

Angelina and Madonna: Why All the Fuss? An Exploration of the Rights of the Child and Intercountry Adoption within African Nations

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In July of 2005, it was reported that Angelina Jolie was adopting a baby girl from the African country of Ethiopia.¹ Jolie used a private adoption agency to facilitate the proceeding and was under the belief that the baby's parents had died from AIDS. An Ethiopian official pointed out that Jolie had met the two most important conditions for adoption, which are "economic capabilities" and passing a background check with the police.² Jolie named the baby Zahara Marley Jolie, and the adoption went relatively smoothly, with the media largely praising Jolie for her benevolent disposition which motivated her to give Zahara a life with more opportunities.

In October of 2006, it was reported that Madonna intended to adopt a child, David Banda, from the African country of Malawi.³ Madonna, who helps to fund six orphanages in the country, evidently spent almost a year attempting to adopt a child.⁴ She was granted only temporary custody of David, and child welfare was charged to regularly monitor and assess the family at their residence in England over a period of eighteen months.⁵

The reaction to the Jolie intercountry adoption stands in sharp contrast to the international criticism Madonna has faced as a result of her attempt to adopt David from Malawi. Madonna spent a great deal of time defending the adoption,

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¹ Ian West, *Angelina Jolie Adopts Ethiopian Girl*, USA Today (July 6, 2005), available online at <http://www.usatoday.com/life/people/2005-07-06-jolie-baby-girl_x.htm?csp=34> (visited Apr 21, 2007).

² Id.

³ Karen S. Shneider, *Madonna's Adoption Controversy*, People 60, vol 66 no 18 (Oct 30, 2006).

⁴ Id.

⁵ Id.

not just in the media, but also in court. There have been accusations that Madonna did not follow the proper procedures when adopting David despite being granted an interim adoption order by Malawi's High Court in October.⁶

There are two significant differences between Madonna's adoption of David and Jolie's adoption of Zahara. First, Malawi has a state provision which bars adoption by any applicant who is not a resident of Malawi, and there are individuals who believe this should be interpreted to mean that international adoptions are illegal.⁷ The second significant difference is the fact that Madonna was aware that David's father was alive and met with him before the adoption took place.⁸

This Development primarily attempts to address the concerns that are associated with the latter of the two differences. David's birth father stated that he placed his son in an orphanage, after the death of his wife, for fear that David would die if he remained in his father's care.⁹ This fear was not motivated by concerns that he might intentionally harm his son, but rather was a result of his inability to provide David with the food and medicine necessary for his survival.¹⁰ Already having lost two children to malaria, David's father sacrificed a relationship with his son with the hope that David would have a better life.¹¹

This Development argues that the international community should focus its energy on finding ways in which to support African families. Birth parents need this support so that they are not forced to place their children into orphanages when the child has family members who are willing but unable to care for them. African children who are placed in orphanages are often adopted by individuals living outside of Africa, thereby leaving them without connections to their countries of origin. This Development further supports the goals laid out in the African Charter on the Rights and Welfare of the Child ("African Charter"),¹² which include restricting intercountry adoption to an option of last resort. Although this Development seeks to encourage the international community to help improve the situations of citizens in African countries, it

⁶ Associated Press, *Madonna: Media Fanned Adoption Dispute*, USA Today (Nov 5, 2006) available online at <http://www.usatoday.com/life/people/2006-11-05-madonna-media_x.htm> (visited Apr 21, 2007).

⁷ Schneider, *Madonna's Adoption*, People at 60 (cited in note 3).

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² African Charter on the Rights and Welfare of the Child (1990), OAU Doc. CAB/LEG/24.9/49 (1999), available online at <<http://www.africa-union.org/root/au/Documents/Treaties/Text/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf>> (visited Apr 21, 2007).

does not argue that intercountry adoption is wrong or that intercountry adoptions should be discontinued. Instead it attempts to show that intercountry adoption should not be seen as a solution to a much greater problem. If and when intercountry adoption is allowed, it should be properly implemented, monitored, and enforced, while conclusively evaluating the possible effects, both negative and positive, of intercountry adoption on the child.

Part I introduces a brief history of Africa, which is followed in Part II by an investigation into the roles played by the different treaties that address intercountry adoption. These treaties have different requirements and preferences and play an important role in determining what ensures that an intercountry adoption is in fact “legal.” Part II also discusses the growing popularity of international adoptions within the US.

This Development next investigates whether intercountry adoption is in the best interest of the child. Part III analyzes a South African court’s decision in *Minister for Welfare and Population Development v Fitzpatrick*¹³ where the court found a provision of South Africa’s constitution unconstitutional.¹⁴ The provision had restricted adoption to South African citizens, therefore disallowing non-citizens from adopting children from South Africa.¹⁵ The restriction was found to be inconsistent with another section of the constitution which enumerated the rights of the child.¹⁶ Part IV then discusses some of the pitfalls associated with allowing intercountry adoption, including issues regarding: the rights of the birth parents, the implications of trans-racial adoptions, gender preferences, child trafficking, and mechanisms for enforcement. Part V concludes by attempting to determine how the international community and implicated authorities should define “best interests of the child.”

I. CIRCUMSTANCES LEADING TO PRESENT-DAY AFRICA

Intercountry adoption is not a recent phenomenon, but the growing popularity, particularly in the US, of adopting children from African countries makes one wonder what might have contributed to the increase.¹⁷ While it is extremely difficult to conclusively state the main causes for the increased intercountry adoption of African children, a brief review of the historical background of the continent can serve to frame the current societal situation.

¹³ 2000 SACLX LEXIS 68 (South Africa).

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ See Part II.B.1–2 for further discussion regarding the growing popularity of intercountry adoptions in the US.

A. COLONIALISM IN AFRICA

The impact of colonialism in Africa is one of the most important contributing factors necessary for understanding the development of Africa. There were three major European countries which colonized the majority of Africa: the British, the French, and the Portuguese.¹⁸ Colonization of Africa was formalized at the Berlin Conference of 1884-1885 when the major European countries met and partitioned Africa.¹⁹ These boundaries were drawn in order to avoid conflict amongst the European powers, and were made without regarding the natural ethnic and cultural divisions of the African people.²⁰

Despite arguments that colonialism was detrimental to African society, and specifically to African culture, there are five basic benefits that scholars agree resulted as a consequence of colonialism.²¹ These benefits included the introduction of Western medicine and formal education.²² In addition, the colonial powers helped to establish infrastructure mechanisms which laid the foundation for African leaders to build “their new national institutions.”²³ Colonialism also led to the introduction of Islam and Christianity, which simplified African spirituality, giving Africans with diverse backgrounds additional points of commonality.²⁴ Finally, the boundaries that were drawn by the colonial powers enabled countries to be created without the usual lengthy process of state-formation.²⁵

B. EFFECTS OF WORLD WAR I AND II

Approximately one million Africans were drafted to serve during World War I, and two million in World War II.²⁶ The two world wars contributed to the eventual deterioration of economic conditions in Africa.²⁷ Some of these effects included “high unemployment, accelerated rural-urban migration resulting in overcrowded cities, inadequate schools, and health facilities.”²⁸

¹⁸ Vincent B. Khapoya, *The African Experience 2* (Prentice Hall 1998).

¹⁹ *Id.*

²⁰ *Id.* at 112.

²¹ *Id.* at 144.

²² *Id.*

²³ *Id.* at 145.

²⁴ *Id.*

²⁵ *Id.* at 146.

²⁶ *Id.* at 158.

²⁷ *Id.* at 160.

²⁸ *Id.*

After World War II the United Nations was formed.²⁹ This was significant because African nations were able to use the United Nations as a “forum to press for their people’s right to be free.”³⁰ The United Nations eventually addressed the issue of “non-self-governing territories” and recommended that its members develop regimes of self-government that would take into account the political aspirations of the people, as well as “assist them in the progressive development of their free political institutions . . . according to the . . . varying stages of advancement.”³¹ As a result of these, and many other factors, Britain and France began to search for ways to withdraw from Africa after World War II.³²

C. AFRICAN INDEPENDENCE

The European colonists began giving African leaders political authority and control over the different state governments in the early 1950s.³³ These new leaders, however, inherited problems with these new nations, which significantly influenced the future political environment within Africa.³⁴ A major problem included the territorial and ethnic divisions which contributed to political instability.³⁵ These divisions were the result of the arbitrary boundary lines drawn by the colonial powers.³⁶ As a result of these and other problems, the new African leaders had to decide how to gather the support of the people, while building cohesive government structures.³⁷ They also had to find ways to increase their citizen’s productivity, in an effort to increase the overall standard of living.³⁸

In an attempt to solve problems and reach the necessary goals, many African leaders attempted to create a sense of legitimacy and support for the government through the establishment of “one-party states,” which included

²⁹ Id at 168.

³⁰ Id.

³¹ Id.

³² Id at 160.

³³ Id. For the most part, these transitions were peaceful, but exceptions include the countries of Algeria, Zimbabwe, Namibia, Mozambique, Angola, Guinea-Bissau and South Africa. Id.

³⁴ Id at 183.

³⁵ Id at 184. See 184–90.

³⁶ Id at 187.

³⁷ Id at 190.

³⁸ Id at 190–91.

socialist forms of government.³⁹ These decisions eventually caused persistent political and economic difficulties.⁴⁰

The 1980s made obvious the weakness of Africa's national economies, and severely damaged the possibility of "reasonable economic growth and prosperity."⁴¹ As a result of a growing dependency on foreign aid and loans to remain financially solvent, the total debt of African countries was over 260 billion dollars by 1990.⁴² This was a significant amount due to the weakness of most African countries' economies.⁴³

These conditions eventually led many African countries to change their views of government, which led to a new preference for democratic institutions.⁴⁴ By 2002, the Secretary-General of the United Nations, Kofi Anan, stated that "[t]he struggle for democracy, development, human rights and good governance in Africa may well [have] reach[ed] what has been called the 'tipping point.'"⁴⁵ There are, however, still challenges to be faced. In order to obtain legitimate democratic governments, countries need additional "institutional checks and balances, an independent judiciary, viable political parties, a free press and the freedom of each individual to express his or her ideas without fear of retribution."⁴⁶

D. EFFECTS OF THESE CHANGES ON INTERCOUNTRY ADOPTION

While the above can only serve as a brief introduction to the historical frameworks which have led to the Africa of today, it does help explain the current political, cultural, and financial situation within Africa. Understanding the historical framework of Africa may help in understanding why the Organization of African Unity ("OAU")⁴⁷ felt the need to supplement other international treaties regarding the rights of the child with the African Charter.

³⁹ Id at 191. Please note that some countries which insisted that they were pursuing "African socialism" were in fact practicing a form of capitalism or mixed economy. Id at 205-06.

⁴⁰ Id at 191.

⁴¹ Id at 211.

⁴² Id.

⁴³ Id.

⁴⁴ Id at 216.

⁴⁵ Secretary-General Kofi Anan, Godkin Lecture at the Kennedy School of Government, Harvard University (Apr 25, 2002), available online at <<http://www.un.org/News/Press/docs/2002/sgsm8209.doc.htm>> (visited Apr 21, 2007).

⁴⁶ Id.

⁴⁷ Id at 2.

II. CONVENTIONS AND TREATIES DEALING WITH INTERCOUNTRY ADOPTION AND THE RIGHTS OF THE CHILD

Determining how best to regulate and monitor intercountry adoptions is an issue that the international community has attempted to address for over a decade. There have been several treaties and conventions that have either specifically focused on the issue of intercountry adoption or addressed the issue of intercountry adoption within a broader discussion of the general rights of children. This Development analyzes the requirements and guidelines set forth in three treaties: the International Convention on the Rights and Welfare of the Child (“CRC”), the Hague Convention on Intercountry Adoption (“HCIA”), and the African Charter. Analyzing the goals of these different treaties and their signatories yields a better understanding of the importance of children’s rights and proper intercountry adoption procedures to the international community.

A. INTERNATIONAL CONVENTION ON THE RIGHTS AND WELFARE OF THE CHILD

The CRC entered into force on September 2, 1990 and appears to have a similar purpose to that of the HCIA and the African Charter.⁴⁸ All three treaties mention that a child has the right to “grow up in a family environment, in an atmosphere of happiness, love and understanding.”⁴⁹ The CRC also highlights the importance of the family, stating that “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.”⁵⁰ The CRC dictates that when making determinations about children, it is important to take account “of the traditions and cultural values of each people for the protection and harmonious development of the child.”⁵¹ One commentator has noted that the CRC is mainly concerned with the “sexual and economic exploitation; abduction of, sale of, and trafficking in children; and the use of children as combatants in armed conflicts.”⁵²

⁴⁸ Although the CRC has been ratified by almost every country in the world, it has yet to be ratified by the US. Linda J. Olsen, *Live or Let Die: Could Inter-country Adoption Make the Difference?*, 22 Penn St Intl L Rev 483, 508, 520 (2004).

⁴⁹ Convention on the Rights of the Child (1989), 18 ILM 1448 (1989), available online at <<http://www.unhchr.ch/html/menu3/b/k2crc.htm>> (visited Apr 21, 2007) (“CRC”).

⁵⁰ Id at Preamble.

⁵¹ Id.

⁵² Olsen, 22 Penn St Intl L Rev at 512 (cited in note 48).

The CRC goes on to define the term “child” as a human being under the age of eighteen.⁵³ It also stresses that all actions taken by public and private welfare institutions concerning the child must be completed with the best interests of the child as a primary consideration.⁵⁴ Notably, the child is given the right “to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”⁵⁵

Article 18 is especially interesting as it appears to give a right to the birth parents of children to have appropriate resources provided for them so that they are able to act in the best interests of their children. It highlights that while parents or legal guardians have the primary responsibility for the upbringing of their child, the most important concern should be the best interests of the child.⁵⁶ In order to achieve this goal, states should provide “appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.”⁵⁷

Article 21 specifically establishes a set of standards dealing with intercountry adoption. The CRC, like the HCIA and the African Charter, states that the adoption of a child must be authorized by “competent authorities” who have the ability to determine whether the adoption is accompanied by appropriate consent by the birth parents.⁵⁸ The CRC also states that intercountry adoption should be considered only after a determination that suitable placement cannot be found in the child’s country of origin.⁵⁹

B. HAGUE CONVENTION ON INTERCOUNTRY ADOPTION

The HCIA⁶⁰ entered into force on May 1, 1995.⁶¹ The HCIA states that children should “grow up in a family environment, in an atmosphere of

⁵³ CRC, art 1 (cited in note 49).

⁵⁴ *Id.*, art 3.

⁵⁵ *Id.*, art 8.

⁵⁶ *Id.*, art 18(1).

⁵⁷ *Id.*, art 18(2).

⁵⁸ *Id.*, art 21(a).

⁵⁹ *Id.*, art 21(b).

⁶⁰ The HCIA was previously known as the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption. See *State Department Issues Final Rules on Intercountry Adoption*, available online at <<http://usinfo.state.gov/eur/Archive/2006/Feb/16-194133.html>> (visited Apr 21, 2007).

⁶¹ Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (1993), 32 ILM 1134, available online at <http://www.hcch.net/index_en.php?act=conventions.text&cid=69> (visited Apr 21, 2007).

happiness, love and understanding,” while recognizing that “each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin.”⁶² The HCIA also emphasizes that states should work to ensure that intercountry adoptions proceed only when in the best interest of the child and that such adoptions are done in such a way as to “prevent the abduction, the sale of, or traffic in children.”⁶³

Chapter II, Articles 4–5, of the HCIA lays out the requirements for intercountry adoption. An adoption is only allowed once the “competent authorities of the State of origin” have determined: (1) that the child is in fact adoptable; (2) that efforts have been made to place the child within the State of origin and found that intercountry adoption is the best option; (3) that all appropriate consents have been given freely, without coercion or compensation of any kind; and (4) that the child, depending on age and maturity, fully understands and consents to the adoption without coercion or compensation.⁶⁴ The “competent authorities of the receiving State” must then determine whether the prospective adoptive parents are “eligible and suited to adopt” and have been counseled as deemed necessary, and whether the child will be authorized to enter and permanently reside in the receiving State.⁶⁵

In Chapter II, Articles 14–21, the HCIA outlines the “Procedural Requirements in Intercountry Adoption.” If a citizen of State A, the receiving state, wants to adopt a child from State B, the citizen must apply to the “Central Authority” in his State of residence.⁶⁶ If State A is satisfied that the applicant from State A is suitable to adopt, State A must then prepare a comprehensive report with information about his “suitability to adopt, background, family and medical history, social environment, reasons for adoption, [and] ability to undertake an intercountry adoption,” and send this report to the “Central Authority” in State B.⁶⁷ If State B is satisfied that the applicant from State A is suitable to adopt, State B must then prepare a comprehensive report with information about the child from State B and send this report to the “Central Authority” in State A.⁶⁸ This report should include information ensuring that the appropriate consents, as highlighted in Article 4 of the HCIA, have been obtained.⁶⁹ Both States A and B must agree that the adoption should proceed

⁶² Id.

⁶³ Id.

⁶⁴ Id, art 4.

⁶⁵ Id, art 5.

⁶⁶ Id, art 14.

⁶⁷ Id, art 15.

⁶⁸ Id, art 16.

⁶⁹ Id.

and that the adoptive parents from State A are eligible and suitable to adopt as outlined in Article 5.⁷⁰ Both States must then obtain permission to allow the child to leave State B and move to State A.⁷¹ The States must then ensure that the transfer of the child actually takes place, preferably in the company of the prospective adoptive parents.⁷² The States are required to remain in contact about the adoption process and the measures taken to complete the adoption. If a probation period is required, the States must communicate regarding the progress of placement.⁷³ If State A determines for any reason that the adoption should not be completed because it is not in the “best interests of the child,” State A is then responsible for protecting the child and finding either a new adoptive family, long-term placement, or if necessary, making arrangements for returning the child to his country of origin.⁷⁴ This should all be done, depending upon the age and maturity of the child, with the child’s consent.⁷⁵ Despite the specifications contained in the HCIA, the convention never actually defines the “best interests of the child” and therefore leaves this determination open to subjective interpretation.

1. US Involvement with the HCIA

The HCIA is seen as setting the “minimum international standards and procedures for adoptions that occur between implementing countries.”⁷⁶ On February 15, 2006—twelve years after the US signed the multinational treaty—the US issued the final rules relating to the accreditation of adoption agencies, thereby moving one step closer to implementing the HCIA.⁷⁷ In 2000, the US Senate approved the ratification of the convention and Congress passed the Intercountry Adoption Act of 2000 (“IAA”), which was signed by President Clinton on October 6, 2000.⁷⁸ Under the IAA, the Department of State is named as the US Central Authority for the HCIA.⁷⁹ In order to comply with the HCIA, the US spent significant time developing and issuing federal regulations

⁷⁰ Id, art 17.

⁷¹ Id, art 18.

⁷² Id, art 19.

⁷³ Id, art 20.

⁷⁴ Id, art 21.

⁷⁵ Id.

⁷⁶ *State Department Issues Final Rules on Intercountry Adoption* (cited in note 60).

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Department of State, *Fact Sheet: Implementation of the Hague Convention on Intercountry Adoption*, available online at <<http://www.state.gov/r/pa/prs/ps/2006/61274.htm>> (visited Apr 21, 2007).

to provide standards that nonprofit adoption agencies must meet for accreditation when arranging intercountry adoptions where the child is from a HCIA member country and the potential adoptive parents are US citizens.⁸⁰

2. Number of Intercountry Adoptions in the US

The number of intercountry adoptions within the US has more than doubled over the last decade.⁸¹ In fact, the US appears to be responding to the rising demand for such adoptions as a result of the “reduction of children available for adoption within the United States.”⁸² More recently, between October 2004 and September 2005, US citizens adopted 22,739 children from around the world, of which 13,241 were from countries that have joined the HCIA.⁸³ The ten most popular HCIA-member countries from which US citizens adopted children during 2005 were China, Guatemala, India, Colombia, the Philippines, Mexico, Poland, Thailand, Brazil, and Moldova.⁸⁴

As demonstrated by the charts below, one of the underlying factors connecting these countries is their relatively low per capita GDP as compared to the US, which has a per capita GDP of \$43,500.⁸⁵ This chart serves to demonstrate that US citizens who are participating in intercountry adoptions are adopting children from economically disadvantaged countries. The lower per capita GDP of these countries is a cause for concern regarding whether or not these countries are economically capable of effectively monitoring and regulating intercountry adoptions to the US.

⁸⁰ *State Department Issues Final Rules on Intercountry Adoption* (cited in note 60).

⁸¹ Department of State, *Fact Sheet* (cited in note 79).

⁸² Department of State, *International Adoption*, available online at <http://travel.state.gov/family/adoption/adoption_485.html> (visited Apr 21, 2007).

⁸³ Id.

⁸⁴ See Department of State, *Fact Sheet* (cited in note 79).

⁸⁵ The World Factbook, *Rank Order – GDP – per capita (PPP)*, available online at <<https://www.cia.gov/cia/publications/factbook/rankorder/2004rank.html>> (visited Apr 21, 2007). GDP refers to the gross domestic product “or value of all final goods and services produced within a nation in a given year. PPP refers to purchasing power parity, which is the “sum value of all goods and services produced in the country valued at prices prevailing in the US.” To obtain GDP per capita, the GDP is divided by the population as of July 1st for the same year. See The World Factbook, *Notes and Definitions*, available online at <<https://www.cia.gov/cia/publications/factbook/docs/notesanddefs.html#2001>> (visited Apr 21, 2007).

Number of US Citizen Intercountry Adoptions from HCIA Member Countries and Corresponding GDP

Country	# of Children Adopted by US Citizens ⁸⁶	World Rank by Per Capita GDP (PPP) ⁸⁷	Per Capita GDP (PPP) ⁸⁸
China	7,906	109	\$7,600
Guatemala	3,783	133	\$4,900
India	322	153	\$3,700
Colombia	291	101	\$8,400
Philippines	271	130	\$5,000
Mexico	88	87	\$10,600
Poland	73	72	\$14,100
Thailand	72	92	\$9,100
Brazil	66	98	\$8,600
Moldova	54	181	\$2,000

The ten most popular non-HCIA-member countries from which US citizens adopted children during 2005 were Russia, South Korea, Ukraine, Kazakhstan, Ethiopia, Haiti, Liberia, Taiwan, Nigeria, and Jamaica.⁸⁹ The increase in intercountry adoptions has continued. As of October 2006, the US intercountry adoptions from Ethiopia had already increased to 731 and adoptions from Liberia had increased to 353.⁹⁰ This chart demonstrates that large numbers of children are involved in intercountry adoptions without an overarching international treaty or set of laws regulating these adoptions. The growing number of adoptions occurring without minimum standards governing them

⁸⁶ Factbook, *Rank Order – GDP – per capita (PPP)* (cited in note 85).

⁸⁷ Id. A total of 233 countries are ranked.

⁸⁸ Id.

⁸⁹ See Department of State, *Fact Sheet* (cited in note 79).

⁹⁰ See Department of State, *Intercountry Adoption Liberia* (Oct 2006), available online at <http://travel.state.gov/family/adoption/country/country_413.html> (visited Apr 21, 2007); Department of State, *Intercountry Adoption Ethiopia* (Oct 2006), available online at <http://travel.state.gov/family/adoption/country/country_380.html> (visited Apr 21, 2007).

highlights the need to reevaluate the procedures in place to ensure that the best interests of the child are really being fulfilled when completing these adoptions.

**Number of US Citizen Intercountry Adoptions from Non-HCIA
Member Countries and Corresponding GDP**

Country	# of Children Adopted by US Citizens ⁹¹	World Rank by Per Capita GDP (PPP) ⁹²	Per Capita GDP (PPP) ⁹³
Russia	4,639	81	\$12,100
South Korea	1,630	44	\$24,200
Ukraine	821	110	\$7,600
Kazakhstan	755	91	\$9,100
Ethiopia	441	215	\$900
Haiti	234	193	\$1,700
Liberia	183	220	\$1,000
Taiwan	141	33	\$29,000
Nigeria	65	201	\$1,400
Jamaica	63	138	\$4,600

**C. AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF
THE CHILD**

The African Charter entered into force on November 29, 1999.⁹⁴ Of the fifty-three African countries, only fourteen have yet to ratify the African Charter.⁹⁵ This is important because it shows overwhelming support for the

⁹¹ See Department of State, *Fact Sheet* (cited in note 79).

⁹² Factbook, *Rank Order – GDP – per capita (PPP)* (cited in note 85).

⁹³ Id.

⁹⁴ African Charter on the Rights and Welfare of the Child (cited in note 12).

⁹⁵ See *List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on African Charter on the Rights and Welfare of the Child*, available online at <<http://www.african-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20>

African Charter and its principles within Africa. The African Charter, like the HCIA, emphasizes the need of a child to “grow up in a family environment in an atmosphere of happiness, love, and understanding.”⁹⁶ The African Charter, however, goes a step further than the HCIA, stating that the child “requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.”⁹⁷ More significantly, the African Charter also states that its members should “[t]ak[e] into consideration the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child.”⁹⁸

According to the African Charter, the best interest of the child must be the primary consideration when undertaking any action concerning the child. If capable, a child must be allowed to communicate his or her own views in any and all judicial or administrative proceedings that affect the child.⁹⁹ It is important to note that while the African Charter requires the “best interest of the child” to be the center of all inquiries, there is no definitive working definition of what “best interest” actually entails. The African Charter also mentions the need to maintain a connection to African civilization, which seems to suggest that this should be a consideration in determining the rights of the child.¹⁰⁰

In Article 24, the African Charter specifically addresses the issue of adoption, emphasizing that the best interests of the child should be the main consideration in these proceedings.¹⁰¹ As stated in the HCIA, member countries must establish a competent authority to oversee matters of adoption and to ensure that adoptions are carried out legally. The competent authority must also ensure that the adoption “is permissible in view of the child’s status concerning

and%20Welfare%20of%20the%20Child.pdf> (visited Apr 21, 2007). This list does not include the country of Morocco. Instead it includes the Sahrawi Arab Democratic Republic (“SADR”), also known as Western Sahara. The territory of SADR was partitioned between Morocco and Mauritania in April of 1976. Morocco is currently asserting administrative control over SADR. Morocco is not listed as having signed the African Charter. See The World Factbook, *Western Sahara*, available online at <<https://www.cia.gov/cia/publications/factbook/geos/wi.html>> (visited Apr 21, 2007). Morocco’s world rank by GDP per capita is 141, and its per capita GDP is \$4,400. See Factbook, *Rank Order – GDP – per capita (PPP)* (cited in note 85).

⁹⁶ African Charter on the Rights and Welfare of the Child, Preamble (cited in note 12).

⁹⁷ Id.

⁹⁸ Id.

⁹⁹ Id, art 4.

¹⁰⁰ Id at Preamble.

¹⁰¹ Id, art 24.

parents, relatives and guardians,” and that the appropriate people have given their informed consent to the adoption after receipt of counseling regarding the adoption.¹⁰² The African Charter next declares that

inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this [African] 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 adoptive family or cannot in any suitable manner be cared for in the child's country of origin.¹⁰³

The African Charter requires that children involved in intercountry adoption enjoy the same “safeguards and standards” as those children adopted nationally.¹⁰⁴ It also requires that countries make certain that appropriate measures are taken to ensure that any intercountry adoption does not result in “trafficking or improper financial gain for those who try to adopt a child.”¹⁰⁵ Like the HCIA, the African Charter also requires that the country establish a mechanism “to monitor the well-being of the adopted child” and ensure that the placement in the country of the adoptive parents is “carried out by the competent authorities.”¹⁰⁶ These requirements seem to be in place to ensure the safety of the child and the legality of the adoption.

D. THE CHILD'S COUNTRY OF ORIGIN: A CRITICAL DIFFERENCE BETWEEN THE ADOPTIONS BY ANGELINA JOLIE AND MADONNA

Despite the fact that both Ethiopia and Malawi have signed the African Charter, the public reaction to the two adoptions has been very different. It appears that the differing reactions can be attributed to the different adoption procedures within each state, and confusion regarding the requirements for adoption in Malawi.

According to an Ethiopian official involved in Jolie's adoption, an adoption there can take only two days to finalize if the potential adoptive parent's paperwork (that is, paperwork with the adoptive parent's “competent

¹⁰² Id, art 24(a).

¹⁰³ Id, art 24(b). Please note that the author has chosen to use “intercountry” as opposed to “inter-country” throughout the Comment, which is consistent with the spelling chosen by the Hague Convention on Intercountry Adoption. Where other authors or quotations have chosen the spelling “inter-country,” this has remained unchanged.

¹⁰⁴ Id, art 24(c).

¹⁰⁵ Id, art 24(d).

¹⁰⁶ Id, art 24(e)–(f).

authority,” in this case the US State Department) is in order.¹⁰⁷ Due to Ethiopia’s extremely high number of orphans—estimated at over five million in a country with a population of seventy million—Ethiopia has taken great strides to make intercountry adoption easier.¹⁰⁸ The costs of caring for the orphans are estimated to be \$115 million per month, while Ethiopia’s annual health budget is only \$140 million.¹⁰⁹ This high proportion of orphaned children is believed to be a result of children losing their parents to famine, disease, war, and AIDS.¹¹⁰

Despite this, Ethiopia does have regulations in place for those interested in adopting. Adoptive parents must provide a post-placement report after three months, again at the six-month mark, and once again on the one-year anniversary of the adoption. Reports must be made yearly after this until the child reaches the age of eighteen.¹¹¹

In the case of Madonna, who chose to adopt from Malawi, much of the media criticism was a result of the belief “that Malawi typically forbids such adoptions because it is not a party to the 1993 Hague Convention on inter-country adoption.”¹¹² However, Malawi has in fact signed the African Charter which allows adoption by parents who are citizens of a country that has signed the CRC or the African Charter. Therefore, this particular criticism may be unfounded if David is actually going to be a citizen of Great Britain, a signatory of the CRC.¹¹³

Another difference between Ethiopia and Malawi is the rarity of US adoptions of children from Malawi. In 2005 only 3 children from Malawi were adopted by US citizens, versus 731 in Ethiopia.¹¹⁴ It could be that the international community is just more accustomed to seeing adoptions from Ethiopia, and therefore the Jolie adoption did not instigate as much criticism. This difference in the number of orphans adopted is notable considering there

¹⁰⁷ West, *Angelina Jolie Adopts Ethiopian Girl*, (cited in note 1).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Department of State, *Intercountry Adoption Ethiopia* (cited in note 90).

¹¹² CTV, *Madonna Files Adoption Papers for Malawi Boy* (Oct 12, 2006), available online at <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061012/madonna_adoption_061012/20061012?hub=Entertainment> (visited Apr 21, 2007).

¹¹³ Office of the United Nations High Commissioner for Human Rights, *Declarations and Reservations to the Convention on the Rights of the Child*, available online at <<http://www.ohchr.org/english/law/crc-reserve.htm>> (visited Apr 21, 2007).

¹¹⁴ Department of State, *Intercountry Adoption Malawi* (Oct 2006), available online at <http://travel.state.gov/family/adoption/country/country_417.html> (visited Apr 21, 2007). Department of State, *Intercountry Adoption Ethiopia* (cited in note 90).

are believed to be more than one million orphans in Malawi.¹¹⁵ While this is considerably less than the estimated five million orphans in Ethiopia, it does not account for such a vast difference in the number of children being adopted. It may be that higher standards within Malawi governing adoption are contributing to the lower numbers of adoptions.

These differences do not seem to indicate that adoption should be encouraged in Ethiopia and discouraged in Malawi, or vice versa. Each country has a large orphan population, and while this Development argues that support should be found for parents and extended family to enable them to care for the child before resorting to intercountry adoption, it does not appear that intercountry adoption should be promoted or discouraged in one country and not the other.¹¹⁶

Other criticisms of intercountry adoption stem from the belief that African children should be kept in their own communities.¹¹⁷ The African Network for Prevention and Protection against Child Abuse and Neglect (ANPPCAN) has argued against using intercountry adoption as a method for solving the problems plaguing the orphans of Africa.¹¹⁸ In addition, Deogratias Yiga, of ANPPCAN, has been attributed as saying that “providing help for a select few [children] ignores the greater AIDS and poverty crises of African children,” and instead discourages people from investing in solutions that will help African countries combat such problems on a much larger scale.¹¹⁹

III. MINISTER FOR WELFARE AND POPULATION DEVELOPMENT *V* FITZPATRICK¹²⁰

In 2000, the South African Constitutional Court decided *Minister for Welfare and Population Development v Fitzpatrick*.¹²¹ The case involved the Fitzpatricks, a

¹¹⁵ *Malawi's Other Orphans: the Children Madonna Left Behind*, The Independent (Oct 22, 2006), available online at <<http://news.independent.co.uk/world/africa/article1919034.ece>> (visited Apr 21, 2007).

¹¹⁶ Jeremy Sandbrook, a county director for an international non-governmental organization that cares for orphans, has stated that the growing number of orphans in Malawi has created a situation where extended families are no longer able to care for their family members. *Id.*

¹¹⁷ CTV, *Madonna Files Adoption Papers for Malawi Boy* (cited in note 112).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ This case is truly unique, as there are very few published cases from South Africa involving the adoption of a child. This case appears to be the only published South African case dealing with adoption. This is likely because before this case, potential adoptive parents who were not South African citizens were automatically denied and after this case automatic denial ceased to exist.

¹²¹ *Fitzpatrick*, 2000 SACLR LEXIS 68 (South Africa) (cited in note 13).

British couple living permanently in South Africa since March 1997.¹²² A South African child had been in the care of the couple since November 1997, after having been neglected and abandoned by his biological parents.¹²³ In March, 1998, there was an attempt to place the child in a foster home, mainly because the Fitzpatricks did not believe that they would be permitted to adopt the child.¹²⁴ Due to his inability to acclimate to the foster home, the child was returned to the Fitzpatricks, who initiated adoption proceedings. The social worker from the Child Welfare Society of South Africa strongly believed that it was in the best interest of the child to be adopted by the Fitzpatricks.¹²⁵ But according to section 18(4)(f) of the South African Constitution, a South African citizen is prohibited from being adopted by a non-citizen.¹²⁶

The court ultimately found that Section 18(4)(f) was unconstitutional because it conflicted with Section 28 of the South African Constitution which enumerates the rights of the child. The court focused its inquiry on the child's best interest and found that Section 18(4)(f) was too limiting in that it categorically prohibited adoption of a South African citizen by a non-citizen without considering the best interests of the child.¹²⁷ The court stated that "[t]he facts of the instant case clearly illustrate that the best interests of a child born to South African parents may well lie in such child being adopted by non-South African adoptive parents."¹²⁸

A. FITZPATRICK DISTINGUISHED

While the *Fitzpatrick* case is the first of its kind, it has been cited as support for the adoption of "AIDS orphans," healthy children who have lost their families to AIDS, and others through intercountry adoption, despite policies against such adoptions.¹²⁹ But the *Fitzpatrick* case is unique in the fact that the adoptive parents had extremely strong ties to the child's country of origin. They had lived there for three years prior to the case and had significant interactions with the Child Welfare Society of South Africa. It was very likely that the parents would be well-equipped to effectively expose the child to extensive aspects of

¹²² Id at *9.

¹²³ Id at *12.

¹²⁴ Id at *14.

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ Id at *21–22.

¹²⁸ Id at *21.

¹²⁹ Barbara Stark, *Children as Refugees and Displaced Persons: Lost Boys and Forgotten Girls: Inter-country Adoption, Human Rights and African Children*, 22 St Louis U Pub L Rev 275, 289 (2003).

his country of origin as a result of their first-hand knowledge and familiarity with the culture. This would seem to be extremely different than intercountry adoptions that completely remove the child from his or her country of origin.

B. RECONCILIATION OF *FITZPATRICK* WITH THE AFRICAN CHARTER

The question which naturally follows upon reading the *Fitzpatrick* case is whether the African Charter goes against the best interests of the child by limiting intercountry adoption to “those States who have ratified or adhered to the International Convention on the Rights of the Child or [the African] Charter.”¹³⁰ If South Africa’s provisions limiting adoption were unconstitutional, it could be argued that the African Charter’s preference for children to remain in Africa is in direct conflict with its goal of seeking out the best interests of the child. Furthermore, the African Charter refers to finding care in a “suitable manner,” but it is unclear that because care is “suitable” it is also preferable.¹³¹

Due to the facts of the case, however, it does not appear that the *Fitzpatrick* case is necessarily in conflict with the provisions of the African Charter. Although the *Fitzpatrick* case promotes a more subjective “best interests” standard, as opposed to rigid restrictions based on citizenship, it does so in a manner which encourages support for such adoptions when there is significant belief that the child will maintain considerable connections with his or her country of origin. It can be argued that this is the proposition for which *Fitzpatrick* actually stands. If this is the case, it could lead one to the conclusion that it should not be used to support the notion that intercountry adoption is necessarily preferable to a placement within the child’s country of origin. Many of the concerns which anchor the reasoning for limiting intercountry adoption were not apparent in *Fitzpatrick*.

For example, the African Charter speaks of a child’s rights to survival and development, freedom of expression, education, and also addresses various other rights.¹³² Although there is a significant preference for adoptions within African countries and a bias against outside adoptions, there is no reason to believe that this preference is contrary to the best interests of the child.¹³³ In the *Fitzpatrick* case, there was no reason to believe that the child would be deprived of any of the aforementioned rights.

¹³⁰ African Charter on the Rights and Welfare of the Child, art 24 (cited in note 12).

¹³¹ *Id.*

¹³² *Id.*, arts 5, 7, 11.

¹³³ Stark, 22 St Louis U Pub L Rev at 280–81 (cited in note 129).

If one looks at Article 11 of the African Charter, which discusses the right of the child to an education, one sees that part of those educational rights include the “preservation and strengthening of positive African morals, traditional values and cultures.”¹³⁴ The child in the *Fitzpatrick* case was very likely to continue to have an education which satisfied these criteria.

As will be further explained by the discussion below, the African Charter actually protects the rights of the child by limiting intercountry adoption to those countries that have signed the African Charter or the CRC. This allows countries of origin to guarantee a certain minimum standard of care for children within the adoptive parent’s country. This minimum standard of care leads to laws regarding parental rights, enforcement of adoption laws, and many other issues relevant to determining the best interests of the child when deciding whether or not to approve an intercountry adoption.

IV. POTENTIAL PROBLEMS OF ALLOWING INTERCOUNTRY ADOPTION

There are numerous potential problems facing families who are involved in intercountry adoption. Intercountry adoptions have the ability to affect numerous parties, including the birth parents and extended family, the adoptive parents, the child, and the communities from which the child is taken and into which the child is brought. Some potential problems include concerns that allowing intercountry adoption or making it easier may encourage birth parents to abandon their children when temporary problems arise, based on the hope that they may be adopted. Another concern is that the promotion of intercountry adoption may fuel the black market for baby selling and child trafficking.¹³⁵ There are also indications that adopted children are usually the healthiest and the brightest, leaving a disproportionate number of children behind with mental and physical disabilities.¹³⁶ Finally, there is a fear that intercountry adoptions may cause children to lose a sense of identity that can only be fostered in their country of origin, because Western society does not share similar values.

The problems discussed above are just a few of many different concerns raised when discussing the issue of intercountry adoption. In order to adequately address these and other concerns, social workers and courts should begin an assessment of the best interests of the child by considering: (1) whether the rights of the birth parents are being upheld, (2) the implications of trans-racial

¹³⁴ African Charter on the Rights and Welfare of the Child, art 11(c) (cited in note 12).

¹³⁵ Olsen, 22 Penn St Intl L Rev at 490 (cited in note 48).

¹³⁶ Id at 510.

adoption, (3) the implications of gender preferences, and (4) concerns regarding child trafficking when deciding whether or not an intercountry adoption should be allowed.

A. ENSURING THAT THE RIGHTS OF THE BIRTH PARENTS ARE UPHELD

The rights of the birth parents—and their ability to knowingly consent to intercountry adoptions—are critically important. By ensuring that the birth parents fully understand what is happening with their children, courts and society at large can be more at ease in determining whether or not intercountry adoptions are being completed without violating the inherent rights of the birth parents.

When Madonna initiated David's adoption, there was speculation that his birth father was not aware that his parental rights were being permanently terminated.¹³⁷ One source of this type of confusion in intercountry adoptions comes from importing Western standards and practices into foreign countries.¹³⁸ There have been instances where parents placed their children in orphanages believing it would be a type of temporary foster care and, as a result of the child's placement, lost the child through intercountry adoption.¹³⁹ While adoption has historically been common and encouraged in many African cultures, it was very different than the current practice of intercountry adoption.¹⁴⁰ Adoption in the past often involved exchanges of children between brothers and sisters or co-wives.¹⁴¹ The Western view of adoption has the danger of creating confusion in the adoption process and could violate the rights of the birth parents who have not knowingly given full consent.

An example of a practice that raises concern can be found in Ethiopia. If a child's living parent or parents have been diagnosed with HIV/AIDS, the Ethiopian government declares the child an orphan and assumes legal guardianship of the child.¹⁴² In effect, the child's parents are denied the ability to consent to an adoption because their parental rights are prematurely terminated. This may be attributed to the fact that the current life expectancy of those living

¹³⁷ Associated Press, *Malawi Boy's Father Concerned about Madonna Adopting His Son*, (USA Today Oct 22 2006), available online at <http://www.usatoday.com/life/people/2006-10-22-madonna-adoption_x.htm> (visited Apr 21, 2007).

¹³⁸ See Fiona Bowie, *Adoption and the Circulation of Children*, in Fiona Bowie, ed, *Cross-Cultural Approaches to Adoption* 3, 13 (Routledge 2004).

¹³⁹ Id at 14.

¹⁴⁰ Id at 11.

¹⁴¹ Id.

¹⁴² Department of State, *Intercountry Adoption Ethiopia* (cited in note 90).

in Sub-Saharan Africa with HIV/AIDS is forty-seven years.¹⁴³ Without the risk of HIV/AIDS, the life expectancy in Sub-Saharan Africa would have been sixty-two years.¹⁴⁴ That aside, it would seem that a preferable solution would be for the international community to focus its efforts on raising the funds necessary to provide parents with the medicine and resources they need to care for themselves and their families, as opposed to having Ethiopia declare children wards of the state.

Those involved in arranging and approving intercountry adoptions need to fully explain to parents the implications of terminating their parental rights. It should be confirmed that the birth parents understand that they will most likely never see their child again, and that they are no longer responsible for their child's care. In addition, this termination should be voluntary as dictated by the HCIA¹⁴⁵ and the African Charter.¹⁴⁶

B. IMPLICATIONS OF TRANS-RACIAL ADOPTION

There are individuals who have taken issue with the phenomenon of trans-racial adoption—adoption where the adoptive parents' race or ethnicity differs from that of the child. A point of comparison with the trans-racial adoptions which are often associated with intercountry adoptions can be found in US debates regarding interracial adoption.

A surge of whites adopting black children within the US occurred in the late 1960s and early 1970s and has been attributed to the racial integration that followed the Southern Civil Rights Movement.¹⁴⁷ It was believed that these adoptions reached their peak in 1971 and that the decline began after a position paper from the National Association of Black Social Workers was distributed in 1972 denouncing the practice.¹⁴⁸ Whether or not race should be a determining factor when matching potential adoptive parents with children has been argued, discussed, and litigated for over three decades. Some of these arguments have highlighted that any attempt to match parents and children based on race

¹⁴³ Annabel Kanabus and Jenni Fredriksson-Bass, *HIV & AIDS in Africa*, available online at <<http://www.avert.org/aafrica.htm>> (visited Apr 21, 2007).

¹⁴⁴ Id.

¹⁴⁵ Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, art 4 (cited in note 61).

¹⁴⁶ African Charter on the Rights and Welfare of the Child, art 24(a) (cited in note 12).

¹⁴⁷ Hawley Fogg-Davis, *Symposium on Transracial Adoption: A Race-Conscious Argument for Transracial Adoption*, 6 BU Pub Intl L J 385, 396 (1997); See also Cynthia G. Hawkins-Leon and Carla Bradley, *Race and Transracial Adoption: The Answer is Neither Simply Black or White Nor Right or Wrong*, 51 Cath U L Rev 1227, 1237 (2002).

¹⁴⁸ Fogg-Davis, 6 BU Pub Intl L J at 396 (cited in note 147).

“violates the equal protection rights of white individuals seeking to adopt.”¹⁴⁹ Others have said the opposition to adoptions based on racial grounds can only be justified through racist beliefs. Still others argued that allowing trans-racial adoption would lead to the degeneration of black culture.¹⁵⁰

While adoptive parents and children are often of different races when intercountry adoptions occur, the main fears seem to be focused on the child’s loss of identity with his country of origin. This is much different than an occurrence of a trans-racial adoption within a common country because the child has a greater chance of obtaining exposure to his or her racial community.

An African-American child adopted by a white American family will undoubtedly have a different life experience than that of the child’s parents. But the child still has the opportunity to investigate Black American culture rather easily. Upon adulthood the child can choose to attend a historically black college or university, attend a predominantly black church, or move to a predominantly black neighborhood. This is much different than the experience of the child who is party to an intercountry adoption.¹⁵¹

While a child adopted from an African country can choose to return to that country upon reaching adulthood, there are significant barriers to reentry into the culture of origin. One significant barrier is language. If a child from an African country were adopted by a person from a Western country speaking English, the adopted child may not be able to communicate effectively if he attempted to return to his country of origin. More importantly, as is indicated by the information in the above charts, most US citizens are adopting children from countries with a relatively low GDP compared to the US. The difference in GDP is a reliable indicator of significant societal differences between the US and these countries. Finally, depending upon an individual country’s citizenship policies, the adopted child may not have legal citizenship within his country of origin, which may result in the adoptive child having no legal connection with his country of origin.

Those attempting to determine whether intercountry adoption is in the best interest of the child must also consider the issue of racial discrimination, particularly when adoptive parents come from Western countries. Many African children who are brought to the US and other Western societies will likely be

¹⁴⁹ Id at 398.

¹⁵⁰ Id at 396.

¹⁵¹ An argument could be made that being raised by a non-black family would create a situation where a black child would be unable to fully assimilate into black American culture, and therefore even if he did attempt to immerse himself in black culture, he would fail due to his lack of commonality in upbringing. There are also those who have stated that international adoptions are in fact very similar to domestic private adoption within the US. See Andrew Morrison, *Transracial Adoption: the Pros and Cons and the Parents’ Prospective*, 20 Harv BlackLetter L J 167, 178 (2004).

perceived as “black.” This means that they could be subject to racial discrimination in their new country. In the US, blacks make up approximately 12.9 percent of the population and are therefore a minority of the population.¹⁵² Black African children would, however, most likely be a part of the majority population in their country of origin. Therefore children who are involved in an intercountry adoption may be at risk for racial discrimination, and if their adoptive parents are not of a racial or ethnic minority themselves, the parents may have difficulty relating to the circumstance of their adopted child. This, paired with the potential discrimination the child may face as a result of being from a different country, should be carefully considered when determining the best interests of the child.

C. IMPLICATIONS OF GENDER PREFERENCES

When couples decide to adopt a child they often consider whether they have a preference for the gender of the child. International adoption agencies report a strong preference towards adopting girls, regardless of whether or not the couple already has children.¹⁵³ In many countries there is a preference toward male children, thereby making them less likely to be abandoned. This only helps to serve the preferences of US citizens who would like to adopt female children.¹⁵⁴

There are several theories attempting to explain why girls are preferred over boys in adoption, including the thought that girls may be easier to raise because they are less aggressive and more submissive, and that girls may be able to assimilate into American society easier than their male counterparts.¹⁵⁵ Whatever the reasons, many countries, although not all,¹⁵⁶ are allowing parents to indicate a preference in the gender of the child that they would like to adopt.¹⁵⁷ Hopefully this allows parents to indicate a gender which they believe they are better equipped to raise and help transition into a new culture. Honoring indicated preferences on the gender of adoptive children may help

¹⁵² The World Factbook, *United States*, available online at <<https://www.cia.gov/cia/publications/factbook/geos/us.html>> (visited Apr 21, 2007).

¹⁵³ Christine Adamec and William Pierce, *Gender Preference*, in *The Encyclopedia of Adoption* (2000), available online at <<http://encyclopedia.adoption.com/entry/gender-preference/150/1.html>> (visited Apr 21, 2007).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ The country of Nigeria will not allow a single person adopting a child to adopt a child of the opposite gender of the adoptive parent. See Department of State, *Intercountry Adoption Nigeria*, available online at <http://travel.state.gov/family/adoption/country/country_429.html> (visited Apr 21, 2007).

¹⁵⁷ Department of State, *Intercountry Adoption Ethiopia* (cited in note 90).

these new families to properly develop. It can, however, be argued that honoring these preferences is actually a form of gender discrimination, which would become increasingly unacceptable if the gender preferences of adoptive parents ceased to align with the availability of children of a particular sex.

D. CONCERNS REGARDING CHILD TRAFFICKING

There are varying concerns regarding the potential abuse of intercountry adoption, and the unintended consequence of promoting child trafficking. As noted by David Smoline, there are some who go so far as to claim that any type of intercountry adoption is child trafficking, because “it involves the transfer of children from poor nations to rich nations in order to meet the demand of those in rich nations for children.”¹⁵⁸ The UN passed the 2001 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (“2001 Protocol”).¹⁵⁹ The 2001 Protocol established minimum standards for determining whether human trafficking was taking place and highlighted three elements: “(1) some transfer, harbouring or receipt of a person; (2) by wrongful means, broadly defined to include coercion, deception, abduction, abuse of power, or payment; and (3) for purposes of exploitation.”¹⁶⁰ Element two would seem to indicate intercountry adoption cannot be considered as child trafficking if the child is adopted through legal means. However, the 2001 Protocol goes on to indicate that “trafficking in persons exists when the first and third elements, transfer and exploitation, are present, even if there are no wrongful means.”¹⁶¹

Although the above arguments exist, they are largely ineffective. Unless the child is adopted and then forced into some sort of servitude, sexual exploitation, or other wrongful purpose, it is unlikely that the child will be considered as someone who is a victim of “trafficking.” Despite this, there are valid concerns regarding abuse in intercountry adoption. For some, intercountry adoption has become a source of income. In China, for example, there are instances of prospective adoptive parents paying \$3,000 to the home from which the child is taken.¹⁶² In addition, the individuals facilitating these intercountry adoptions have sometimes been accused of exploiting both the birth and adoptive

¹⁵⁸ David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 Valp U L Rev 281, 283 (2004).

¹⁵⁹ *Id.* at 294.

¹⁶⁰ *Id.* at 295.

¹⁶¹ *Id.*

¹⁶² See Peter Selman, *Adoption: A Cure for (too) Many Ills?*, in Bowie, ed, *Cross-Cultural Approaches* 257, 270 (cited in note 138).

parents.¹⁶³ It is likely that similar practices are or can take place in African countries just as easily.

To ensure that trafficking and abuses do not occur, countries must maintain high standards in determining whether intercountry adoptions are appropriate, and must institute policies to regulate adoptions. Finally, countries must also develop mechanisms to check on the health and well-being of the child.

E. ENFORCEMENT

A final assessment should be made by social workers and courts deciding the best interests of the child and how they will enforce the laws and standards they have outlined regarding intercountry adoption. The US publication of final rules for adoption agencies involved in intercountry adoptions is one possible mechanism for providing enforcement.¹⁶⁴ Other mechanisms of ensuring the continued well-being and safety of the child can come as a result from laws in the child's country of origin.

For example, Ethiopia requires post-placement reports three months, six months, and one year after the adoption. The government then requires yearly reports until the child's eighteenth birthday.¹⁶⁵ Liberia on the other hand appears not to have such requirements, and one has to wonder what assurances the government has that the children entrusted to the adoptive parents' care are not being exploited.¹⁶⁶ Nigeria also has a set of complex rules governing intercountry adoption, including a foster care period for up to one year before adoption is granted and in person investigations in the state where the adoption is to take place to ensure the authenticity of information provided in the adoption decree.¹⁶⁷ Although these rules make adoption much more difficult, they do help to ensure that the children are being placed in appropriate homes, and that the information provided is complete and accurate.

Each country must determine what mechanisms of enforcement are feasible for them. This determination must include an assessment of economic and personal resources and the country's ability to actually enforce any policies put into place. Regardless of what measures a country decides to employ to guarantee enforcement, it must ensure that the best interests of the child are taken into account.

¹⁶³ Id.

¹⁶⁴ *State Department Issues Final Rules on Intercountry Adoption* (cited in note 60).

¹⁶⁵ Department of State, *Intercountry Adoption Ethiopia* (cited in note 90).

¹⁶⁶ Department of State, *Intercountry Adoption Liberia* (cited in note 90).

¹⁶⁷ Department of State, *Intercountry Adoption Nigeria* (cited in note 156).

V. DEFINING “BEST INTERESTS OF THE CHILD”

It is surprising that decisions made about the well-being of children are supposed to be made with their best interest in mind, but these best interests are never specifically defined in the CRC, HCIA, or the African Charter. A definition or objective standard is needed to ensure that minimum requirements are set and accepted by the international community on how the best interests of the child should be determined.

But developing a definition of the “best interests of the child” is challenging for several reasons. First, it would seem that the current international treaties already promote: (i) keeping children with their birth families, (ii) finding extended family willing and able to care for the child, (iii) keeping the child in their original community, and (iv) attempting to match the child with a family that has a similar culture, religion, race, and ethnicity, before engaging in intercountry adoption. Second, there is a question of how specific one really wants to be in defining this concept, as it is largely subjective and in need of an individualized assessment for each and every situation.

It would appear that independent inquiries into the reasons the child is in need of adoption, as well as thorough evaluations of the potential adoptive parents can be used as tools in helping to determine the child’s best interests. If it appears that the adoptive parents are equipped to provide the child with his or her basic needs and the child has no realistic alternatives within his country of origin, then the intercountry adoption should be allowed. The key would be to standardize these procedures and formalize them into an actual treaty or bilateral agreement.

A. DISALLOWING INTERCOUNTRY ADOPTION BETWEEN STATES WITHOUT FORMAL AGREEMENTS

As demonstrated in Chart II, thousands of intercountry adoptions occur each year between the US and countries that have not signed the HCIA. Remember that the US—unlike most countries—has not ratified the CRC. As a result, many of these adoptions take place without a formal agreement between the US and the child’s country of origin. The lack of formal agreements should be discouraged because they can lead to confusion, as well as an abandonment of appropriate standards when regulating intercountry adoption. Intercountry adoptions should be instances of international cooperation, and this can only be effectively achieved if the two states responsible for regulating the process have a common perspective on what is required to complete and appropriately monitor the adoption. The hope would be that by initially obtaining consensus between the states, the parties will be able to avoid potential problems and

conflicts. If problems and conflicts do occur this mutual agreement should allow for a quick resolution.

B. DETERMINATION OF WHY THE CHILD IS IN NEED OF ADOPTION

There are several reasons why a child may be in need of adoption, based upon the circumstances of the child and his family. Determining why the child is in need of adoption can help one assess whether or not intercountry adoption is really within the child's best interest, or if the adoption is being used as a mechanism to solve other larger problems.

If the child's parents and extended family are no longer alive, this creates the easiest case for determining that the child is in need of adoption. The next-best case in support of an intercountry adoption would be if the child has family, but they have expressly stated that they have no intention or desire to care for the child. In these circumstances, intercountry adoptions can occur without a great deal of trepidation, although it should be noted that the cause of the death of the family may revive one's sense of concern (for example if the members of the family died as a result of not being able to access adequate healthcare, despite it being generally available).

The cases of adoption which should be most closely examined are those in which there are parents, extended family, or members of the community who are willing to care for the child, but who are not equipped with the necessary resources. This appeared to be the situation of David Banda's father, and such cases are extremely problematic.

If child welfare determines that the reason the child is in need of adoption is similar to the above situation, it should investigate to see if there is a feasible way to reunite the family. Are there government services available which could allow for the family to remain together? Are there any non-governmental organizations that can provide aid or financial support to the family? Is there a way in which the international community can come together to support families in these situations? All potential remedies should be exhausted before allowing for the splintering of families.

In making its determination, child welfare should not confuse "necessary" resources with the Western perception of "better" resources. There should be a determination of whether the availability of greater economic opportunities necessarily translates into considering the best interests of the child if it results in the child being removed from his or her family of origin.¹⁶⁸ It is important to

¹⁶⁸ See Barbara Yngvesson, *National Bodies and the Body of the Child: "Completing" Families through International Adoption*, in Bowie, ed, *Cross-Cultural Approaches* 211, 213 (cited in note 138).

remember that while sometimes it appears as if there are “more” opportunities in countries like the US, it may just be that the opportunities are different, not necessarily better.

C. ESTABLISH STANDARDIZED EVALUATION CRITERIA OF ADOPTIVE PARENTS

There are several factors which should be assessed when determining whether or not an intercountry adoption should go forward. If the minimum criteria for evaluating prospective adoptive parents were standardized, this would help with ensuring the legitimacy of future adoptions. At this time, each country has its own policies and procedures, which is appropriate. Specific countries should analyze their individual situations and act accordingly, however, it would be beneficial to develop minimum standards which adoptive parents must meet, and then allow individual states to add additional requirements as they see fit. These minimum standards should be put directly into treaties and bilateral agreements so that the minimum requirements are explicitly known.

The first step should be to evaluate the appropriateness of the potential adoptive parents. This evaluation should include several items, but there are some which should be used by all countries. All prospective adoptive parents should undergo an extensive background check. This check should include information about their criminal history, their employment information, their marital status (including whether there is a history of divorce), their job history, and it should include copies of their tax returns for the last five-ten years. Another item that should be checked is whether the adoptive parents have ever had to call the police for domestic disturbances, etc. An inquiry should also be made into whether the adoptive parent has ever attempted to adopt in his country of citizenship, and if so, why that adoption was or was not approved. One of the goals of intercountry adoption is to provide children with safe and stable home environments. In attempting to define the best interests of the child, Linda Olsen stated “that every child deserves the right to grow up and live in a community that provides security, stability, and love.”¹⁶⁹ Having information from a detailed background check will help assess the adoptive parents’ ability to provide security and stability.

In addition to background checks, the adoptive parents should be required to provide the contact information for several references. These references should include one family member, one co-worker, one neighbor, as well as two other non-familial references. For an individual to qualify to give a reference they would need to have known the adoptive parent for a minimum of two

¹⁶⁹ Olsen, 22 Penn St Int'l L Rev at 487 (cited in note 48).

years, with a preference for having known the parent for five years or more. These individuals should be contacted and interviewed by phone or in person. The hope would be that the references would be able to provide greater insight on the safety and stability of the home, as well as the likelihood that the child would be entering into a loving environment. In addition, the child welfare worker checking these references should also attempt to assess whether they feel as if the community would be willing to embrace a child adopted from another country. This would be a subjective inquiry, but it is still very important in attempting to establish whether the adoptive parents will be able to provide an appropriate home.

If the adoptive parents are found suitable after the background and reference check, then the adoption should be allowed to proceed, although there are certain other requirements that should also be fulfilled. First, at least one adoptive parent should go to where the child is located when it comes time for the transfer of custody. The HCIA states that adoptive parents should make every effort to be present when the child leaves his or her country of origin and goes to the adoptive parents' country of citizenship, but this is not sufficient. According to the African Charter, children have a right to have a sense of cultural identity and relationship with their country of origin if at all possible.¹⁷⁰ If part of the goal of the African Charter is to ensure that the child will receive information about their country of origin, yet the adoptive parents are unwilling to actually go to the child's country of origin, it seems nearly impossible for that goal to be achieved.

The adoptive parents should also be encouraged, but not necessarily required, to attempt to learn something of the child's country of origin. When the adoptive parent goes to obtain custody of his child, he should be given the opportunity to spend a few days seeing the country. In addition, the parents should be encouraged to learn how to make at least one meal from the country of origin, or to learn a particular custom. As was noted in Part I, the continent of Africa was dramatically changed by colonialism; arguably several aspects of African culture were destroyed as a result. It is important that intercountry adoptions do not create a situation of future destruction of the African culture.

Finally, the adoptive parents should be required to provide yearly reports to the country of origin for several years. These reports should include a copy of the child's medical history, progress in school, as well as a picture of the child and the child's home. If a report is not provided, or if a report raises a red flag, the child's country of origin should contact the country where the child is currently residing and request that an investigation into the child's well-being be initiated.

¹⁷⁰ See generally African Charter on the Rights and Welfare of the Child (cited in note 12).

D. A CHARTER ON THE RIGHTS OF THE FAMILY SHOULD BE PRESENTED BY THE OAU

While several treaties and conventions have dealt with the rights of the child and the child's best interests, it would seem that to focus on the child and ignore the family is problematic. The family unit is what ushers the child into adulthood. An international assessment focusing on the rights of the family, including the right to adequate healthcare, medicine, general support, social services, and the ability to remain as an intact family unit should be next on the international community's agenda. Finding ways to support families will naturally spill over into finding ways to support the child, while helping to end the fragmentation of societies, cultures, and families.

The OAU should create a charter focused on the rights of the family that takes into account Africa's unique history and culture. Such a charter should be based on the purposes of the OAU which are (i) "to promote the unity and solidarity of the African states;" (ii) "to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa;" (iii) "to defend their sovereignty, their territorial integrity and independence;" (iv) "to eradicate all forms of colonialism from Africa;" and finally (v) "to promote international co-operation, having due regard to the Charter of the United Nations and the Declaration of Human Rights."¹⁷¹ Such a charter should also include concrete goals for improving the lives of families and should include specific recommendations and mechanisms for achieving these goals.

VI. CONCLUSION

Despite the various concerns and problems highlighted in this Development, intercountry adoption is an important and viable option for children who are living in situations which seem devoid of hope. The families that open their hearts and homes to the children of strangers should be praised and recognized for their generosity. Their noble actions, however, should not be confused as an ultimate solution to the problems plaguing children in many African countries. Enabling couples to more easily enter into an intercountry adoption, without developing strategies to address the problem which have left so many children orphans is only a temporary solution to a much larger problem of poverty and disease.

The international community has a duty to honor the principles outlined in the CRC, HCIA, and the African Charter. These principles include the right of African children to maintain their cultural identity and heritage. When the

¹⁷¹ Khapoya, *The African Experience* at 288 (cited in note 18).

necessary support is given to families within these countries, the global community will see an increase in familial stability and a decrease in the number of children living in orphanages. This should be the focus of the international community and the ultimate goal.