the country.⁴¹

The adoption process in Romania is controlled by the government. All matters regarding adoption in Romania are handled by the "Tutelary" Office⁴² in the locality where the child, his custodian, or his guardian lives.⁴³ Once it has approved the adoption, the Romanian government issues an Order of Adop-

Children and Parents in Seattle, Washington; and Bethany Christian Services in Grand Rapids, Michigan. ADOPTIONS IN ROMANIA, update as of July 1, 1992, U.S. DEP'T OF STATE, Washington, D.C.

39. *Id.*

40. *Id.*

41. *Id.*

42. The Romanian equivalent of the court of jurisdiction. The Tutelary Office requires the adoptive parents to supply the following documents: certified affidavit or statement of the intention to adopt; certified copy of birth certificate of the adoption applicant or a certified copy of the marriage certificate if the adopting parties are husband and wife; certified document of the social and economic status of the adoption applicants as provided by the local law of the adoptive parents; an affidavit under oath that the adoptive parents do not have a criminal record; and a document or statement under oath that the applicants are capable of nurturing, educating, and providing an adequate home and opportunities for the adopted child's development.

The Tutelary Office also requires the following documents pertaining to the child: certified copy of the child's birth certificate; certified copies of the child's biological parents' birth certificates or a certified copy of the child's biological parents' marriage certificate; an affidavit or certified statement by the biological parents consenting to the adoption, or if the child is under guardianship authority, the certified consent of that guardianship office; and a medical certificate indicating the health of the child. PAUL, *supra* note 1, at 567.

43. *Id.*

tion and a new birth certificate and passport to the child.⁴⁴

C. *Russia*

During the Communist regime, the Soviet Union did not allow foreign adoption of its children. As a result of the fall of Communism, the Russian educational authorities reached an agreement with American intermediary agencies that children who permanently remain in orphanages would be put up for adoption.⁴⁵ In 1991, for the first time, foreigners were able to adopt Russian children. Russia does not have a legal system to protect these children. As a result, numerous intermediary agencies have emerged eager to profit from adoption deals.⁴⁶

Two hundred and sixty seven children were adopted in 1992, with most of them going to United States families. In June of 1992, the United States Embassy issued seventy-seven visas for children adopted by Americans.⁴⁷ In July, 1992, however, these adoptions were suspended when the health ministry ordered local health officers not to process their medical documents.⁴⁸

In response to the chaos that ensued, the United States Embassy in Moscow and the Department of State warned Americans to exercise extreme caution in their pursuit of a Russian adoption. They strongly advised that only adoptive parents who are certain that their adoptions are complete should go to Russia. They further recommended that in pending cases, the prospective parents should rely on the advice of their local agency representative regarding the impact of any new procedures or changes. Finally, they cautioned that adoptive parents should not attempt a Russian adoption without the help of a licensed

44. *Id.* at 567-568. The passport is issued on the basis of the new birth certificate.

45. These children are disabled, racially or ethnically mixed, have a history of hereditary diseases, or have parents who have lost their parental rights because of abandonment or substance abuse. Approximately 150,000 children in Russia meet these criteria. Judi Buehrer, *Russia: Fraud Claims Suspend Foreign Adoptions*, INTER PRESS SERV., July 29, 1992.

46. Galina Bryntseva, *How Much are Russian Babies Worth in the Russian Market*, RUSSIAN PRESS DIG., Mar. 14, 1992, at 6.

47. Buehrer, *supra* note 45.

48. *Id.*

agency, registered with the appropriate Russian authorities.⁴⁹

III. THE ADOPTION PROCESS

An analysis of the international adoption process in the United States will give insight into the procedures and the problems that can arise. International adoption is a trifold process involving the law of the child's natural country, United States immigration law, and the law of the state where the adopting parents reside.⁵⁰

Adoption is considered from two standpoints: the status created by the new parent-child relationship and the rights flowing from that status.⁵¹ The federal government grants the right of nationality, citizenship, and their accompanying benefits. The state governments confer additional rights such as the right to the adoptive parents' name, the right to support from the adoptive parents, the right to recover damages in a wrongful death action, and the right to an intestate share in parental property.⁵²

A. Foreign Adoption Process

The child's country of origin determines where the adoption is to take place.⁵³ Whether a child is adoptable and able to leave his or her country must be established in order to meet the United States' immigration requirements.⁵⁴ Federal immigration law requires that the foreign adoption decree must comply with the rendering country's legal standards and will be deemed invalid unless an adoptive parent is personally present to observe

49. STATUS OF ADOPTIONS IN RUSSIA, U.S. DEP'T OF STATE, Washington, D.C.

As of the date of this publication, rumors exist that the Russian government has temporarily closed its doors to international adoptions of Russian children. The adoptions are expected to resume but with stricter guidelines. However, Vladimir Derbenev, a spokesman for the Russian Embassy in Washington, stated that no such ban exists. Ann Scales, *No longer an orphan*, THE DALLAS MORNING NEWS, Sept. 17, 1993, at 25A.

50. The term "states" as used throughout this Comment refers to the fifty states of the United States of America unless otherwise indicated.

51. Ellis, *supra* note 9, at 364; RESTATEMENT (SECOND) CONFLICTS OF LAWS § 263 (1969).

52. Ellis, *supra* note 9, at 364; RESTATEMENT (SECOND) CONFLICTS OF LAWS § 290 (1969).

53. Cynthia J. Bell, *Consent Issues in Intercountry Adoption*, 6 CHILDREN'S LEGAL RTS. J. 4 (1985).

54. U.N. Guidelines, *supra* note 16, at 59.

the child prior to or during the adoption proceedings.⁵⁵ The adoption may occur in the child's natural country⁵⁶ or alternatively the country may release the child for adoption in the United States.⁵⁷

B. Federal Immigration Requirements

In order to enter the United States, a child must meet United States immigration requirements.⁵⁸ The Immigration and Naturalization Act⁵⁹ contains specific provisions⁶⁰ pertaining to the immigration of children adopted abroad.

The prospective adoptive parents initiate the federal immigration process by requesting that the Immigration and Naturalization Services (INS) permit the child to enter the United States as a permanent legal resident.⁶¹ Adoptive parents must apply for such permission by filing an I-600⁶² petition or an I-

55. Ellis, *supra* note 9, at 373-374; 8 C.F.R. § 204.2(d)(4).

56. Romania, Russia, and the majority of Latin American countries require foreign adoption to take place in the child's country of origin. U.N. Guidelines, *supra* note 16, at 8.

Bolivia, Colombia, and Paraguay require both parents to travel to their countries to execute the adoption. Brazil, Chile, and the Dominican Republic require that one parent travel to their country. El Salvador and Guatemala are the exception, not requiring a visit to their countries. Zeller, *supra* note 5, at 126-127, n.87.

57. Ellis, *supra* note 9, at 362.

58. 8 U.S.C. § 1101 (1988).

59. June 27, 1952; 66 Stat. 163, 8 U.S.C. § 1101 (1988), amended July 1, 1992.

60. The provisions include an order of strict adherence to applicable state and foreign adoption law. 8 C.F.R. § 204.2-3 (1991); Ellis, *supra* note 9, at 362.

61. Ellis, *supra* note 9, at 362; it is the responsibility of the prospective adoptive parent to establish the child's adoptable status before a visa can be granted. Bell, *supra* note 53, at 2.

62. 8 C.F.R. § 204.1(b)(2)(i) (1988). The I-600 is a "Petition to Classify Orphan as an Immediate Relative."

Under § 201(b) of the Immigration and Naturalization Act, foreign children may gain entry into the United States as "immediate relatives." INT'L ADOPTIONS, U.S. DEP'T OF STATE, CA/OCS/CCS, Nov. 1992, at 3. An "immediate relative" is defined as "the children, spouses, and parents of a citizen of the United States." INA § 201(b)(2)(A)(i); 8 U.S.C.A § 1151(b) (1976).

The I-600 petition requires documentary proof of the adopting parents' United States citizenship, age, and marital status (if joint petitioners), as well as fingerprinting. 8 C.F.R. § 204.2(d)(1)(ii)-(iv). Petitioners must submit a valid home study in support of the petition to insure that the adopting parents will be suitable and capable. This home study must have "been favorably recommended by an agency of the state of the child's proposed residence, or by an agency authorized by that state to conduct such a study." 8 C.F.R. § 204.2(1)(i). "Whether a home study is satisfactory is contingent upon whether

600A⁶³ petition. In addition to providing for an investigation of the adoptive parents, the I-600 petition includes criteria which the child must fulfill to be adopted.⁶⁴

To be adoptable, the child must be an orphan⁶⁵ or, if the

it contains an evaluation of the adopting parents' capabilities to rear and educate the child, a description of the prospective parents' current residence, a description of the proposed residence of the child, and a statement signed by the appropriate agency official recommending the adoption." Ellis, *supra* note 9, at 371; 8 C.F.R. § 204.2(d)(2)(ii)(A)-(C). In the case of a child adopted abroad, the home study and recommendation must be provided "by an appropriate public or private adoption agency licensed in the United States." 8 U.S.C. § 1154; 8 C.F.R. § 204.2(d)(1)(i).

The I-600 form will be replaced by the I-130 form and a special Supplement C to the form. Austin T. Fragomen and Steven C. Bell, *Immigration Fundamentals*, at 3-22; 8 C.F.R. § 204.3(b) (proposed). The revised draft version of Form I-130 and Supplement C are currently at the Office of Management and Budget for approval. Interview with Stephen J. O. Maltby, Adjunct Professor of Law at Pace University School of Law and immigration attorney, in New York, N.Y. (Apr. 15, 1993).

63. *Id.* at § 204.1(b)(3)(i). The I-600A form is a petition for a child who is not yet known at the time of application but the prospective parents intend to go abroad to locate a child for adoption. 8 C.F.R. § 204.1(b)(3)(i)(A)-(C). The I-600A is a form which determines in advance the prospective parents' suitability as adoptive parents. Once a child is located, prospective adoptive parents must file a petition I-600 with the appropriate U.S. consular officer or INS office abroad or with their local INS office in the United States. 8 C.F.R. § 204.1(b)(2)(iii)(A); INT'L ADOPTIONS, U.S. DEP'T OF STATE, *supra* note 62, at 4-5.

64. *See infra* note 65.

65. INA § 101(b)(1)(F); 8 U.S.C. § 1101(b)(1)(F) (1988). Specifically, a child qualifies as an orphan if he is under sixteen years of age at the time the prospective parents file the petition. In addition, the child is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption. *Id.*

There are no guidelines as to whether a child qualifies as an orphan because he was unconditionally abandoned by his natural parents. Instead, the regulations describe situations that do not constitute unconditional abandonment. INT'L ADOPTIONS, U.S. DEP'T OF STATE, *supra* note 62, at 3. For example, a biological parent leaving her child at an orphanage as a dire necessity, as in wartime, does not constitute an abandonment which dispenses with consent. Voluntary abandonment is substantiated by an adoptive parent through proof of an intentional and willful disregard of parental obligations on the part of a biological parent. Bell, *supra* note 53, at 3. Moreover, the INS has ruled that children can be abandoned other than to an orphanage. For instance, "children of an adulterous relationship who have been ejected from their family homes can be considered abandoned." *Id.*; *Matter of Del Conte*, 10 I & N DEC. 761.

Irrevocably released means that a child who has been abandoned by both parents may meet the definition of orphan, for example, if the child has been unconditionally abandoned to an orphanage or legally documented as abandoned by a competent legal authority in the child's country of origin. INT'L ADOPTIONS, U.S. DEPT. OF STATE, *supra* note 62, at 3.

"In cases where the child was adopted abroad, the requirement of 'irrevocable re-

biological parents are living, be legally and irrevocably released before the adoption process can begin.⁶⁶ Valid consent or the documentation of conditions that dispense with parental consent is an additional requisite which must be met before the final adoption process can commence.⁶⁷ The final step to completing the petition is evidence that the prospective parents meet their state's preadoption requirements.⁶⁸ Once the prospective parents have all the pertinent information, they must verify the I-600 documents by oath and submit them in original form to an Immigration and Naturalization Office.⁶⁹ After the I-600⁷⁰ is approved, a medical examination must be given to the adopted child.⁷¹ After the child's good health has been determined by the medical examination and INS approval, the child receives a visa⁷² which the INS sends to the United States consulate or embassy in the child's country of origin.⁷³ The United States consular officer, in the child's country, must verify the facts stated about the child in the approved petition. The approved petition is returned to the INS office for reconsideration if the child's status as an orphan is questionable or if previously un-

lease in writing' is considered met if the certified copy of the adoption decree states that the child's sole or surviving parent has agreed to release the child for adoption." *Id.*

66. INT'L ADOPTIONS, U.S. DEP'T OF STATE, *supra* note 62, at 2. If a child does not meet the Immigration and Nationality Act's definition of an orphan, the child may qualify to enter the U.S. if the child was adopted before the age of sixteen and if the child has been in the legal custody of, and has resided with, the adopting parents for at least two years. The two-year legal custody and residence requirement may take place either before or after the adoption, but must take place before the issuance of a visa. *Id.* at 5.

67. Bell, *supra* note 53, at 3.

68. This step is required because in the United States, adoption law is state regulated; that is, each state has enacted or has power to enact its own adoption law. Pedro F. Silva-Ruiz, *Intrastate and Intercountry Adoption in the United States*, 38 AM. J. COMP. L. 155 (Supp. 1990).

69. 8 C.F.R. § 204.1(b)(1)(i) (1988).

70. If an I-600 petition is denied, the INS informs the petitioners of the reasons and the petitioners may appeal to the Board of Immigration Appeals. 8 C.F.R. § 204.1(b)(2)(ii).

71. 8 U.S.C. § 1201(d) (1976); 8 C.F.R. § 234 (1981).

72. The "visa 38" procedure is followed if the child is adopted abroad, and the "visa 39" procedure is utilized if the child is coming to the United States to be adopted. INT'L ADOPTIONS, U.S. DEP'T OF STATE, *supra* note 62, at 4. The fee for a visa is \$200. *Id.* at 6.

73. 8 C.F.R. § 204.3; U.S.C. § 1204 (1976). If requested, INS will also send notification of approval via telegram to help speed up issuance of the visa. INT'L ADOPTIONS, U.S. DEP'T OF STATE *supra* note 62, at 4.

identified medical information is discovered.⁷⁴ When the child arrives in the United States, the child surrenders his visa and receives an alien identification card which proves legal residency.⁷⁵

C. State Adoption Process

The United States Immigration and Naturalization Act does not require readoption when the child arrives in the United States.⁷⁶ Nevertheless, readoption in a court of the child's state of residence is highly recommended.⁷⁷ The primary reason for readoption is that foreign adoptions are recognized by only two-thirds of the states in the United States.⁷⁸ If the child is not readopted in a state court the status of the child will always be subject to challenge.⁷⁹ Readoption would give full faith and credit to the adoption decree thus eliminating the necessity of relying on comity.⁸⁰

The adoptive parents must fulfill adoption criteria in the state of residency,⁸¹ which generally are patterned after the INS

74. *Id.*

75. 8 C.F.R. § 221 (1981).

76. However, if the adoptive parent did not see the child prior to or during the full adoption process abroad, or if no formal adoption is required by the child's country of origin, the child must be readopted in the United States. INT'L ADOPTIONS, U.S. DEPT OF STATE, *supra* note 62, at 6. Furthermore, if no formal adoption is required by the child's country of origin, it will definitely be necessary for the child to be adopted in the state where the parents intend to reside with the child. *Id.*

77. Many adoption agencies and the U.S. Department of Health and Human Services have recommended readoption in the child's new resident state as additional security. IRVING J. SLOAN, THE LAW OF ADOPTION AND SURROGATE PARENTING 89 (1988); See also, U.N. Guidelines, *supra* note 16, at 41.

78. Bell, *supra* note 53, at 4, citing D. Hale, *Adopting Children from Foreign Countries*, 4 FAMILY ADVOCATE 32 (1981).

Even if the court in the original state of residence provides for recognition of foreign adoption under its statutes, this fact will not necessarily protect the child if the child moves into a state that does not grant comity to the foreign adoption decree.

79. For instance, the child's status may come into question during a contest over inheritance. If the court hearing the case decides not to grant comity, the child will lose his adopted status and his inheritance rights. The child's adopted status might also be challenged by the biological parents if they seek to set aside the adoption decree in state court. A biological parent may claim that his or her parental authority was not effectively terminated and may seek judicial review of the child's adoptable status although that status was determined by foreign law. Bell, *supra* note 53, at 4.

80. See *infra* part IV for comity discussion.

81. Ellen F. Epstein, *International Adoption: The Need For A Guardianship Provi-*

immigration requirements.⁸² These requirements safeguard against coercion or other improper influences on the biological parents' decision regarding relinquishment of the child. Most state laws require that a voluntary relinquishment⁸³ by the biological parents be in writing and witnessed, and a few states also require that the relinquishment occur in court.⁸⁴ Biological parents' rights to a child may cease when they surrender these rights, when their rights are terminated through the judicial process⁸⁵, or when the parents die.⁸⁶ Throughout the entire process, the best interest of the child is paramount.⁸⁷

D. *Federal Naturalization Requirements*

A foreign child adopted by a United States citizen must go through a naturalization process to become a citizen.⁸⁸ Once the state court grants a final adoption decree for the foreign child, the parents may then file immediately for naturalization of the child in order to afford the child rights and protection under the United States Constitution.⁸⁹

A child can be expeditiously naturalized as a citizen of the

sion, 1 B.U. INT'L L.J. 225, 242 (1982).

82. *Id.* State requirements include a waiting period, a home study, proof of consent, and a statement of financial position. *Id.*

83. A relinquishment is often required to be absolutely or conditionally revocable for a limited period of time after its execution. The child is not adoptable if a necessary relinquishment has been omitted or is defective. Carlson, *supra* note 19, at 336.

84. *Id.* Arizona, Georgia, and Tennessee require that the relinquishment be made in court. *Id.*

85. *Id.* at 337. A child may become adoptable where the courts intervened and involuntarily terminated parental rights in cases of egregious abuse, abandonment, desertion, neglect, or inability to support. If the birth parents' rights over the child are terminated involuntarily, their consent to the adoption is not required, but other relatives may still be entitled to notice and an opportunity to oppose an adoption. *Id.*

86. *Id.* However, the biological parents' death does not necessarily mean the child is adoptable. In some states, notice must be given to the deceased parents' relatives to allow them an opportunity to oppose the adoption, or a child would be placed with a guardian until he reaches majority. *Id.*

87. *Id.*

88. THE IMMIGRATION OF ADOPTED AND PROSPECTIVE ADOPTIVE CHILDREN, U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, [hereinafter U.S. DEP'T OF JUSTICE] M-249Y (Revised, 1990), at 25.

89. HOUSE COMM. ON THE JUDICIARY, H.R. REP. No. 1301, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S.C.C.A.N. 2301, 2307 (Legislative History of Pub. L. 95-417); See also Ellis, *supra* note 9, at 375-76.

United States.⁹⁰ An adopting parent may apply to the Attorney General of the United States for a Certificate of Citizenship for an alien adopted child. The Attorney General will issue a Certificate of Citizenship and the adopted child shall then automatically become a naturalized U.S. citizen once certain conditions have been established.⁹¹ The administrative process requires that the adoptive parents file an N-643⁹² before the child is eighteen years old. Once the Form N-643 is approved and the certificate of citizenship is issued, the child becomes a citizen of the United States.⁹³

Alternatively, a child may become naturalized through the judicial process.⁹⁴ This procedure requires the adoptive parents to file a Form N-402⁹⁵ with INS. Upon INS approval of this form, the parents and child appear before a district or state court judge to take an oath of allegiance. Thereafter, the judge grants a certificate of citizenship.⁹⁶

90. Sec. 341 of the INA was amended to add subsections (b)(1) and (b)(2), amendment of November 14, 1986.

91. The conditions are as follows:

(1) the adopting parent (and spouse, if married) are U.S. citizens,
(2) the child meets the qualifications of § 341 (c) (2) of the Immigration and Nationality Act. This section defines "child" for naturalization purposes. The required criteria are:

(a) the child be under the age of eighteen,
(b) the child was adopted before the age of sixteen by a U.S. citizen parent, and
(c) is residing in the United States in the custody of the adopting parent pursuant to lawful admission for permanent residence.
(3) the child is in the United States.

INT'L ADOPTIONS, U.S. DEP'T OF STATE, *supra* note 62, at 9.

92. Application for Certificate of Citizenship in Behalf of an Adopted Child. 8 U.S.C. § 1432(a)(2) (1976).

93. INT'L ADOPTIONS, U.S. DEP'T OF STATE, *supra* note 62, at 9.

94. U.S. DEP'T OF JUSTICE, *supra* note 88, at 25. However, the INS is trying to completely eliminate this alternative method since it is more complex and time consuming than the administrative process. Telephone Interview with B. Taylor, INS Information Officer, (June 15, 1993).

95. This form, entitled Application to File Petition for Naturalization in Behalf of Child, may be filed when the child is adopted and a lawful permanent resident. However, the child must be unmarried and under the age of eighteen. The naturalization process must also become complete before the child reaches eighteen years. U.S. DEP'T OF JUSTICE, *supra* note 88, at 25.

96. U.S. DEP'T OF JUSTICE, *supra* note 88, at 25; Telephone Interview with B. Taylor, INS Information Officer, (June 15, 1993).

IV. CONFLICT OF LAWS

Simply defined, adoption is "the relation of parent and child created by law between persons who are not in fact parent and child."⁹⁷ The statutory terms that define this relationship vary in different jurisdictions. These statutory differences create a conflict of laws.⁹⁸ Under general American principles of conflict of laws, United States courts will recognize "a valid judgment rendered in a foreign nation after a trial in a contested proceeding."⁹⁹ However, in international conflicts cases, American courts generally refuse recognition to foreign decrees based on "extralictitious" proceedings such as adoption or custody.¹⁰⁰

A. *The Principle of Comity*¹⁰¹

When a state presides over a foreign nation's adoption decree, it applies principles of comity. Recognition of a foreign decree is not automatic, but depends upon the parties' compliance with both foreign regulations¹⁰² and the American constitutional requirements of due process. Due process includes requirements of reasonable notice and opportunity to be heard,¹⁰³ and fairness

97. RESTATEMENT (SECOND) CONFLICT OF LAWS § 142 cmt. a (1934).

98. HERBERT F. GOODRICH & EUGENE F. SCOLES, CONFLICT OF LAWS (4th ed. 1964).

99. RESTATEMENT (SECOND) CONFLICT OF LAWS, § 98 (1969).

100. ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICTS OF LAWS 180 (1962).

101. The recognition that one sovereign gives within its territory to the legislative, executive, or judicial act of another sovereign, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws. BLACK'S LAW DICTIONARY 242 (5th ed. 1979).

102. United States immigration law requires a valid foreign adoption decree, or release for adoption. 8 C.F.R. § 204.2(d)(1)(viii) (1991).

103. RESTATEMENT (SECOND) CONFLICT OF LAWS, § 78 (1969).

Under RESTATEMENT OF CONFLICT OF LAWS § 136, the law of the forum state controls when examining the judicial notice and proof of foreign law. Each state court prescribes the need to give notice of the parties' reliance on foreign law, the required form of that notice, and the consequences of lack of notice. Additionally, the law of the forum state establishes how to prove foreign law and the likely result if it is not proven. *Id.*

"State courts evaluating whether notice and other aspects of due process were met abroad in the forming of adoptable status can take under advisement the societal conditions and cultural and legal practices in the sending country." Bell, *supra* note 53, at 6.

The domestic law of the adoption forum will be applied to determine a child's eligibility for adoption. *Id.* at 5. The validity of the consent will be upheld by the state court "if it is voluntary, knowing, and without fraud or unscrupulous practice." *Id.* "When an adoption petition is reviewed solely under local procedural law, the child's adoptable status accorded him/her in his/her homeland may be jeopardized." *Id.* at 6.

in securing parental consents to adoption or in terminating parental rights.¹⁰⁴ The decree must not offend the forum state's public policy.¹⁰⁵ Finally, although a foreign judgment may have satisfied the standards of forum law, it will be denied recognition if it fails to comply with its own jurisdictional requirements.¹⁰⁶

B. *The Act of State Doctrine*

The act of state doctrine requires a court to refrain from scrutinizing the validity of an act of a foreign nation that has exercised its jurisdiction to give effect to its public concerns.¹⁰⁷ The purpose of the doctrine is to deter a court from interfering with the federal executive branch in the exercise of its foreign relations power.¹⁰⁸ American adoptive parents may raise the act

104. Bell, *supra* note 53, at 6.

105. For example, public policy includes fairness in parental relinquishment. *Id.* See *Doulgeris v. Bambacus*, 127 S.E.2d 145 (1962) (Virginia court denied adoptable status of a child adopted in Greece without consent of the natural mother).

106. EHRENZWEIG, *supra* note 100, at 164. See *In re Chinsky's Estate*, 666, 159 Misc. 591, 288 N.Y.S. 666 (Surr. 1936) (to achieve recognition in state, asserted status must have been legally acquired at place of prior domicile of person asserting status); *Guaranty Bank & Trust Co. v. Gillies*, 83 A.2d 889 (1951) (Greek adoption in absentia denied recognition as contrary to forum conceptions); *In re Topcuoglu's Will*, 174 N.Y.S.2d 260 (Surr. 1958) (Turkish adoption not recognized because of fraud).

"If the foreign country has no formal adoption system or statute, the INS recognizes customary adoption, but only if that country's courts accept customary adoption as legally valid." Bell, *supra* note 53, at 6.

If the child enters the United States for its first and sole adoption, many states accord comity as to the adoptable status. *Id.*

But See, *Pemberton v. Hughes*, 1 Ch. 781 (1899) (where state failed to comply with its jurisdictional requirements but recognition given because foreign court was one of competent jurisdiction from an international point of view, and such recognition was not contrary to natural justice). However, this decision has been attacked as 'unsound.' EHRENZWEIG, *supra* note 100, at 164, n.8. See also *Anonymous et. al. v. Ingraham*, 371 N.E.2d 492 (1977) ("for purposes of statute requiring issuance of a new birth certificate on behalf of an adopted child upon presentation of papers showing that an order of adoption issued from a court of competent jurisdiction, Mexican order of adoption purporting to order the adoption be a New York couple of a child born in New York to a New York mother, was violative of New York public policy and could not be recognized under principles of comity"); *Tsilidis v. Pedakis*, 132 So.2d 9 (Fla. Dist. Ct. App. 1961) ("local forum need not adhere to or enforce incidents which, as to adoptive status created by foreign jurisdiction, are repugnant to local forum's laws or policy").

107. Carlson, *supra* note 19, at 358 citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS OF THE U.S. § 41 (1965).

108. *Id.*

of state doctrine argument against reexamination by the INS of the foreign court's determination that the child is adoptable.¹⁰⁹ However, the act of state doctrine is of limited usefulness in the context of an international adoption¹¹⁰ because it does not apply to the acts of all foreign officials or institutions.¹¹¹ Judicial acts are also excluded because they are seldom "act[s] of a sovereign state in its own public interest."¹¹² Since the process by which a child becomes adoptable is usually judicial, the act of state doctrine would not necessarily be applicable to a foreign state's termination of parental rights or to a foreign state's adoption decree.¹¹³ Furthermore, application of the doctrine presumes that the foreign state's law would normally govern the matter. However, it is not at all certain that foreign law still governs the adoptability of a child after the child has become a United States resident.¹¹⁴

V. THE ROLE OF INTERNATIONAL TREATIES AND CONVENTIONS

The legal framework of international adoption falls within the realm of private international law.¹¹⁵ The dilemmas arising out of the adoptions have traditionally been addressed by conventions and treaties, such as the Hague Conference on Private International Law¹¹⁶ and the European Convention on Adoption

109. *Id.* at 358.

110. *Id.* In re McElroy's Adoption, 522 S.W.2d 345 (Tenn. Ct. App.), *cert. denied*, 423 U.S. 1024 (1975) (petitioners invoked the doctrine in an attempt to prevent a Tennessee court's reexamination of a child's adoptability but the court asserted that the doctrine was applicable only to actions of "sovereign nations" and not to the actions of a political subdivision of a nation (decision that child was adoptable was made by municipal authorities, rather than the central government)).

111. Carlson, *supra* note 19, at 360.

112. *Id.*

113. *Id.*

114. *Id.*

115. ALBERT A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW, VOL. II SPEC. PART (1973).

116. Hague Conference on Private International Law Final Act of 10th Session, (Hague XIII), Nov. 15, 1965, Austria-Switzerland-U.K., 4 I.L.M. 338 [hereinafter Hague Conference]. This Conference produced a Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption of Children which drafted guidelines. Article 4 provides that the country with jurisdiction applies its law for the adoption. To prevent conflict of laws, the country of the adopter's residence shall respect any provisions which prohibit adoptions in the adopter's country of nationality. *Id.* at art. 4. As a catchall safeguard, the Convention provides that an adoption will be granted only "in the interest of the child." *Id.* at art. 6. The Convention also provides that adoptions "shall be

of Children.¹¹⁷ Significantly, the United States, Latin America, Russia, and Romania have not ratified the Hague Conference and the European Convention.¹¹⁸

Attempts to achieve uniformity amongst the world nations with regard to international adoption have been promising,¹¹⁹ while the United States' attempts to achieve uniformity among the individual states' adoption laws have proven to be ineffectual.¹²⁰ The lack of uniformity could violate the rights of those

recognized without further formality" in all contracting countries. *Id.* at art. 8. This provision would eliminate the need to readopt the child.

Although a signatory, the United States has not ratified the Convention, and therefore is not bound to abide by the rules contained therein. "[T]he main objection, from the United States point of view, is that the Convention would not insure recognition of all American adoptions and that the selection between the decrees entitled to recognition and those which are not is not based on compelling reason. Convention protection thus is not comprehensive." EUGENE SCOLES & PETER HAY, *CONFLICT OF LAWS*, 547. The "Convention is silent on a most important aspect - the effects (incidents) of adoptions." *Id.* at 548.

117. European Convention on Adoption of Children — Council of Europe, Apr. 24, 1967, 634 U.N.T.S. 255. The Convention aimed to reduce conflicts arising from differing views of countries as to the principles and practices with respect to the adoption of children and to promote the welfare of the children who are adopted. *Id.* at Preamble. Nonetheless, the Convention is vague in its wording and applicable only to the contracting countries.

In formal recognition of the concern of the international community to rehabilitate destitute children, the United Nations proclaimed 1979 as The International Year of the Child. The Convention on the Rights of the Child is a direct outgrowth of this proclamation. Convention on the Rights of the Child, Nov. 20, 1989, Annex to GA Res 44/25, 28 I.L.M. 1456. Article 21 provides that States parties shall:

(b) recognize that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it . . .

Id. at 1464.

118. See *supra* notes 116 and 117.

119. See, *infra* part VI on the International Co-operation and Protection of Children in Respect of Intercountry Adoption.

120. Uniform Adoption Act 9 U.L.A. 17 (1971). Only North Dakota, Montana, Ohio, and Oklahoma have adopted the Act.

Although the Act contains flaws, such as requiring the consent of the child's father only in certain circumstances and dispensing with parental consent in others, remaining silent on the subject of readoption, and failing to stipulate who may place children in adoptive homes, it is a step in the right direction. See Ellis, *supra* note 9, at 378-81.

children whom the adoption laws are intended to protect. Although state law adoption requirements vary, these statutes share many basic concepts such as consent, residency, and the status of adoption.¹²¹ Uniformity in the adoption proceeding among the states would provide a sound foundation which would allow the United States, as a nation, to enter into bilateral and unilateral treaties.

Bilateral or multilateral international treaties can help to bridge the differences between American and international adoption law.¹²² If a bilateral or multilateral treaty exists between the United States and another country, a recognized foreign adoption would be accorded the same rights as those adoptions granted in the United States.¹²³

Numerous conventions and conferences have offered proposed guidelines for international adoptions. In 1986, the United Nations General Assembly adopted a resolution dealing with the protection and the welfare of children, particularly concerning foster placement and adoption.¹²⁴ The resolution recognized the legitimacy of such adoption, and established the "best interest of the child" as the "paramount consideration" in establishing foster placement and adoption policies.¹²⁵ Specifically, it provides guidance which agencies and organizations interested in promoting and facilitating international adoptions can follow.¹²⁶ Although the resolution regards international adoption as one of the least desirable options, it "represents an important step toward endorsement by the international community of the legiti-

121. Generally, only the specific requirements within these categories may vary from state to state, e.g., duration of residency.

122. Silva-Ruiz, *supra* note 68, at 159-60.

123. *Id.* This is due to the fact that the Supremacy Clause of the United States Constitution ensures that federal laws, including federal treaties, preempt conflicting state laws. An example would be *Corbett v. Stergios*, 256 Iowa 12, 126 N.W.2d 342 (1964), where Iowa had denied inheritance rights to a child adopted in Greece and the U.S. Supreme Court reversed on the grounds of the bilateral treaty between Greece and the United States entitled U.S.-Greek Treaty of Friendship, Commerce and Navigation, 5 U.S.T. 1829, T.I.A.S. 3057 (in force since October 13, 1954).

124. 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 Dec 3, 1986 [hereinafter Declaration].

125. Elizabeth Bartholet, *International Adoption: Overview* 10-39-40 (1988). See Declaration, *supra* note 124, at Preamble and art. 5.

126. Declaration, *supra* note 124.

macy of international adoption."¹²⁷

In 1984, the Inter-American Commission for International Private Law of the Organization of American States (OAS) initiated an effort aimed at modernizing the existent Latin American treaties¹²⁸ by holding the Third Inter-American Conference which resulted in the Inter-American Convention on Conflict of Laws on the Adoption of Minors.¹²⁹ The Inter-American Convention applies to the adoption of minors and to the procedures that confer a legally established filiation, where the domicile of the adopter is in one state party and the habitual residence of the adoptee in another state party.¹³⁰ It provides for such matters as the secrecy¹³¹ and the irrevocability of adoptions.¹³² The Inter-American Convention further establishes the applicable law to govern the capacity to be an adopter,¹³³ the relations between the adopter and the adoptee,¹³⁴ and succession rights.¹³⁵

Furthermore, the OAS is in the process of drafting the Inter-American Convention on the Adoption of Minors.¹³⁶ This draft provides in part that the courts of a country in which the adopting parents are customarily resident may grant an adoption decree.¹³⁷ The adopted child's country of origin should not prevent the child from leaving the country after an adoption is granted in the absence of a public order or for police reasons.¹³⁸ This Convention is, however, not expected to be completed or in effect until well after 1993.¹³⁹

127. Bartholet, *supra* note 125, at 10-41.

128. In Latin America, international adoption is considered in two historic documents, the Bustamante Code of 1928 and the Montevideo Treaty of 1940. Pilotti, *supra* note 6, at 148. Nevertheless, these documents are now old and have little relevance to international adoption as practiced today.

129. Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, May 24, 1984, 24 I.L.M. 460 [hereinafter Inter-American Convention]. This Convention was ratified by Chile, Uruguay, Venezuela, Dominican Republic, Brazil, Haiti, Ecuador, Colombia, and Bolivia.

130. *Id.*, art. 1, at 460.

131. *Id.*, art. 7, at 461.

132. *Id.*, art. 12, at 462.

133. *Id.*, art. 8, at 461.

134. *Id.*, art. 9 and 10, at 461.

135. *Id.*, art. 11, at 461.

136. INT'L ADOPTIONS, U.S. DEP'T OF STATE, *supra* note 62, at 9.

137. *Id.*

138. *Id.*

139. *Id.*

More recently, the Hague Conference on Private International Law has recognized the necessity for a new international instrument to follow and go beyond the limits of the existing Hague Conference.¹⁴⁰ The expectation is that the new convention will address the problems connected with intercountry adoption of children from the Third World.¹⁴¹

VI. INTERNATIONAL CO-OPERATION AND PROTECTION OF CHILDREN IN RESPECT OF INTERCOUNTRY ADOPTION

As evidenced by the procedural flaws discussed above, the United States' international adoption process and the foreign adoption process demand reform. As they stand, the existing federal immigration standards are vague and the state adoption standards are often too rigorous.¹⁴² Relaxed procedures and standards may be proper at times of great urgency. However, fair standards that protect all the parties involved in the process are necessary for adoptions to be successful.

In addition, the foreign adoption process should be devised so that a final determination of adoptability is made at the beginning of the process in the child's country of origin.¹⁴³ Whether the child is adoptable is best ascertained where witnesses and documents are available, and not in a state court thousands of miles away.¹⁴⁴ An early determination of a child's adoptability would eliminate the unnecessary removal of a child from his or her homeland. That initial determination of adoptability should be given the same finality as a state court's determination of adoptability.¹⁴⁵

These proposals could be put into effect through the much-awaited Convention on International Co-operation and Protec-

140. Silva-Ruiz, *supra* note 68, at 160-61 quoting Hague Conference on Private International Law, *Note on the Desirability of Preparing a New Convention on International Co-operation in respect of InterCountry Adoption*, drawn up by Hans van Loon, General Affairs, Prel. Doc. no. 9, Dec. 1987, at 38. See *infra* part VI for discussion of new Convention.

141. *Id.*

142. Carlson, *supra* note 19, at 374.

143. *Id.* at 371.

144. *Id.*

145. *Id.* at 373.

tion of Children in Respect of Intercountry Adoption.¹⁴⁶ After painstaking deliberations, the Seventeenth Session of the Hague Conference on Private International Law adopted the final text of the Convention on May 29, 1993.¹⁴⁷

The primary purpose of the Convention is "to establish safeguards to ensure that intercountry adoptions take place in the best interest of the child. . . ."¹⁴⁸ The Convention is to apply to all adoptions between Contracting States.¹⁴⁹ An adoption pursuant to the Convention may take place only if:

the competent authorities of the *State of origin* have determined that the child is adoptable, that an intercountry adoption is in the child's best interest, and have ensured that the necessary consents to the adoption have been given freely, expressed or evidenced in writing after appropriate counselling about the effect of consent and whether it will result in termination of the parent-

146. 32 I.L.M. 1134 (1993) [hereinafter Convention].

147. The Special Commission of the Hague Conference on Private International Law prepared the preliminary draft Convention which was the working document at the session of the Hague Conference held from May 10 to 29, 1993. The Special Commission is composed of sixty-three countries, including the United States, six representatives from inter-governmental organizations and eleven representatives from non-governmental organizations. It is interesting to note that the Commission made a special effort to invite all the countries affected by intercountry adoption, including those in Latin America. See G. Parra-Aranguren, Report of the Special Commission, at Introduction 32-34 [hereinafter Parra-Aranguren].

The Commission met from June 11-21, 1990, from April 22 to May 3, 1991, and from February 3-14, 1992. The preliminary draft Convention, along with a Report prepared by Professor G. Parra-Aranguren of Venezuela, constitutes Preliminary Document No. 7 for the attention of the Conference's Seventeenth Session.

The Session adopted the final Convention text by a unanimous vote of the 55 countries present at the time. Brazil, Costa Rica, Mexico and Romania signed the Convention on May 29, 1993, thereby taking the first step towards final ratification of the Convention.

148. Convention, *supra* note 146, art. 1, at 1139. Article 1 specifically provides that the purpose of the Convention is:

- a. to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child with respect for his or her fundamental rights as recognized in international law;
- b. to establish a system of co-operation amongst the 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.

Id.

149. *Id.*, art. 2, at 1139. In the context of the Convention, "States" refers to sovereign nations.

child relationship, and, on the part of the mother, after the birth of the child,¹⁵⁰ and the competent authorities of the *receiving State* have 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 State.¹⁵¹

Every party State must establish a Central Authority¹⁵² whose function will be to cooperate in protecting the children and achieving the objectives of the Convention, and to provide information regarding their State's adoption laws and other general information.¹⁵³ The process will be expedited by having the Central Authority in the child's country of origin working with the Central Authority of the receiving state, as the single point of contact. As a result, much of the bureaucracy, confusion, and instability formerly experienced will be eliminated.

Moreover, independent or private adoptions may take place under the Convention.¹⁵⁴ However, both the State of origin and the receiving State must permit private adoptions and they are subject to the same provisions and procedures of the Convention as agency adoptions.¹⁵⁵

The Convention specifically provides that adoptions certified¹⁵⁶ as made in accordance with the Convention shall be recognized by operation of law in the other party States.¹⁵⁷ Thus,

150. *Id.*, art. 4, at 1139-40.

151. *Id.*, art. 5, at 1140; Peter H. Pfund, 1993 HAGUE CONVENTION ON INTERCOUNTRY ADOPTION. BRIEFING PAPER, U.S. DEP'T OF STATE, Washington, D.C., at 6.

152. Convention, *supra* note 146, art. 6, at 1140.

153. *Id.*, art. 7, at 1140.

154. The Convention provides that the Central Authorities' functions may be performed "also by persons or bodies who meet the requirements of integrity, professional competence, experience, and accountability of that State" and "are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption." *Id.*, art. 22 (2) a and b, at 1142.

155. Pfund, *supra* note 151, at 7.

156. The Convention does not establish who makes this certification. Mr. G. Parra-Aranguren suggests that each contracting State be required to designate the competent authorities for this function. Parra-Aranguren, *supra* note 147, para. 259, at 128. Another commentator agreed with that suggestion and added that such a designation would reduce the conflict between the goal of the convention to achieve automatic recognition and the fear that such automatic recognition would extend to adoptions not made in accordance with the Convention. Gloria F. DeHart, Comments on Adoption Convention Draft, Dec. 16, 1992, at 10.

157. Convention, *supra* note 146, art. 23, at 1142.

an adoption conducted pursuant to the Convention would automatically be granted full faith and credit in the receiving State. Due process would no longer be an issue.¹⁵⁸ However, the drafters qualified the recognition provision by adding that "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."¹⁵⁹

Prior to adoption of the Convention, there was strong opposition to this public policy exception.¹⁶⁰ It was felt that non-recognition would result in the child's status remaining in limbo, and the stability of the relationship subject to constant doubt. Yet, this exception was allowed because a rule of absolute recognition could have been used by unscrupulous individuals to undermine some of the protections the Convention sought to ensure.¹⁶¹

The Convention provides a framework laying out minimum norms and procedures that have been internationally agreed upon to protect the children involved in such adoptions and the

158. See *supra*, part IV discussion.

159. Convention, *supra* note 146, art. 24, at 1142. The motivation behind this exception is the necessity of relying on the authority of the State of adoption. DeHart, *supra* note 156, at 10; Parra-Aranguren, *supra* note 147, para. 262, at 130.

160. This exception has been the focus of numerous commentators, one of whom stated, "if an adoption completed according to the Convention can be denied recognition, the guts of the Convention are in effect cut out." Joan H. Hollinger, reporter, NCCUSL Proposed Uniform Adoption Act; Editor, *Adoption Law and Practice*, memorandum to Members of Study Group on Intercountry Adoption, Jan. 5, 1993.

Hollinger also stated opposition to requiring 'second' adoptions in this country for adoptions completed by American citizens in another country. "We favor a simple, expeditious recognition procedure to permit adoptive parents to file a copy of their adoption decree in the state where they reside and obtain, in exchange, a state-issued certificate of adoption that would be as valid as a certificate or decree of adoption issued for an adoption completed in this country." *Id.* at 1.

Another commentator expressed her disapproval of the provision by stating that "permitting the question of recognition to be litigated on a different standard in each contracting State makes a mockery of the Convention's goals, the careful procedures and standards required, and the efforts of authorities in carrying them out." DeHart, *supra* note 156, at 1.

161. Hollinger, *supra* note 160, at 2; DeHart, *supra* note 156, at 11. Some public policy reasons for not recognizing an adoption were abduction of the child from its biological parents and fraudulently obtained consents from the biological parents. Other significant problems in the parent-child relationship, such as child abuse, should be addressed by the State's usual child protection laws, but should not raise a question of recognition. *Id.*

interests of the two sets of parents involved. The Convention sets out only a framework of cooperation to encourage acceptance, and any country becoming a party to it may unilaterally establish additional requirements.¹⁶²

This Convention offers numerous advantages. One such advantage is uniformity of the foreign adoption process through federal implementing legislation, thereby eliminating the need for readoption in the United States.¹⁶³ Second, a new category of children adopted under the Convention may be established by Congress, facilitating the adoption of children from other Party States by prospective adoptive parents residing in the United States.¹⁶⁴ Another benefit is that it counteracts the ambiguous language of the Convention on Rights of the Child¹⁶⁵ by recognizing intercountry adoption as a viable alternative, rather than as a last resort for children.¹⁶⁶

The United States should play a primary role by embracing the international community's attempt to achieve uniformity in international adoptions through the Convention. This Convention will facilitate intercountry adoptions; since United States citizens continue to look to other countries as sources of adoptable children, it is in the United States' interest to encourage ratification of the Convention as a means to expedite the process.¹⁶⁷

VIII. CONCLUSION

International adoption meets the needs of two groups: the adoptive parents and the thousands of children in need of homes. Greater attention must now be focused on the unique problems of international adoption so that the process will not be jeopardized. Because international adoption mostly concerns

162. Pfund, *supra* note 151, at 4.

163. *Id.*

164. *Id.* at 5.

165. 28 I.L.M. 1448 (1989). *See, supra* note 117.

166. Pfund, *supra* note 151, at 4.

167. A Study Group on Intercountry Adoption, headed by Mr. Peter H. Pfund, the Assistant Legal Adviser for Private International Law, has been diligently working at preparing the federal implementing legislation draft for administrative clearance, which is planned for introduction early in 1995. Mr. Pfund expects to recommend that the United States sign the Convention early in 1994. Peter H. Pfund, Memorandum dated Nov. 23, 1993, OFFICE OF THE LEGAL ADVISER, Washington, D.C.

the governments and citizens of Latin American, European, and North American countries, the active participation and collaboration of all these countries is required to create efficient procedures which also protect the rights of the individual parties. The Convention is just the beginning. These countries must not only ratify the Convention, but become actively involved in its operation.

The need to create a uniform process within the United States governing international adoption is crucial. Family and social stability, inheritance and property rights and even American foreign relations are all at stake. The Convention can serve as one mechanism for achieving this objective, since ratified treaties take priority over inconsistent state laws. The Convention must therefore be ratified, and Congress must create an enabling act to implement it.

All parties interested in promoting international adoption must work together to meet the challenge of providing permanent families for homeless needy children. The adoption process must be efficient and predictable. It must also contain adequate safeguards to ensure that the best interests of each child are furthered and that the rights of the biological and adoptive parents and the countries involved in the exchange are all protected.

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