

**INTERNATIONAL ADOPTION: THE MOST LOGICAL SOLUTION TO  
THE DISPARITY BETWEEN THE NUMBERS OF ORPHANED AND  
ABANDONED CHILDREN IN SOME COUNTRIES AND FAMILIES  
AND INDIVIDUALS WISHING TO ADOPT IN OTHERS?**

Sara R. Wallace \*

**I. INTRODUCTION**

Throughout the world there are millions of children who lack families, homes, and basic care.<sup>1</sup> This problem is especially pronounced in countries where war or national disasters have taken a devastating economic toll on families.<sup>2</sup> Many families who cannot afford to provide for their children are left with no choice but to abandon them out of need or shame.<sup>3</sup> As a result, many children are left to the streets. For example, up to seven million “meninos da rua” (Portuguese for “children of the street”) live on the streets in Brazil’s large cities.<sup>4</sup>

Non-economic factors also contribute to children becoming orphans. Social and political circumstances have left children without families. In China, for instance, the One-Child Policy, coupled with Chinese culture’s preference for male children, leads families to abandon or give up for adoption thousands of first-born female children.<sup>5</sup> The Korean War left thousands of children in that country homeless.<sup>6</sup> Confucian beliefs that emphasize continuance of the family through an unbroken bloodline dissuaded Koreans from adopting children unrelated to them.<sup>7</sup> Under the Ceausescu regime in Romania, women were forced

---

\* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2004; Master of Science in Family Studies and Human Development, University of Arizona, 2001; Bachelor of Arts in Psychology, Pepperdine University, 1998. I wish to thank DeAnna Rivera and Rebecca Papoff for their support and thoughtful editing, as well as my friends and family for their continuing encouragement.

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

2. Bridget M. Hubing, *International Child Adoptions: Who Should Decide What is in the Best Interests of the Family?*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 655, 657 (2001).

3. *Id.* at 657-58.

4. *Id.* at 658 (citing George de Lama, *Hope and Fear Battle for Latin Street Kids*, CHI. TRIB., July 3, 1989, at C1).

5. See Jessica L. Singer, *Intercountry Adoption Laws: How Can China’s One-Child Policy Coincide with the 1993 Hague Convention on Adoption?*, 22 SUFFOLK TRANSNAT’L L. REV. 283, 290-96 (1998); see Michelle Van Leeuwen, *The Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Market of Infants from China)*, 8 PAC. RIM L. & POL’Y J. 189, 192-94 (1999).

6. Liu, *supra* note 1, at 188.

7. *Id.*

to have five children for the State.<sup>8</sup> This mandate resulted in healthy children being placed in crowded state-run orphanages while physically- or mentally-disabled children were placed in state-run asylums where they received inhumane care.<sup>9</sup>

These examples reveal deplorable situations in some countries that have left children orphaned and abandoned. At the same time, there are millions of families and individuals in other countries who desperately want to adopt a child (or children). In industrialized countries such as the United States and other Western nations, it is becoming increasingly more difficult to adopt.<sup>10</sup> The number of families and individuals in these countries who are looking to adopt, due to infertility or other reasons, are greater than the number of babies given up for adoption.<sup>11</sup> Greater contraceptive use, the legalization of abortion, and society's increased acceptance of single-parent-families have resulted in the decreased numbers of children, and especially highly "desirable" infants,<sup>12</sup> who are available for domestic adoption in these countries.<sup>13</sup> International adoption (also referred to as "intercountry adoption"), the process by which citizens of one country adopt children from other countries, poses an immediate solution to this dilemma.

International adoption appears to be the "most logical solution" to the disparity in the number of orphaned and abandoned children in some countries and the number of families and individuals wishing to adopt children in others.<sup>14</sup> The practice, however, has been the topic of heated debate. International adoption has been considered in many different lights; including: the best interests of the child; cross-cultural concerns; trade; East-West relations; and in medical and developmental terms.<sup>15</sup> More significantly, many "sending" countries have begun to reduce the number of international adoptions in response to various pressures.<sup>16</sup> Specifically, three types of pressures have been identified. First, many sending countries, which are usually less developed and poorer than "receiving" countries, view international adoption as the "most recent and the most heinous form of imperialism."<sup>17</sup> Second, many sending countries feel that in allowing so many of

---

8. *Id.* at 187 (citing *20/20: Shame of a Nation* (ABC television broadcast, Oct. 5, 1990)).

9. *Id.* at 187-88.

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

11. *Id.*

12. Hubing, *supra* note 2, at 659 (explaining that in the U.S. the greatest demand is for healthy, white infants).

13. *Id.*

14. See *id.* at 659-60.

15. Van Leeuwen, *supra* note 5, at 189.

16. Curtis Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, 28 GA. J. INT'L & COMP. L. 319, 325 (2000).

17. *Id.*

their children to be adopted by foreigners, they are conceding to the perception of their own social and economic failures.<sup>18</sup> Third, the widespread practice of international adoption has produced evils such as child-trafficking, kidnapping, and financial exploitation.<sup>19</sup> Widespread media attention on these “companion evils” to international adoption has led the governments of many traditional sending countries to restrict,<sup>20</sup> or in some instances even halt, the availability of children for international adoptions.<sup>21</sup>

The United Nations has addressed the issue of international adoption, most recently with the 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (hereinafter “Hague Adoption Convention”).<sup>22</sup> The Hague Adoption Convention represents a significant development in the area of international adoption. It provides, for the first time, enthusiastic endorsement of international adoption as a viable solution to the disparity between the number of orphaned and abandoned children in some countries and families and individuals wishing to adopt children in others. As with the practice of international adoption, international measures addressing the practice have also received widespread criticism. For instance, commentators argue that although international adoption represents an immediate solution to the problems of both orphaned and abandoned children, as well as families and individuals wishing to adopt, such international measures fail to address the underlying causes of the high numbers of children in this situation.<sup>23</sup>

This Note investigates whether international adoption is indeed the most logical solution to the disparity in the number of orphaned and abandoned children in some countries and the number of families and individuals wishing to adopt children in others. Specifically, Part II briefly describes the origins and current state of international adoption. Part III provides an overview of United Nations declarations and conventions that address the practice. Part IV analyzes the debate surrounding international adoption, as well as recent developments in the adoption law and policy of China and other popular sending countries. The

---

18. *Id.*

19. *Id.*

20. *Id.*

21. Kleem, *supra* note 16; *see also* Liu, *supra* note 1, at 204 (citing *Romanian Government Temporarily Halts International Adoption of Children* (BBC television broadcast, June 4, 1991)). When Romania’s ex-dictator Ceausescu fell from power, families from all over the world flocked to that country to adopt the thousands of orphaned children who were crowded into state-run orphanages. As a result, a black market emerged. Tales of bribery, bullied mothers, and forged documents led the Romanian government to briefly halt the adoption of Romanian children by foreigners in June of 1991.

22. Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134.

23. *See* Van Leeuwen, *supra* note 5, at 190.

potential effects of the Hague Convention on the practice are also postulated. Part V explains that international adoption, as practiced under the Hague Convention, may be the most logical solution to the *immediate* problems it is purported to remedy, but the practice itself is not the best long-term solution to the underlying causes of the high numbers of orphaned and abandoned children in some countries. This Note concludes that, although the Hague Convention represents the greatest effort to serve the best interests of orphaned and abandoned children, perhaps its greatest impact will be evidenced in its incidental effects.

## II. BACKGROUND: HISTORY AND PREVALENCE OF INTERNATIONAL ADOPTION

### A. Origins of International Adoption

The practice of international adoption began in the aftermath of World War II.<sup>24</sup> Members of the U.S. military who were stationed abroad brought awareness to the plight of children who were orphaned and abandoned as a result of the War.<sup>25</sup> International adoption developed as a vehicle to “save” these children affected by World War II, as well as other children affected by famine and other natural disasters.<sup>26</sup> In the United States, the number of international adoptions increased from zero before World War II to nearly 19,237 in 2001.<sup>27</sup> The number of foreign children adopted by U.S. citizens in 2001 includes 4,681 children from mainland China, 4,279 from Russia, 1,870 from South Korea, 1,609 from Guatemala, 1,246 from Ukraine, and 782 from Romania.<sup>28</sup>

International adoption emerged in the years following World War II, but it was the Korean War that brought widespread attention to the practice.<sup>29</sup> This attention stemmed from various factors. United States soldiers were exposed to the suffering of children left homeless by the Korean War.<sup>30</sup> Furthermore, the South Korean government’s willingness to grant international adoptions brought awareness to the practice.<sup>31</sup> Finally, families in the United States felt compelled to adopt the large number of half-Asian children fathered by U.S. soldiers that

---

24. See Hubing, *supra* note 2, at 661.

25. *Id.* (citing MARY KATHLEEN BENET, *THE POLITICS OF ADOPTION* 121 (1976)).

26. *Id.*; see Liu, *supra* note 1, at 191-92.

27. Hubing, *supra* note 2, at 661 (citing U.S. DEP’T OF JUSTICE, *STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE* (1986)); *Immigrant Visas Issued to Orphans Coming to the United States: Top Countries of Origin*, at [http://www.travel.state.gov/orphan\\_numbers.html](http://www.travel.state.gov/orphan_numbers.html) (last visited Oct. 1, 2003).

28. *Immigrant Visas Issued to Orphans Coming to the United States*, *supra* note 27.

29. Liu, *supra* note 1, at 192; Hubing, *supra* note 2, at 661.

30. Liu, *supra* note 1, at 192.

31. *Id.*; Hubing, *supra* note 2, at 661-62.

became outcasts in South Korean society.<sup>32</sup>

Following the Korean War, U.S. citizens adopted South Korean children in high numbers for over thirty years.<sup>33</sup> Between 1953 and 1981, U.S. citizens adopted 38,129 South Korean children.<sup>34</sup> In the mid-1970s the South Korean government started restricting the practice.<sup>35</sup> The government began by limiting the adoption of South Korean children to citizens of only certain countries.<sup>36</sup> Then, in response to political pressure and international embarrassment caused by a media story aired during the 1998 Seoul Olympics, the South Korean government placed severe restrictions on international adoptions.<sup>37</sup> As a result, the number of South Korean children adopted by U.S. citizens declined in 2001 to 1,870 children.<sup>38</sup> China now represents the leading source of children for international adoptions by U.S. citizens.<sup>39</sup> The number of Chinese children adopted by U.S. citizens has increased from 201 in 1989 to 4,681 in 2001.<sup>40</sup>

## **B. The Current State of International Adoption**

The phenomenon of international adoption, once spurred by the devastation of war, now reflects a more general awareness of developing world poverty and developed world privilege.<sup>41</sup> This awareness, coupled with the shortage of adoptable children in Western countries, and especially highly desired “healthy white infants,” in the United States leads many U.S. families to go to the “four corners of the world” to find the children they so desperately want.<sup>42</sup>

---

32. See Van Leeuwen, *supra* note 5, at 191; see also Hubing, *supra* note 2, at 662.

33. Hubing, *supra* note 2, at 662 (citing BENET, *supra* note 25, at 123).

34. Van Leeuwen, *supra* note 5, at 218 n.7 (citing Richard H. Weil, *International Adoptions: The Quiet Migration*, 18 INT’L MIGRATION REV. 2, 287 (1984)).

35. Hubing, *supra* note 2, at 662 (citing Youn-Taek Tahk, *Inter-country Adoption Program in Korea: Policy, Law and Services*, in ADOPTION IN WORLDWIDE PERSPECTIVE: A REVIEW OF PROGRAMS, POLICIES AND LEGISLATION IN 14 COUNTRIES 83 (R.A.C. Hoksbergen ed., 1986)).

36. *Id.*

37. Kleem, *supra* note 16, at 327-28. The media story described the phenomenon by which large numbers of South Korean children were being adopted by foreigners. The story shocked and embarrassed the South Korean public. As a result, the South Korean government restricted the availability of Korean children for adoption.

38. *Immigrant Visas Issued to Orphans Coming to the United States: Top Countries of Origin*, *supra* note 27.

39. Hubing, *supra* note 2, at 662. China’s One-Child Policy, coupled with recent publicity highlighting terrible conditions in China’s State-run orphanages, has resulted in a dramatic increase in the number of adoptions of Chinese children by U.S. citizens.

40. *Immigrant Visas Issued to Orphans Coming to the United States: Top Countries of Origin*, *supra* note 27.

41. Van Leeuwen, *supra* note 5, at 191.

42. Liu, *supra* note 1, at 190 (citing Harold R. Kennedy, *As Adoptions Get More Difficult*, U.S. NEWS & WORLD REP., June 25, 1984, at 62).

Further, some prospective adoptive parents choose international adoption because domestic adoption agencies deem them ineligible to adopt or place them very low on the waiting list due to a variety of factors such as marital status (i.e., being single), sexual orientation,<sup>43</sup> or race.<sup>44</sup>

The practice of international adoption is prevalent in countries where not only families, but also the countries themselves, cannot care for their orphaned and abandoned children.<sup>45</sup> Families may be unable to care for their children for a variety of reasons, including the economic, political, and social circumstances already addressed. The countries themselves may be temporarily unable to care for their children in the aftermath of war.<sup>46</sup> In time, however, such a situation is remedied when the country's economic situation improves and previously war-torn communities are able to reabsorb their children.<sup>47</sup> These communities are able to care for their children because economic improvement usually occurs simultaneously with declining birthrates and increased interest in adoption.<sup>48</sup>

In contrast, some countries are unable to reabsorb their orphaned and abandoned children. This problem appears particularly pronounced in economically underdeveloped countries that experience a population explosion simultaneously with an economic downturn.<sup>49</sup> In such situations, orphaned and abandoned children are either left to the streets to fend for themselves or may be placed in institutions that are often ill-prepared to care for them. In such situations, international adoption appears an immediate solution.

### III. LEGAL OVERVIEW

Little international law governs international adoption. The United Nations has addressed the issue through international declarations and conventions.<sup>50</sup> For the most part, these measures are aimed at protecting children against potential abuses in the practice of international adoption.<sup>51</sup>

---

43. Hubing, *supra* note 2, at 667.

44. *Id.* at 671-72.

45. Liu, *supra* note 1, at 192.

46. *Id.* (citing BENET, *supra* note 25, at 121).

47. *Id.*

48. *Id.*

49. *Id.*

50. United Nations declarations and conventions pertaining to the practice of international adoption include: The Universal Declaration of Human Rights, The Declaration of the Rights of the Child, The Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, The Convention on the Rights of the Child, and The Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (all discussed *infra*).

51. Bartholet, *supra* note 10, at 190.

## **A. International Declarations and Conventions**

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

The General Assembly of the United Nations adopted the Universal Declaration of Human Rights on December 10, 1948.<sup>52</sup> The Preamble states that “[r]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>53</sup> Article 25(2) of the Declaration specifically addresses the welfare of children: “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”<sup>54</sup> Article 25(2) is the only article that addresses the rights of children.

This Declaration is significant for several reasons.<sup>55</sup> First, all Member States of the United Nations have “tacitly accepted” this Declaration.<sup>56</sup> Further, commentators argue that some, if not all, of the rights set forth in this Declaration have become accepted as customary law.<sup>57</sup> Finally, provisions of this Declaration have “served as a blueprint for constitutions of many newly independent” nations, and the Universal Declaration of Human Rights as a whole has served as a framework for many international human rights documents.<sup>58</sup>

### **2. Declaration of the Rights of the Child**

The General Assembly of the United Nations officially recognized the human rights of children when it adopted the Declaration of the Rights of the Child in 1959.<sup>59</sup> This Declaration consists of ten principles, two of which pertain to international adoption. Principle 2 states:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount

---

52. G.A. Res. 217A(III), U.N. GAOR, U.N. Doc. A/3 (1948).

53. *Id.* pmb1.

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

55. Hubing, *supra* note 2, at 673.

56. *Id.* (citing REBECCA M. M. WALLACE, INTERNATIONAL LAW 208 (3d ed. 1997)).

57. *Id.*

58. *Id.* (citing RICHARD B. BILDER, AN OVERVIEW OF INTERNATIONAL HUMAN RIGHTS LAW, GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 7 (Hurst Hannum ed., 1999)).

59. G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 21, U.N. Doc. A/4354 (1959) [hereinafter Declaration of the Rights of the Child].

consideration.<sup>60</sup>

Principle 6 of the Declaration reads:

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.<sup>61</sup>

The General Assembly called upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities, and national governments to recognize these enunciated rights and to take measures to promote compliance therewith.<sup>62</sup> In commemoration of the twentieth anniversary of this Declaration, the United Nations designated 1979 the International Year of the Child.<sup>63</sup> In recognition of the International Year of the Child, Poland proposed the drafting of an international treaty that would restate the principles set forth in the Declaration in legally binding language.<sup>64</sup> The United Nations assigned the task to a Working Group that produced a first draft of what would eventually become the Convention on the Rights of the Child.<sup>65</sup>

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

The United Nations General Assembly adopted the Convention on the Rights of the Child on November 20, 1989.<sup>66</sup> This Convention reiterated the principles set forth in the Declaration of the Rights of the Child and expanded upon the Universal Declaration of Human Rights in protecting children's rights and ensuring their well-being.<sup>67</sup> Article 3 sets forth the best interests standard as a

---

60. *Id.* princ. 2.

61. *Id.* princ. 6.

62. Hubing, *supra* note 2, at 673.

63. Cynthia Price Cohen, *Introductory Note to United Nations: Convention on the Rights of the Child*, 28 I.L.M. 1448, 1448 (1989).

64. *Id.*

65. *Id.*

66. *Id.*

67. *United Nations: Convention on the Rights of the Child*, 28 I.L.M. 1448, 1457 (1989).



primary consideration for all actions concerning children, but fails to provide clear guidance as to what factors are to be taken into account in determining the child's best interests.<sup>68</sup> Specifically, Subsection 3 merely states that Member States shall ensure that the "institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."<sup>69</sup> This Convention implies that it is in the child's best interests to remain in the care of his or her parents. In particular, Article 7 states that "the child . . . shall have the right to know and be cared for by his or her parents."<sup>70</sup> This Convention also alludes to continuity in a child's upbringing, as well as the child's ethnic, religious, cultural, and linguistic background as factors to be considered in determining an arrangement that is in the child's best interests.<sup>71</sup>

The Convention on the Rights of the Child also addresses for the first time the role of Member States with respect to the practice of international adoption. Article 21 reads:

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

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

---

68. *Id.* at 1459.

69. *Id.*

70. *Id.* at 1460.

71. *Id.* at 1464. Article 20 pertains to alternative (non-family) care:

1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2) States parties shall in accordance with their national laws ensure alternative care for such a child.

3) Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

*Id.*

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

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

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

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavor, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.<sup>72</sup>

#### 4. Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption

The United Nations adopted the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption (hereinafter "Adoption Declaration") on December 3, 1986.<sup>73</sup> The Adoption Declaration expresses for the first time the General Assembly's particular concern with "the large number of children who are abandoned or become orphans owing to violence, internal disturbance, armed conflicts, natural disasters, economic crises or social problems."<sup>74</sup> Further, the Adoption Declaration describes the United Nations as "[c]onscious of the need to proclaim universal principles to be taken into account in cases where procedures are instituted relating to foster placement or adoption of a child, either nationally or internationally."<sup>75</sup>

Section C specifically addresses the issue of adoption.<sup>76</sup> Article 13 proclaims that the primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family.<sup>77</sup> Article 17

---

72. *United Nations: Convention on the Rights of the Child*, *supra* note 67, at 1464.

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

74. *Id.* Annex.

75. *Id.*

76. *Id.* sec. C.

77. *Id.* art. 13.

endorses international adoption as a suitable arrangement when a child cannot be placed in either a foster or an adoptive family nor be cared for in a suitable manner in the country of origin.<sup>78</sup> The remaining articles in Section C set forth guidelines for international adoption.<sup>79</sup>

---

78. *Id.* art. 17.

79. Adoption Declaration, *supra* note 73, art. 17. Section C sets forth guidelines for international adoption:

Article 13. The primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family.

Article 14. In considering possible adoption placements, persons responsible for them should select the most appropriate environment for the child.

Article 15. Sufficient time and adequate counseling should be given to the child's own parents, the prospective adoptive parents and, as appropriate, the child in order to reach a decision on the child's future as early as possible.

Article 16. The relationship between the child to be adopted and the prospective adoptive parents should be observed by child welfare agencies or services prior to the adoption. Legislation should ensure that the child is recognized in law as a member of the adoptive family and enjoys all the rights pertinent thereto.

Article 17. If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family.

Article 18. Governments should establish policy, legislation and effective supervision for the protection of children involved in intercountry adoption. Intercountry adoption should, wherever possible, only be undertaken when such measures have been established in the States concerned.

Article 19. Policies should be established and laws enacted, where necessary, for the prohibition of abduction and of any other act for illicit placement of children.

Article 20. In intercountry adoption, placements should, as a rule, be made through competent authorities or agencies with application of safeguards and standards equivalent to those existing in respect of national adoption. In no case should the placement result in improper financial gain for those involved in it.

Article 21. In intercountry adoption through persons acting as agent for prospective adoptive parents, special precautions should be taken in order to protect the child's legal and social interests.

Article 22. No intercountry adoption should be considered before it has been established that the child is legally free for adoption and that any pertinent documents necessary to complete the adoption, such as the consent of competent authorities, will become available. It must also be established that the child will be able to migrate and to

This Declaration implies a list of preferred situations in which orphaned and abandoned children might be cared for. The best possible situation, as described in the Adoption Declaration, exists when children are cared for by their biological parents.<sup>80</sup> Children should only be placed in a different situation when parents or relatives cannot care for them; that is, “[w]hen care by the child’s own parents is unavailable or inappropriate, care by relatives of the child’s parents, by another substitute – foster or adoptive – family or, if necessary, by an appropriate institution should be considered.”<sup>81</sup> Thus, the Adoption Declaration expressly endorses keeping children with their own parents and families to the extent possible. The Adoption Declaration next provides that the State should try to place the child within his or her country of origin. Only in the situation that the child cannot be adopted, placed in foster care, or placed in a suitable institution in the country of origin, should the child be displaced.<sup>82</sup> Although this Declaration establishes general guidelines for international adoption, it does not explicitly endorse the practice. Specifically, Article 17 conveys the notion that international adoption is the least desirable alternative for orphaned and abandoned children.<sup>83</sup>

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

The Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (“Hague Adoption Convention”), was adopted on May 29, 1993.<sup>84</sup> The Hague Adoption Convention applies to international adoptions between Member States that are parties to it.<sup>85</sup> As of January 2003, fifty countries

---

join the prospective adoptive parents and may obtain their nationality.

Article 23. In intercountry adoption, as a rule, the legal validity of the adoption should be assured in each of the countries involved.

Article 24. Where the nationality of the child differs from that of the prospective adoptive parents, all due weight shall be given to both the law of the State of which the child is a national and the law of the State of which the prospective adoptive parents are nationals. In this connection due regard shall be given to the child’s cultural and religious background and interests.

*Id.*

80. *See id.* art. 3. Article 3 provides, “The first priority for a child is to be cared for by his or her own parents.” *Id.*

81. *Id.* art. 4.

82. *See id.* art. 17.

83. *See id.*

84. *See Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 32 I.L.M. 1134, 1134 (1993) [hereinafter *Hague Adoption Convention*].

85. Peter H. Pfund, *Introductory Note to Hague Conference on Private International*

have become parties to this Convention.<sup>86</sup> An additional ten countries, including the United States and China, have signed the treaty but not yet ratified it.<sup>87</sup>

The Hague Adoption Convention represents a significant development in the area of international adoption because it expands upon the general principles expressed in the United Nations declarations and conventions previously discussed to establish specific standards and procedures to govern the practice.<sup>88</sup> Moreover, the Hague Adoption Convention receives greater deference because nearly all countries that are significantly involved in the practice of international adoption participated in drafting and approving it.<sup>89</sup> Finally, the Convention provides “a far more enthusiastic endorsement of international adoption as a good solution” for the problems of orphaned and abandoned children than do any of the previously discussed conventions or declarations.<sup>90</sup> Specifically, the Preamble states that a “child should grow up in a family environment” and that “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”<sup>91</sup> This represents an explicit rejection of the United Nations’ previous assertion that international adoption is less desirable than foster care, and perhaps even institutional care, in the child’s country of origin.<sup>92</sup>

The Hague Adoption Convention modifies the hierarchy of preferred situations in which children should grow up, which was implied in the earlier Adoption Declaration. As with the Adoption Declaration, the Hague Adoption Convention identifies the best possible situation as that in which a child grows up in their family of origin.<sup>93</sup> The Preamble states that, “each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of

---

*Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 32 I.L.M. 1134, 1134 (1993).

86. *Hague Conference on Private International Law: Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, at <http://www.hcch.net/e/status/adoshte.html> (last visited Jan. 7, 2003). The following countries have signed and ratified (or acceded to) the Hague Adoption Convention: Albania, Andorra, Australia, Austria, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Chile, Columbia, Costa Rica, Cyprus, Czech Republic, Denmark, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Iceland, Israel, Italy, Latvia, Lithuania, Luxembourg, Mauritius, Mexico, Moldova, Monaco, Mongolia, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Philippines, Poland, Romania, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, and Venezuela. *Id.*

87. *Id.* The following countries have signed, but not yet ratified the Convention: Belarus, Belgium, China, Ireland, Portugal, Russian Federation, Turkey, United Kingdom, United States, and Uruguay.

88. Barthelet, *supra* note 10, at 192.

89. *Id.*

90. *Id.*

91. *Hague Adoption Convention*, *supra* note 84, at 1134-35.

92. Barthelet, *supra* note 10, at 193.

93. Kleem, *supra* note 16, at 333.

his or her family of origin.”<sup>94</sup> The second best alternative proffered is for the child to grow up in his or her country of origin with another family.<sup>95</sup> This second best situation includes the possibility of domestic adoption.<sup>96</sup> The Hague Adoption Convention recognizes the importance of providing children with a family environment in the situation listed as third best.<sup>97</sup> If domestic adoption is not possible, then international adoption is preferred to the possibility of placing the child in an institution.<sup>98</sup> This represents a change from the earlier stated preference for keeping the child in his or her country of origin and only displacing the child if no suitable care, including institutionalization, is available in the country of origin.<sup>99</sup> Finally, the Hague Adoption Convention lists as the least desirable option the situation in which children are cared for in a non-family environment, such as an orphanage.<sup>100</sup> In modifying the hierarchy of preferred situations in which children should grow up, the Hague Adoption Convention implies that the child’s need for a permanent home is greater than his or her need to remain in the country of origin.<sup>101</sup> This modification represents acquiescence to attachment theory, which “recognizes the incredible harm that interrupted relationships with a string of primary caregivers can do to a child’s development.”<sup>102</sup>

In addition to providing endorsement for international adoption, the Hague Adoption Convention sets forth standards to protect children involved in this practice. Chapter 1 states that the objectives of the Convention are:

(a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;

(b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and

---

94. *Hague Adoption Convention*, *supra* note 84, at 1139.

95. Kleem, *supra* note 16, at 333.

96. *Id.*

97. *See id.*

98. *See id.*

99. *See Adoption Declaration*, *supra* note 73, art. 17.

100. *See Kleem*, *supra* note 16, at 333, 339.

101. Van Leeuwen, *supra* note 5, at 205.

102. *Id.* Attachment theory is a developmental theory based on the notion that “secure attachments,” and especially the close emotional bonds that form between an infant and his or her caregivers, result in more social competence in later life. Specifically, theorists such as Mary Ainsworth believe that infants who are securely attached use their caregivers as a secure base from which to explore the environment. Ainsworth hypothesizes that secure attachment is critical during the first year of life and provides a foundation for later psychological development. *See* JOHN W. SANTROCK, LIFE-SPAN DEVELOPMENT 172-75 (7th ed. 1999).

thereby prevent the abduction, the sale of, or traffic in children; and

(c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.<sup>103</sup>

Chapter 2 specifies requirements for international adoption, including the requisites that sending countries ensure that the child is eligible for adoption, that an international adoption is in the child's best interests, and that either the child's biological parents or the institution in which the child is placed have freely consented to the adoption.<sup>104</sup> Chapter 3 pertains to the Central Authorities and

---

103. *Hague Adoption Convention*, *supra* note 84, at 1139.

104. *Id.* at 1139-40. Chapter 2 outlines requirements for intercountry adoptions:

Article 4. An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –

- (a) have established that the child is adoptable;
- (b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;
- (c) have ensured that the persons, institutions and authorities whose consent is necessary for adoption, have been counseled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin, such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing, the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and the consent of the mother, where required, has been given only after the birth of the child; and
- (d) have ensured, having regard to the age and degree of maturity of the child, that he or she has been counseled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required, consideration has been given to the child's wishes and opinions, the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and such consent has not been induced by payment or compensation of any kind.

Article 5. An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State –

- (a) have determined that the prospective adoptive parents are eligible and suited to adopt;
- (b) have ensured that the prospective adoptive parents have been counseled as may be necessary; and
- (c) have determined that the child is or will be authorized to enter and

Accredited Bodies that the Convention requires be created to administer the procedures set forth.<sup>105</sup> Procedural requirements for international adoption are outlined in Chapter 4.<sup>106</sup> Chapter 5 of the Convention addresses recognition and effects of the adoption,<sup>107</sup> and Chapter 6 contains general provisions,<sup>108</sup> including

---

reside permanently in that State.

*Id.*

105. *Id.* at 1140. Article 6(1) states: “A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.” Article 7 states: “(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention. (2) They shall take directly all appropriate measures to – (a) provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms; and (b) keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.” Article 9 states:

Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to –

- (a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;
- (b) facilitate, follow and expedite proceedings with a view to obtaining the adoption;
- (c) promote the development of adoption counseling and post-adoption services in their States;
- (d) provide each other with general evaluation reports about experience with intercountry adoption;
- (e) reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

*Id.*

106. *Id.* at 1141. Article 17 states:

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if –

- (a) the Central Authority of that State has ensured that the prospective adoptive parents agree;
- (b) the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;
- (c) the Central Authorities of both States have agreed that the adoption may proceed; and
- (d) it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorized to enter and reside permanently in the receiving State.

*Hague Adoption Convention, supra* note 84, at 1141.

107. *Id.* at 1142. Article 26 states:



Article 32, which prohibits child-trafficking.<sup>109</sup>

### **B. Effects of International Declarations and Conventions**

The effects of the aforementioned international declarations and conventions vary. The Universal Declaration of Human Rights, the Declaration of the Rights of the Child, and the Adoption Declaration are declarations, which are not legally binding on Member States. Rather, they represent *opinio juris*, or consensus of those nations that are parties to them.<sup>110</sup> If, however, a large number of Member States ratify a declaration, some commentators view this as significant

- 
- 1) The recognition of an adoption includes recognition of
    - (a) the legal parent-child relationship between the child and his or her adoptive parents;
    - (b) parental responsibility of the adoptive parents for the child;
    - (c) the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.
  - 2) In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognized, rights equivalent to those resulting from adoptions having this effect in each such State.
  - 3) The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognizes the adoption.

Article 27 addresses the effect of the adoption on the pre-existing parent-child relationship:

- 1) Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognizes the adoption under the Convention, be converted into an adoption having such an effect –
  - (a) if the law of the receiving State so permits; and
  - (b) if the consents referred to in Article 4, subparagraphs (c) and (d) have been or are given for the purpose of such an adoption.

*Id.*

108. *Id.* at 1143.

109. *Hague Adoption Convention*, *supra* note 84, at 1143. Article 32 states:  
 (1) No one shall derive improper financial or other gain from an activity related to an intercountry adoption.  
 (2) Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.  
 (3) The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

*Id.*

110. *See* Hubing, *supra* note 2, at 678 (citing LINDA MALONE, INTERNATIONAL LAW: THE PROFESSOR SERIES 36 (1998)).

evidence of customary law.<sup>111</sup>

Conversely, the Convention on the Rights of the Child and the Hague Adoption Convention are international conventions. The effects of these documents vary depending upon which Member States have signed and ratified them.<sup>112</sup> Only those States that have signed and ratified a particular convention are legally bound by its terms.<sup>113</sup> States that have signed but not ratified a particular convention have no legal obligation to comply with its terms.<sup>114</sup>

In light of these characteristics, commentators cite as a major problem with international law its consensual nature.<sup>115</sup> If Member States do not agree to the terms of a particular convention, they may refuse to sign it and, thus, are not bound by its terms. Further, even when States are legally bound by a convention, compliance with its terms is not guaranteed because of a lack of enforcement mechanisms.<sup>116</sup>

## IV. ANALYSIS

### A. The Debate Surrounding International Adoption

To determine whether international adoption is the most logical solution to the disparity in the number of orphaned and abandoned children in some countries and the number of families and individuals wishing to adopt children in others, it is useful to analyze the debate surrounding the practice.

#### 1. Arguments in Favor of International Adoption

The position taken by proponents of international adoption is that the practice “saves” children who have been orphaned and abandoned and otherwise victimized by the conditions in poor countries.<sup>117</sup> For example, rather than fighting over the limited number of healthy infants available for adoption in the

---

111. *Id.*

112. *Id.* at 679 (citing LINDA MALONE, INTERNATIONAL LAW: THE PROFESSOR SERIES 13-14 (1998)).

113. *Id.*

114. *Id.*

115. Hubing, *supra* note 2, at 679.

116. *Id.* A major criticism of international law is that enforcement mechanisms are severely lacking. The principle enforcement body of the United Nations, the International Court of Justice (ICJ), hears very few cases because only States may bring actions before the Court. For example, if a dispute arises during an international adoption, the ICJ does not provide a mechanism by which the families may seek relief because they are private parties. Furthermore, even if a State did become involved in the dispute, the ICJ is limited as an enforcement mechanism because the other State involved must consent to jurisdiction, which rarely occurs. *Id.*

117. Liu, *supra* note 1, at 193 (citing BENET, *supra* note 25, at 128).

United States, individuals and families wishing to adopt are reaching out to children in need of families.<sup>118</sup> Critics of international adoption argue that uprooting a child from his or her country of origin is not in the child's best interests; however, proponents contend that the United States is in a better position to provide care for orphaned and abandoned children than are many poorer countries of the world.<sup>119</sup> Emphasis is placed on what is in the child's best interests. Proponents argue that it is in the child's best interests to receive adequate care, nourishment, and shelter, even if this occurs in a country other than the child's country of origin.<sup>120</sup>

Another central argument in favor of international adoption is that this practice is preferable to the child being raised in an institution in the country of origin. Adoption allows orphaned and abandoned children to grow up in loving, permanent homes that, when compared to growing up in foster care, orphanages, or on the streets, better meet children's physical and emotional needs.<sup>121</sup> In many countries, and for a variety of reasons, domestic adoption is not a viable solution to the problems of orphaned and abandoned children. Without international adoption, orphaned and abandoned children would have no opportunity to grow up in a family environment. Therefore, advocates of international adoption deem the practice a "necessary and positive solution to the problem of children without families."<sup>122</sup>

---

118. Bartholet, *supra* note 10, at 183.

119. *See* Liu, *supra* note 1, at 193.

120. *Id.*

121. Hubing, *supra* note 2, at 663 (citing Stacie I. Strong, *Children's Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT'L L.J. 163, 170 (1995)).

122. *Id.* Elizabeth Bartholet cites various empirical studies as evidence of this notion that international adoption provides a positive solution to the problem of children without families. She explains:

The studies show these children and their families functioning well, and comparing well on various measures of emotional adjustment with other adoptive families, as well as with biologic families. This is rather strikingly positive evidence since most international adoptees have had problematic preadoptive histories that could be expected to cause difficulties in adjustment. The studies show that adoption has for the most part been extraordinarily successful in enabling even those children who have suffered extremely severe forms of deprivation and abuse in their early lives, to recover and flourish.

Bartholet, *supra* note 10, at 202-04.

Bartholet cites one major study of Vietnamese children between the ages of two and five who were adopted by citizens of Norway. When the children arrived in Norway, many could not walk, and they were described as "passive, apathetic, retarded and malnourished." When studied at the ages of seventeen to twenty-two, these children were found to be well-adjusted and strongly attached to their families.

Bartholet also cites studies of special challenges faced by children and families involved in international adoption. These studies pertain to the children's adjustment to a new language and culture, the effects of children's traumatic preadoptive experiences and

Elizabeth Bartholet,<sup>123</sup> an advocate of international adoption, asserts that the debate surrounding the practice should focus on the “misery and deprivation that characterize the lives of huge numbers of the children of the world.”<sup>124</sup> She states:

Millions of children die regularly of malnutrition and of diseases that should not kill. Millions more live in miserably inadequate institutions or on the streets. Their situations vary: some institutions are worse than others; some “street children” maintain a connection with a family while others are entirely on their own. But there can be no doubt that overwhelming numbers of children in the poor countries of the world are living and dying in conditions which involve extreme degrees of deprivation, neglect, exploitation, and abuse. These are the real problems of children of the world. International adoption should be seen as an opportunity to solve some of these problems for some children. It should be structured to maximize this positive potential by facilitating the placement of children in need of nurturing homes with people in a position to provide those homes.<sup>125</sup>

Bartholet concedes that international adoption can only play a very limited role in addressing these problems.<sup>126</sup> She asserts that the solutions to these problems involve reallocation of social and economic resources both among and within countries so that more children may be cared for by their families of origin; however, since such grand scale “social reordering” does not appear to be on the immediate horizon, Bartholet claims that international adoption “clearly can serve the interests of at least those children in need of homes for whom adoptive parents can be found.”<sup>127</sup>

Finally, there is global consensus that children’s rights deserve special protection.<sup>128</sup> For instance, the Universal Declaration of Human Rights,<sup>129</sup> which

---

early health problems, and complex issues involved in being part of a family formed by international adoption. These studies reveal no evidence that these challenges cause psychological harm to international adoptees. *Id.* at 202-06.

123. Elizabeth Bartholet is a professor of Law at Harvard Law School. She served as a member of an advisory group to the United States State Department in connection with its role in representing the United States in the Hague Convention negotiations, as well as in its role in developing and implementing legislation in the United States. *Id.* at 210 n.dd.

124. *Id.* at 196.

125. *Id.* at 196-97.

126. *Id.* at 197.

127. Bartholet, *supra* note 10, at 197.

128. Liu, *supra* note 1, at 193-94.

129. Universal Declaration of Human Rights, *supra* note 52.

explains the universal rights of humans, also calls for special care and assistance for children.<sup>130</sup> The Declaration of the Rights of the Child<sup>131</sup> outlines children's rights regarding proper nutrition, shelter, recreation, and health care.<sup>132</sup> The Declaration also calls for special protection of children's psychological, moral, religious, and social development.<sup>133</sup> In spite of these declarations, millions of orphaned and abandoned children living abroad are not afforded these rights. International adoption appears to be an obvious way to recognize children's rights and to provide them with the care and nurturance they so desperately need.

## 2. Arguments Against International Adoption

Although international adoption appears to be the most logical solution to the disparity between the numbers of orphaned and abandoned children in some countries and families and individuals wishing to adopt in others, the practice has received widespread criticism. There are two central arguments against the practice that are based on financial grounds, either at the national or personal level.<sup>134</sup>

At the national level, some view the practice as a new form of imperialism. A common attitude among developing nations is, "First you want our labor and raw materials; now you want our children."<sup>135</sup> While the West considers the practice "charitable, humane – even noble – behavior, developing countries have come to define [international adoption] as imperialistic, self-serving, and a return to a form of colonialism in which whites exploit and steal natural resources."<sup>136</sup> Bartholet responds to this argument by examining what is best for the global community:

[International adoption] does tend to involve the adoption by the privileged classes in the industrialized nations, of the children of the least privileged groups in the poorest nations, the adoption by whites of black- and brown-skinned children from various Third World nations, and the separation of children not only from their birth parents, but from their racial, cultural, and national communities as well . . . . [However,]

---

130. Liu, *supra* note 1, at 193-94.

131. Declaration of the Rights of the Child, *supra* note 59.

132. Liu, *supra* note 1, at 193-94 (citing Declaration of the Rights of the Child, *supra* note 59, princ. 4).

133. *Id.* at 194 (citing Declaration of the Rights of the Child, *supra* note 59, princ. 2).

134. Hubing, *supra* note 2, at 665.

135. Liu, *supra* note 1, at 194-95 (citing Jane Rowe, *Perspectives on Adoption, in ADOPTION: INTERNATIONAL PERSPECTIVES* 3, 6 (Euthymia D. Hibbs ed., 1991)).

136. Kleem, *supra* note 16, at 325 (citing Howard Altstein & Rita J. Simon, *Introduction*, to *INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE* 1, 2 (Howard Altstein & Rita J. Simon eds., 1991)).

[t]he fact that these families are built across lines of racial and cultural difference can be seen as a good thing, both for the parents and children involved and for the larger community. These are families whose members must learn to appreciate one another's differences, in terms of racial and cultural heritage, while at the same time experiencing their common humanity.<sup>137</sup>

On the personal level, critics of the practice cite the prevalence of negative activities associated with international adoption.<sup>138</sup> These co-occurrences include child-trafficking and abduction, financial exploitation, and coercion.<sup>139</sup> High demand for children in the United States and other industrialized countries has resulted in a black market.<sup>140</sup> For example, it is estimated that in 1974, 5,000 children were sold on the black market for adoption purposes.<sup>141</sup> Black markets do not serve the best interests of children, or their biological or adoptive families; black markets operate solely for profit.<sup>142</sup>

Critics argue that as the practice of international adoption has expanded,

---

137. Bartholet, *supra* note 10, at 182-83.

138. Hubing, *supra* note 2, at 665-66.

139. See Kleem, *supra* note 16, at 329. Kleem describes a recent case that exemplifies China's concern with the abduction and selling of children. Kleem states:

In August 1998, a child-smuggling operation was uncovered in Taiwan. Apparently, Chinese children were either bought or stolen from their parents, then smuggled across the Taiwan Strait into Taiwan. They were then issued false birth certificates and adopted by Taiwanese parents. Records confiscated by Taiwanese police showed that the birth certificates for as many as thirty children had been falsified. The adoptive parents of eleven of the children claimed that they were told by the clinic used in the operation that the children had been born to local women who placed the children up for adoption. Further investigation showed that as many as one hundred children had been illegally adopted in Taiwan between 1995 and 1998. A number of children had been sold for roughly \$8,700, and others sold for even more.

*Id.* Kleem states that this is not an isolated incident. For example, major press outlets in the United States have reported instances of peasants selling children in Romania, and that authorities in Ontario claim to have evidence that children have been sold for up to \$50,000. These reports, and others similar to them, have been influential in the decisions made by some countries to restrict the practice of international adoption. *Id.* at 329-30.

140. Liu, *supra* note 1, at 194.

141. Hubing, *supra* note 2, at 665 (citing Ahilemah Jonet, *Legal Measures to Eliminate Transnational Trading of Infants for Adoption: An Analysis of Anti-Infant Trading Statutes in the United States*, 13 *LOY. L.A. INT'L & COMP. L.J.* 305, 305 (1990)).

142. Liu, *supra* note 1, at 194.

so too have the negative activities associated with it.<sup>143</sup> They contend that this increase has occurred, despite heightened restrictions on the practice.<sup>144</sup> Underlying this problem is the fact that the laws of supply and demand apply to children; while there is a current shortage of adoptable babies in the United States, demand is higher than ever.<sup>145</sup> At the same time, third world countries have high demand for U.S. dollars.<sup>146</sup> Thus, adoption is “big business” in developing countries.<sup>147</sup> Those who oppose international adoption also claim that the practice allows sending countries to ignore the underlying causes of the high numbers of orphaned and abandoned children available for adoption.<sup>148</sup> For example, China’s One-Child Policy<sup>149</sup> limits a family to only one child. Because Chinese culture places greater value on sons than on daughters, implementation of the policy has led families to abandon around 95,000 baby girls.<sup>150</sup> Some of these abandoned baby girls are adopted internationally. Critics of international adoption argue that the practice allows the Chinese government to ignore the need for social change.<sup>151</sup> Supporters of international adoption acknowledge the fact that the practice fails to address the underlying causes that produce so many orphaned and abandoned children.<sup>152</sup> They argue, however, that disallowing families and individuals wishing to adopt these children that opportunity would be irrational.<sup>153</sup> They contend that waiting for social conditions to improve (e.g., waiting for the One-Child Policy to be relaxed in China), would be inaction “tantamount to sacrificing an existing generation of children who need families now.”<sup>154</sup>

On a related note, some critics link international adoption to the foster

---

143. Jonathan G. Stein, *A Call to End Baby Selling: Why the Hague Convention on Inter-country Adoption Should be Modified to Include Consent Provisions of the Uniform Adoption Act*, 24 T. JEFFERSON L. REV. 39, 64-65 (2001).

144. *Id.* at 164 (arguing that there has been an increase in babies being sold on the black market, despite increased regulations and legislation prohibiting baby selling).

145. *Id.* at 164-65.

146. *Id.* at 165.

147. *Id.*

148. See Kleem, *supra* note 16, at 328 (“Another aspect of the potential embarrassment that China and other large scale sending countries may face is the argument that in allowing so many orphans to be adopted internationally, the country is not focusing on the source of the problem. The international adoptions do nothing to address the real social and economic conditions that lead to the number of orphans in China.”).

149. China’s One-Child Policy permits families to have only one child. See Singer, *supra* note 5, at 291.

150. See Van Leeuwen, *supra* note 5, at 193.

151. Kleem, *supra* note 16, at 328-29.

152. *Id.*

153. *Id.*

154. *Id.* (citing John Triseliotis, *Inter-country Adoption: In Whose Best Interest?*, in INTER-COUNTRY ADOPTION: PRACTICAL EXPERIENCES 119, 131 (Michael Humphrey & Heather Humphrey eds., 1993)).

care crisis in the United States.<sup>155</sup> They point out that while unprecedented numbers of American-born children continue to enter the foster care system in the United States, between 7,000 and 10,000 foreign-born children enter the United States each year as a result of international adoption.<sup>156</sup> For example, one scholar writes, “[a]t first glance, the domestic foster care crisis and an increasingly high rate of international adoptions by American citizens seem to have little connection. In fact, adoption policies at the federal and state levels have contributed to both situations.”<sup>157</sup> She asserts that U. S. adoption laws and policies force many prospective adoptive parents to look abroad to find children.<sup>158</sup> She argues that Americans must first care for our own orphaned and abandoned children, and we must amend our own adoption laws and policies to encourage domestic adoptions.<sup>159</sup>

### **B. Recent Developments in Foreign Adoption Law and Policy**

Recent developments in the adoption law and policy of some sending countries evidence general reactions to the debate surrounding the practice of international adoption. This article will examine recent changes in the adoption law and policy of three countries: China, Korea, and Romania. The adoption law and policy of these three countries warrants closer examination for various reasons. The adoption law and policy of China is examined because, since that country opened its doors to international adoption in 1992, it has become a leading source of children.<sup>160</sup> China’s popularity as a sending country stems from the One-Child Policy enacted by the Chinese government and its resultant

---

155. See, e.g., Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, COLUM. J.L. & SOC. PROBS. 327, 328 (1997).

156. *Id.* at 327.

157. *Id.* at 328.

158. *Id.* Kleiman states that international adoption results, largely in part, from the difficulties inherent in domestic adoption in the United States. Prospective adoptive parents may choose to adopt internationally in response to adoption policies and laws in the United States. For example: (a) they cannot find the children they want in the United States (i.e., healthy white infants); (b) white families who are open to adopting a child of minority descent are prohibited from doing so by adoption agencies that employ race-matching policies; (c) American policies and laws provide powerful protection for the rights of biological parents at the expense of adoptive parents (e.g., many prospective parents view domestic adoption as lacking the degree of certainty or finality that accompanies international adoption); and (d) they have been deemed ineligible as an adoptive parent or have been placed low on the waiting list when measured against domestic adoption agency criteria (e.g., young, happily-married couples are usually ranked at the top of the waiting list; single, older, and disabled people are placed in the middle; and at the bottom are gays, lesbians, and severely disabled people). See generally *id.*

159. See *id.* at 328.

160. Singer, *supra* note 5, at 283.



overabundance of babies, predominately girls, who are available for adoption.<sup>161</sup> Further, China has recently lessened the restrictions it imposes on international adoption.<sup>162</sup> Korea's adoption law and policy deserves closer examination because that country has played a significant role in international adoption for over forty years.<sup>163</sup> Assessment of Romania's participation in the practice of international adoption reveals the potential for problems that can occur.<sup>164</sup> As discussed below, Romania experienced well-documented problems with child-trafficking. Recent developments in the law and policies of both Korea and Romania reflect heightened constraints on the practice of international adoption.

### 1. China's Influence on International Adoption and Recent Lowering of Restrictions on the Practice

As a consequence of gross overpopulation resulting from Mao-Tse-Tung's reign, China instituted the One-Child Policy in 1979.<sup>165</sup> The policy permits Chinese families to have only one child.<sup>166</sup> Families may ask their regional government for permission to have additional children, but the sanctions imposed for additional children (e.g., loss of state benefits, housing, or employment) exact too high a price for poorer families.<sup>167</sup> This restriction on family size limits the ability of Chinese society to care for its orphaned and abandoned children.<sup>168</sup> Ironically, it is the One-Child Policy that produces China's problem of orphaned and abandoned children in the first place.<sup>169</sup> China's cultural preference for male children also exacerbates the problem.<sup>170</sup> Chinese culture places higher value on male children because male children assure that parents will be cared for in old age and that someone will carry on the family name.<sup>171</sup> Although these mores are beginning to change in the cities, the preference for sons remains strong in the rural areas where the majority of the population resides.<sup>172</sup> Faced with only one (in some cases maybe two) chance to have a son, the One-

---

161. *Id.*

162. See Crystal J. Gates, *China's Newly Enacted Intercountry Adoption Law: Friend or Foe?*, 7 *IND. J. GLOBAL LEGAL STUD.* 369, 388 (1999).

163. See Liu, *supra* note 1, at 192; see Hubing, *supra* note 2, at 661-62.

164. See Liu, *supra* note 1, at 204-05.

165. Singer, *supra* note 5, at 290 (citing Lisa B. Gregory, Note, *Examining the Economic Component of China's One-Child Family Policy Under International Law: Your Money or Your Life*, 6 *J. CHINESE L.* 45, 48 (1992)). As leader of the country, Mao encouraged Chinese citizens to produce as many children as possible to show the country's wealth and fortitude. *Id.*

166. *Id.* at 291.

167. Van Leeuwen, *supra* note 5, at 193.

168. *Id.*

169. See *id.*

170. *Id.*

171. *Id.*

172. Van Leeuwen, *supra* note 5, at 193.

Child Policy compels families to either abandon or relinquish their baby girls to alternative care (i.e., institutionalization).<sup>173</sup>

Many families and individuals wishing to adopt view China's surplus of adoptable children as a solution to their problems; however, it must be recognized that China's abundance of adoptable children resembles a "solution" because of the country's own domestic problems and policies.<sup>174</sup> The One-Child Policy has produced an estimated 100,000 orphans, 95% of which are baby girls.<sup>175</sup> Although the Chinese government refuses to allow Amnesty International to inspect orphanages and study the phenomenon of large numbers of babies being abandoned,<sup>176</sup> there is evidence suggesting that overcrowding and otherwise deplorable conditions exist in China's state-run orphanages.<sup>177</sup> This situation forced China to recognize the need for international adoption of its orphaned and abandoned children.

China's history of international adoption is short. Chinese law only recently recognized the practice of adoption in 1981, when it first began to allow domestic adoption.<sup>178</sup> China passed laws in 1988 that allowed foreigners of Chinese descent or those with close ties to China to adopt Chinese children.<sup>179</sup> In 1991, the Chinese government enacted the Adoption Law of China, which allowed foreigners to adopt Chinese children.<sup>180</sup> Following enactment of the 1991 Adoption Law, international adoption of Chinese children soared.<sup>181</sup> U.S. State Department records indicate that between 1989 and 1992, fewer than 210 Chinese children were adopted by U.S. citizens.<sup>182</sup> By 2001, this number had jumped to 4,681.<sup>183</sup>

In response to the increasing foreign demand of Chinese children for international adoption, China enacted the 1992 Adoption Law of China (hereinafter "1992 Adoption Law").<sup>184</sup> The 1992 Adoption Law "outline[d] a national policy that treated all foreigners, regardless of their heritage or connection to China, the same as its own nationals."<sup>185</sup> Although the 1992

---

173. Van Leeuwen, *supra* note 5, at 193.

174. Singer, *supra* note 5, at 289-90.

175. Van Leeuwen, *supra* note 5, at 193.

176. Singer, *supra* note 5, at 295-96.

177. *Id.*

178. Kleem, *supra* note 16, at 320-21 (citing Robert S. Gordon, *The New Chinese Export: Orphaned Children – An Overview of Adopting Children from China*, 10 *TRANSNAT'L LAW* 121, 132 (1997)).

179. *Id.* at 321.

180. *See id.*

181. *Id.*

182. *See id.* (citing *Immigrant Visas Issued to Orphans Coming to the United States*, *supra* note 27).

183. *Immigrant Visas Issued to Orphans Coming to the United States*, *supra* note 27.

184. Gates, *supra* note 162, at 385-86.

185. *Id.* at 386 (citing Order of the President of the People's Republic of China No. 54, Adoption Law of the People's Republic of China, at

Adoption Law was intended to protect lawful adoptions and to eliminate black market adoptions, illegal adoptions continued following its enactment.<sup>186</sup>

In 1993, as a result of these illegal adoptions, the Chinese government suspended all adoptions.<sup>187</sup> This prohibition lasted for ten months, during which time the Chinese government ratified procedural requirements for international adoptions. The “Implementation Measures on the Adoption of Children by Foreigners in the People’s Republic of China” (hereinafter “Adoption Procedures”) established the China Adoption Organization (CAO) as a central administrative body that would coordinate international adoptions of Chinese children.<sup>188</sup> The CAO reviews applications for foreign adoptions; applications must include proof of age, marital status, occupation, financial status, health conditions, and a police record.<sup>189</sup> After reviewing the application, the CAO performs a careful investigation of the applicants. If it approves an adoption, the CAO will assist the applicant(s) in finding a child to adopt.<sup>190</sup>

Although the Adoption Law, combined with the Adoption Procedures, streamlined the process of international adoption in China, it barred many families and individuals from adopting.<sup>191</sup> Therefore, in 1999 the Chinese government amended the Adoption Law to allow more individuals and families to become adoptive parents and to combat overcrowding in China’s orphanages.<sup>192</sup> Specific changes included: (1) a reduction in the minimum age requirement for adoptive parents from thirty-five to thirty years; (2) permission for those adopting orphans, handicapped, or abandoned children to adopt more than one child; and (3) a relaxation of the procedural requirements for domestic adoptions as compared to foreign adoptions.<sup>193</sup>

Views on the rationale behind the amendments to the 1992 Adoption Law differ. One commentator suggests that the amendments reflect China’s recognition that institutional care is less than an ideal situation for children and that the amended Law will allow more orphaned and abandoned children to grow up in a family environment.<sup>194</sup> Another commentator is more skeptical. Specifically, he notes that because the minimum age requirement has been lowered for foreign as well as Chinese adopters, this represents an attempt by the

---

[http://www.fwcc.org/china\\_adoption\\_law\\_98.htm](http://www.fwcc.org/china_adoption_law_98.htm) (last visited Nov. 29, 1999)). Prior to enactment of the 1992 Adoption Law, the Chinese government only allowed adoption of Chinese children by foreigners of Chinese heritage, non-Chinese foreigners with strong ties to the country, or long-term foreign residents. Kleem, *supra* note 16, at 320-21.

186. Gates, *supra* note 162, at 386-87.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. See Gates, *supra* note 162, at 388.

192. See *id.*

193. See Kleem, *supra* note 16, at 324.

194. Gates, *supra* note 162, at 389.

Chinese government to allow more Chinese citizens to adopt orphaned and abandoned children rather than an attempt to encourage international adoption.<sup>195</sup> Because the One-Child Policy continues to apply to prospective adoptive parents in China, however, it is debatable whether the amendments encourage domestic adoption at all.

## 2. Korean and Romanian Influence on International Adoption and Recent Increases in Restrictions on International Adoption

While China has lowered its restrictions on international adoption, other sending countries have placed additional constraints on the practice.<sup>196</sup> These heightened restrictions reflect concern as to whether international adoption really serves the best interests of orphaned and abandoned children.<sup>197</sup> Additionally, the social policy of some countries has been changed to encourage the domestic adoption of orphaned and abandoned children.

### a. South Korea

Similar to China, South Korea was once characterized as the “world’s number one exporter of orphans.”<sup>198</sup> The Korean War tore apart the nation and left thousands of children homeless.<sup>199</sup> Orphaned and abandoned, these children were left with no one to care for them because Confucian culture discouraged Korean families from adopting and caring for children not related by blood.<sup>200</sup> Recent changes in adoption law and social policy, and changing attitudes, however, have resulted in increased numbers of domestic adoptions of Korean children.<sup>201</sup> According to the Korean Ministry of Health and Welfare, domestic adoptions have increased from 200 in 1972 to 1,686 in 2000.<sup>202</sup>

The South Korean government has effectuated various laws and policies to restrict international adoption and to encourage domestic adoption. For

---

195. Kleem, *supra* note 16, at 324.

196. See Gates, *supra* note 162, at 389-90.

197. *Id.* (citing Liu, *supra* note 1, at 193).

198. Seo Hyun-jin, *Adoptive Parents Strive to Change Adoption Culture*, KOREA HERALD, June 8, 2001, available at 2001 WL 20829442. South Korea was the primary country of origin for international adoptees until a media story that aired during the 1998 Seoul Olympics caused both embarrassment and a swelling of national pride. The story described South Korea as the leading “exporter” of orphaned children. Liu, *supra* note 1, at 213 n.128 (citing Sam Jameson, *Keeping Them Home: Orphan – A Shame Fades in South Korea*, L.A. TIMES, Sept. 1, 1989, at A1). In response to the broadcast, the South Korean government restricted the availability of its children for international adoption. Kleem, *supra* note 16, at 327-28.

199. Liu, *supra* note 1, at 188 (citing Jameson, *supra* note 198).

200. *Id.*

201. See Hyun-jin, *supra* note 198.

202. *Id.*

example, South Korean adoption laws now require that an agency certify potential adoptive parents to be “married, economically stable, in good health, of good moral character, and able to provide the child with education and freedom of religion.”<sup>203</sup> Further, a child is only available for international adoption if there is no Korean family who wishes to adopt.<sup>204</sup> The South Korean government recently announced its policy to reduce the number of children that are available for international adoption by three to five percent each year, with the goal of terminating all international adoptions of South Korean children by 2015.<sup>205</sup> The Minister of Health and Welfare stated, “it is time for us to depend on domestic, rather than foreign, adoption.”<sup>206</sup> The South Korean government has taken positive steps to encourage domestic adoption. As an example, the government provides financial support for Korean families who adopt children in the way of special loans for housing, tax breaks, and exemption of school fees.<sup>207</sup>

In addition to changes in law and social policy, other factors are important. Declining birthrates, increasing affluence, and greater acceptance of domestic adoption have led to a decrease in the international adoption of South Korean children.<sup>208</sup> South Koreans have modernized and relaxed their Confucian beliefs.<sup>209</sup> Rather than turning away from caring for children not related by blood, Korean families are opening their homes to orphaned and abandoned children.<sup>210</sup>

#### b. Romania

Another country that has restricted the availability of its children for international adoption is Romania. Under the Ceausescu regime, contraceptives and abortion were banned in Romania, and women were mandated to have five

---

203. Liu, *supra* note 1, at 203.

204. *Id.*

205. Shin Hye-son, *Government to Reduce Adoptees Going Overseas*, KOREA HERALD, July 26, 1997, available at 1997 WL 10712250.

206. Liu, *supra* note 1, at 213 n.128 (citing Jameson, *supra* note 198). It should be noted, however, that this promotion of domestic adoption does not solve the problems of orphaned and abandoned children who are only half Korean. No one is promoting their domestic adoption. *Id.*

207. Hye-son, *supra* note 205.

208. Liu, *supra* note 1, at 213 n.128.

209. *Id.* at 213 n.16.

210. *See id.*; *see also* Hyun-jin, *supra* note 198. In addition to becoming more accepting of domestic adoption, South Koreans have begun to take steps to change adoption culture in that country. For example, adoptive families organized the Mission to Promote Adoption in Korea (MPAK) to encourage open, rather than secret, adoption. Because of the fear that their children would face ridicule and discrimination, many Korean adoptive parents adopted their children in secret. MPAK believes that as adoptive families become more open about their experiences, adoption will become more acceptable in South Korean society. *Id.*

children for the nation.<sup>211</sup> Difficult economic conditions drove many women and families to send their children to live in orphanages.<sup>212</sup> Thousands of healthy children were placed in overcrowded, state-run orphanages and physically or mentally ill children were placed in state-run asylums.<sup>213</sup> When Ceausescu fell from power, the world witnessed the suffering that these children endured in a dilapidated welfare system.<sup>214</sup> Families and individuals flocked to Romania to adopt these children,<sup>215</sup> and consequently, a black market was created.<sup>216</sup> Orphaned and abandoned children became a valuable commodity and child-traffickers sold them to families and individuals willing to pay high prices. In response to allegations of bribery, forged documents, and bullying of mothers to give up their children, the Romanian government temporarily halted the adoption of children in 1991.<sup>217</sup>

In 1991, the Romanian government amended the adoption laws to modify the procedures for international adoption.<sup>218</sup> The purpose of the amendments was to both eliminate private international adoptions and to encourage domestic adoptions.<sup>219</sup> The amendments proscribed private international adoptions by allowing an adoption to occur only through the use of an approved agency in the prospective adoptive parents' own country.<sup>220</sup> The amendments encouraged domestic adoption by considering as available for adoption only those children who were registered with the Romanian Adoption Committee and by requiring a six-month waiting period before an international adoption could be approved.<sup>221</sup> During the waiting period, efforts were to be made to find a Romanian family to adopt the child; only if these efforts were unsuccessful could a child be eligible for an international adoption.<sup>222</sup>

Following this temporary halt on international adoption, the Romanian government reopened its borders to the practice.<sup>223</sup> The Romanian Adoption

---

211. Liu, *supra* note 1, at 187. During Ceausescu's reign, every loyal Romanian couple was expected to have at least five children. The government administered mandatory pregnancy tests and punished women for not having children. See Mary Ann Candelario McMillan, *International Adoption: A Step Towards a Uniform Process*, 5 PACE INT'L L. REV. 137, 164 n.35 (1993).

212. McMillan, *supra* note 211, at 142-43.

213. Liu, *supra* note 1, at 187.

214. *Id.* at 204; Stein, *supra* note 143, at 65-66. The suffering endured by these children was brought to light by television broadcasts including 20/20's Shame of a Nation (ABC television broadcast, Oct. 5, 1990). Liu, *supra* note 1, at 213 n.7.

215. Stein, *supra* note 143, at 65.

216. *Id.*

217. Liu, *supra* note 1, at 204.

218. McMillan, *supra* note 211, at 143.

219. *Id.*

220. *Id.*

221. *Id.* at 144.

222. *Id.*

223. Stein, *supra* note 143, at 82 n.229 (citing Lisa M. Katz, *A Modest Proposal? The*

Committee subsequently announced a one-year moratorium on international adoption beginning in June 2001.<sup>224</sup> The moratorium was extended and is currently pending passage and implementation of new legislation that will attempt to eliminate abuses in Romania's adoption system.<sup>225</sup>

### **C. Potential Effects of the Hague Convention on International Adoption**

In encouraging ratification of the Hague Convention, the U.S. State Department pointed out "major advantages of the convention and its implementation."<sup>226</sup> The State Department declared that the Hague Convention:

- (a) Provides, for the first time, formal international and intergovernmental approval of the process of intercountry adoption.
- (b) Encourages intercountry adoption, as regulated by the Convention, as a means of offering the advantage of a permanent family to a child for whom a suitable family cannot be found in the child's country of origin.
- (c) Establishes a minimum set of uniform standards governing international adoptions. Every party country is able to promulgate or maintain further conditions and restrictions beyond those specified in the Convention.
- (d) Establishes a Central Authority in each country to ensure that one authoritative source of information and point of contact exists in that country. In the U.S., authorities of other party countries and members of the American public will be able to look to the U.S. Central Authority for reliable information and assistance.
- (e) Establishes reasonable certainty that adoptions decreed pursuant to the Convention will be recognized and given

---

*Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT'L L. REV. 283, 288 (1995).

224. International Adoption – Romania: Update on Romanian Moratorium on International Adoption, [http://www.travel.state.gov/adoption\\_romania.html](http://www.travel.state.gov/adoption_romania.html) (Sept. 22, 2002).

225. *Id.*

226. Hubing, *supra* note 2, at 695 (citing Bureau of Consular Affairs, Hague Convention on Intercountry Adoption, *available at* [http://travel.state.gov/adoption\\_info\\_sheet.html](http://travel.state.gov/adoption_info_sheet.html) (last visited Mar. 3, 2001)).

effect in all other party countries.<sup>227</sup>

It will likely take many years to determine the actual effect of the Hague Convention on the practice of international adoption. Possible effects – both short term and long term – may be postulated.

### 1. Possible Short Term Effects

Perhaps the major short term effect of the Hague Convention will be the establishment of a uniform set of procedures and standards premised on the best interests of the child. Arguably, this will make for a more efficient process. It should be noted, however, that uniform standards cannot take into account cultural differences in what is viewed to be “in the best interests of the child.” For example, not all countries view transracial, international adoptions favorably.<sup>228</sup> As another example of cultural differences, Chinese culture views older parents as the ideal, while the view in the United States is that younger parents better serve the child’s best interests.<sup>229</sup> Therefore, the uniform procedures and standards set out in the Hague Convention may streamline the process of international adoption, but fail to respect cultural differences in beliefs regarding what is in the child’s

---

227. *Id.* at 695-96.

228. *See id.* at 695. Much of the controversy surrounding international adoption, and particularly transracial international adoption, centers on the issue of racial identity. Experts have identified three factors that contribute to the development of a child’s identity: (a) the overall quality of the child’s experiences within his or her family (natural or adopted); (b) the child’s knowledge and understanding about his or her background and genealogy; and (c) community perceptions toward the child. *See* Van Leeuwen, *supra* note 5, at 216 (citing John Triseliotis, *Identity and Genealogy in Adopted People*, in *ADOPTION: INTERNATIONAL PERSPECTIVES* 42, 42-43 (Euthymia D. Hibbs ed., 1991)). These experts have concluded that adopted children are “no less likely than children raised by their biological parents to have identity problems.” *Id.* *See also* Bartholet, *supra* note 10, at 204-05 for a summary of empirical findings relating to racial or cultural identity among international adoptees. She states:

Other studies hint at the complex issues involved in being part of a biracial, bicultural, binational family. These families do have to deal with issues of discrimination. And the children do have to deal with complex identity issues in working through what it means to be an “Asian American” or a “Peruvian American” or a “Mexican American.” But the problems of discrimination are not different in nature than the problems many of these children would face in their own lands. The challenges involved in developing an appropriate sense of group identity are not different in nature from those that all immigrants face. The studies provide no evidence that the challenge of establishing a satisfactory ethnic and cultural identity causes psychological harm to the international adoptee.

*Id.*

229. Van Leeuwen, *supra* note 5, at 207.



best interests.

As a result of streamlining the process of international adoption and recognizing that it is in children's best interests to grow up in a family environment, perhaps more of the world's orphaned and abandoned children will be adopted internationally. More families and individuals, especially those finding it difficult to adopt domestically, may be able to adopt the children they so desperately desire. Thus, under the Hague Convention, the practice of international adoption appears a logical solution to the disparity between the numbers of orphaned and abandoned children in some countries and families and individuals wishing to adopt in others.

## 2. Possible Long Term Effects

While the Hague Convention may appear to provide a logical solution to the problems it is purported to remedy, its long term effects will most likely be unremarkable and possibly even in direct contradiction to its stated goals. Although the Convention provides a solution to the immediate problems of orphaned and abandoned children, it overlooks the underlying causes, such as the imbalance in social and economic resources among nations, or domestic public policies (e.g., China's One-Child Policy) that fail to address the causes of, or in some instances even produce, the high numbers of orphaned and abandoned children throughout the world. Although the Hague Convention cannot be expected to solve these problems, incentives should be put in place to reconcile its goals with actions taken and policy choices made at the national level.

The Hague Convention emphasizes the best interests of the child and implies that it is in the child's best interests to grow up in a family environment. The Hague Convention lists a hierarchy of preferred situations in which a child should grow up. This list specifies as the best possible situation that the child grow up in his or her family of origin.<sup>230</sup> The second best alternative listed is for the child to be adopted domestically.<sup>231</sup> The Convention recognizes the importance of providing children with a family environment in the third best situation listed – international adoption.<sup>232</sup> Only if domestic adoption is not possible, is international adoption preferred. Finally, the Convention lists institutional care, such as growing up in an orphanage, as the least desirable alternative.<sup>233</sup>

To understand how the Hague Convention overlooks, and possibly even exacerbates, the underlying causes of the high numbers of orphaned and abandoned children, this section will examine China's One-Child Policy.<sup>234</sup> The

---

230. Kleem, *supra* note 16, at 333.

231. *Id.*

232. *Id.*

233. *Id.*

234. China's One-Child Policy allows Chinese families to have only one child. See Singer, *supra* note 5, at 291, 306-07.

One-Child Policy conflicts with the emphasis on the child's best interests and the goal of allowing children to grow up in a family environment. As a result of the One-Child Policy, thousands of children are prohibited from growing up in their families of origin because parents are severely punished for over-quota births.<sup>235</sup> To allow children to grow up in the best possible situation – with their families of origin – China must relax the prohibition against having more than one child. Even the possibility of children growing up in the second best situation listed (i.e., with adoptive parents in the child's country of origin) cannot occur with the One-Child Policy in place. The Hague Convention requires sending countries to make attempts to locate a suitable, adoptive home within the country prior to looking for a family abroad.<sup>236</sup> Because the One-Child Policy disallows the birth, as well as the adoption, of a second child, China cannot satisfy the objective of promoting domestic adoption over international adoption.<sup>237</sup> International adoption, listed as the third best situation in which children can grow up, thus allows countries such as China to send their orphaned and abandoned children to other countries rather than confront the underlying causes of the problem (i.e., the ramifications of the One-Child Policy). In the case of China, international adoption may even aggravate the problem because people may be more likely to abandon a baby girl in the hopes of having a son because of the high numbers of foreigners who wish to adopt such children.

The Hague Convention provides Member States with uniform international adoption procedures that are likely to ease the administration of international adoptions while also protecting the best interests of the children involved in the practice. In order to become a Member State to the Convention, countries must sign and ratify the treaty.<sup>238</sup> Only those countries that are members to the Convention are bound by its terms.<sup>239</sup> Although China currently provides more children for international adoption than any other country, it is not a party to the Hague Convention.<sup>240</sup> In order to become a party to the Hague Convention, China should be required to comply with its standards, including the best interests standard. Member States should apply political pressure to the Chinese government to somewhat relax the One-Child Policy so that more domestic adoptions might occur. Whether they grow up in an institution or in a family environment, children require food and shelter to survive. Allowing domestic adoptions would not put any further strain on China's limited resources. Instead,

---

235. See Van Leeuwen, *supra* note 5, at 193. Sanctions imposed for over-quota births include loss of state benefits, housing, and employment. *Id.*

236. Rachel A. Bouman, *China's Attempt to Promote Domestic Adoptions: How Does China's One-Child Policy Affect Recent Revisions in China's Adoption Law and Measure Up to the Hague Convention?*, 13 *TRANSNAT'L LAW* 91, 131-33 (2000).

237. *Id.*

238. See Hubing, *supra* note 2, at 678-79.

239. *Id.*

240. China has signed but not yet ratified the Hague Convention. See Van Leeuwen, *supra* note 5, at 211-12.

relaxing the One-Child Policy and allowing the domestic adoption of orphaned and abandoned children would promote the goals of the Hague Convention.

On the other hand, the enactment of the Hague Convention has focused much attention on the practice of international adoption. Perhaps as a result of this exposure, social and legal changes targeting the underlying causes of the high numbers of orphaned and abandoned children will be effectuated. There is evidence that this may be the case. The recent changes in South Korean's attitudes toward adoption provide a prime example. In Korea, where Confucian beliefs once discouraged families from adopting orphaned and abandoned children, the shame that followed a news story which described South Korea as the number one exporter of orphans caused that society to reevaluate the situation and to encourage domestic adoption. Only time will tell whether the Hague Convention will have such incidental long term effects on international adoption and its underlying causes.

## V. CONCLUSION

Throughout the world, and especially in under-developed countries, orphaned and abandoned children lack families. Families and individuals wishing to adopt children, particularly in the United States and other western, industrialized countries, are finding it increasingly more difficult. The practice of international adoption does appear to be a logical solution to this disparity in the number of orphaned and abandoned children in some countries and the number of families and individuals wishing to adopt in others.

The Hague Convention establishes internationally agreed upon standards and procedures to govern the practice of international adoption. These standards and procedures are likely to streamline the process and to protect children and families involved. The Convention also outlines a hierarchy of preferred situations in which children should grow up. The best possible situation, of course, is for a child to grow up in his or her family of origin. The second best situation listed is for the child to be adopted domestically. The third best situation reflects the Convention's emphasis on the importance of growing up in a family environment. If domestic adoption is not possible, the Convention identifies international adoption as the third best situation. International adoption is preferred over placing the child in an institution or in foster care in the country of origin. This hierarchy of preferred situations implies that the child's need to grow up in a family environment and to form attachment relationships is greater than his or her need to remain in the country of origin.

International adoption as a solution, however, only addresses the *immediate* problems of orphaned and abandoned children. The practice of international adoption itself overlooks, and in some cases may even exacerbate, the underlying causes that have produced such high numbers of orphaned and abandoned children.

Although the Hague Convention cannot solve the problems that have led to the prevalence of international adoption, perhaps it will have incidental long term effects. Perhaps the Convention's greatest impact will be to bring exposure to the practice of international adoption and its underlying causes. Perhaps this worldwide attention will lead to social and legal changes that will decrease the numbers of children that are orphaned and abandoned throughout the world.

