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Live or Let Die: Could Intercountry Adoption Make The Difference?

Linda J. Olsen*

... The child that is hungry must be fed;  
the child that is sick must be nursed;  
the child that is backward must be helped;  
the delinquent child must be reclaimed;  
and the orphan and the waif  
must be sheltered and succored; ... ¹

Dawn is breaking; the sky is a palette of warm colors. A gentle morning breeze is blowing. The aroma of breakfast cooking floats to twelve-year-old Shika Tamaa Moed's nostrils as his mother tiptoes in, kisses him gently, and rouses him for another day. Soon his friends will arrive to join him for the walk to school.

Slowly, his eyes flutter open; he sits up. A tear trickles down this

* J.D. Candidate, The Penn State Dickinson School of Law, May 2004. The author extends her heartfelt thanks and gratitude to her family for their unwavering patience and support over the past three years of law school. Only through their sacrifices has it all been possible. Special thanks are extended to Dr. Donna W. Jorgensen, assistant professor of English education and pedagogy, Rowan University, for her invaluable grammatical and editorial assistance.


². Shika Tamaa Moed is a fictitious name, created by the author for this comment. It was chosen as a tribute to courageous orphans worldwide hoping for a family to love and nurture them in reaching their full potential. Shika tamaa is a Swahili verb meaning live in hope, and Moed is an Afrikaans word meaning courage. Swahili and Afrikaans were chosen because they are languages common to the sub-Saharan region of Africa. The English-Afrikaans translation was found at http://dictionaries.travlang.com/EnglishAfrikaans/dict.cgi?query=courage&max=50; the English-Swahili translation was found at http://dictionaries.travlang.com (last visited Nov. 16, 2003).
man-child’s face as he wakes to the harsh reality of another day in sub-Saharan Africa. No breakfast is cooking because he has not yet gathered wood to start the fire. No mother is kissing him gently—she died of AIDS months ago, leaving him in charge of his younger siblings. He and his siblings may also be infected with the virus; only time will tell. Shika’s father was killed in his homeland’s war for independence. No extended family can help, and all around his village the story is the same. There is no one here to raise this child. No friends will arrive to walk with him to school. The only walk he will take this morning will be a two mile round-trip to the river for water; there is no money or time for him to go to school.

Shika is a representative statistic, one of more than thirteen million children under the age of fifteen who have lost one or both parents to AIDS. Worldwide, millions of children are living without homes, families, or basic needs because of catastrophic events like war, famine, and disease. These children have never heard of the United Nations Convention on the Rights of the Child (CRC), nor are they aware of the rights and best interests the CRC promotes, including intercountry adoption.

The goal of this comment is to analyze whether the practice of intercountry adoption is a viable way to ensure the rights and promote the best interests of children, particularly those affected by the world’s catastrophic events. Data on intercountry adoption varies greatly among

3. Children on the Brink 2002 A Joint Report of Orphan Estimates and Program Strategies. (Author) TVT Associates/The Synergy Project under U.S. Agency for International Development, Contract No. HRN-C-00-99-00005-00. available at http://www.unaids.org/EN/resources/epidemiology/epi_recent_publications/childrenonth ebrink.asp (last visited Feb. 22, 2004) [hereinafter Children on the Brink]. This report is a collaboration of the U.S. Agency for International Development (USAID), the United Nations Children’s Fund (UNICEF), and the Joint United Nations Programme on HIV/AIDS from eighty-eight countries, forty-one of which are in Africa. These are comprehensive statistics on the historical, current, and projected number of children orphaned by HIV/AIDS. This number is climbing exponentially. Where statistics are normally gathered extending over a period of years, the number of orphans either with or affected by AIDS changes so rapidly that it must be measured much more frequently in order to understand the effect upon Africa.


6. Most scholars and texts use the terms intercountry adoption and international adoption interchangeably. Both terms refer to adoptions by citizens from one country of children from a different country. For purposes of consistency, this comment will use the term intercountry adoption.

7. The analysis contained in this comment is based on the assumption that a child is a human being under the age of eighteen.
receiving countries. Because it is difficult to obtain accurate information from many sending and receiving countries, this comment focuses on the United States as a receiving country. The U.S. Department of State has, for many years, published and updated statistics regarding orphaned children entering the U.S., categorized by state of origin, on its website. Availability and accuracy of statistics make it inherently easier to evaluate the practice of intercountry adoption from the perspective of U.S. prospective parents.

Several issues present themselves for comment: What does “best interests of the child” mean? Who has the responsibility for defining best interests for the disenfranchised children of the world? What laws and instruments govern and ensure that those interests are realized? How have a variety of sending countries traditionally handled intercountry adoption of their native children? Has intercountry adoption been a positive way to promote the rights and best interests of orphaned children?

First, the comment looks at the meaning of “best interests of the child,” explores the motivation for intercountry adoption, and questions whether the practice actually promotes the best interests of the world’s children. Next, Part II of the comment traces the evolution of international law regarding children’s rights. The comment looks at the


9. Sending countries are those whose children are being adopted. Receiving countries are those where the children are adopted.


11. Skepticism about international law comes from the way it is made, interpreted, and enforced. There is no international legislature, no executive to enforce laws that are made, and no centralized court to interpret international law and adjudicate disputes. JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS 31 (2002).

12. Id. at 40. Primary international instruments are declarations and treaties. Treaties take many forms and can be called by many different names including convention, charger, agreement, protocol, and pact. These terms are synonymous with treaty and may be used interchangeably at times in this comment.

13. Id. at 31. Article 38 of the Statute of International Justice, which forms part of the United Nations Charter, describes the law that the International Court of Justice (ICJ) is to apply in resolving disputes:

* * *

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;
cornerstone of international legislative initiatives, the 1924 Declaration of Geneva (Geneva Declaration).\textsuperscript{14} The comment also examines additional declarations of significance including the 1959 Declaration of the Rights of the Child and the 1986 Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.\textsuperscript{15}

Part III of the comment looks at what effect historical and political events have had on the practice of intercountry adoption by U.S. citizens. Some of those events include World War II, the Korean and Vietnam Wars, political upheaval in Romania and the former Soviet Union, and governmental family planning policies in China. Part IV discusses the HIV/AIDS pandemic in Africa, the overwhelming number of orphans the pandemic is creating, and suggests reasons why, in spite of the huge need, humanitarian concerns have not spurred an increase in intercountry adoption of African orphans by U.S. citizens. Part IV also discusses the Child Care Act, 1983 (Child Care Act),\textsuperscript{16} the governing South African legislation on adoption that was incorporated into the 1996 South African constitution and its relationship to the practice of intercountry adoption.

Finally, Part V analyzes the CRC and the 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (1993 Hague Convention),\textsuperscript{17} the comprehensive procedural guidelines for intercountry adoption. Legislation and instruments enacted subsequent to these documents are also discussed. Part V concludes with a report of actions taken by the United States with respect to ratification of the CRC.

There are two very different approaches to the viability of serving the best interests of children and protecting their rights. The first demands consistent and strong enforcement of the CRC by the international community and, through the procedural mechanism of the

\begin{itemize}
\item d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
\item 14. GENEVA DECLARATION, \textit{supra} note 1.
\item 15. DECLARATION ON SOCIAL AND LEGAL PRINCIPLES RELATING TO THE PROTECTION AND WELFARE OF CHILDREN, WITH SPECIAL REFERENCE TO FOSTER PLACEMENT AND ADOPTION, G.A. RES. 41/85, U.N. GAOR, 41\textsuperscript{ST} SESS., U.N. Doc. A/41/898 (1986) [hereinafter DECLARATION ON PROTECTION OF CHILDREN].
\end{itemize}
1993 Hague Convention, the allowance and promotion of intercountry adoption when it is in the best interests of a child. The second approach rests on the premise that each nation bears responsibility for its children, knows how to protect and guarantee the best interests of future generations, and will do so without interference or monitoring by the international community. This approach accepts that the international community must recognize individual nations' discretionary determinations in enforcing children's rights, i.e., letting nature take its course, whatever that course may be, even to the exclusion of intercountry adoption. It presumes that each nation will accept its responsibility to protect the best interests of its children. In reality, not all countries will choose to or will be able to accept those responsibilities; thus, the second approach becomes what might best be labeled as survival of the fittest. It should be the goal of the international community to ensure that intercountry adoption is considered as a viable alternative in deciding the best interests of the world's children.

I. Best Interests of the Child and Motivation for Intercountry Adoption

A. Best Interests of the Child

Best interests of the child means that every child deserves the right to grow up and live in a community that provides security, stability, and love. This is, at best, a subjective definition, and there appears to be no universally accepted legal definition for what is encompassed by the phrase "best interests." Different cultures, different geographic locations, and different legal and political systems all seem to have adopted a "we'll know it when we see it" approach. Principles of the 1959 Declaration of the Rights of the Child indicate that the best interests of children are achieved not only when their tangible needs are met, but also when their needs for love and understanding are met. Wherever possible, according to the 1959 Declaration, those tangible and intangible needs of children should be met as they grow up in the care and responsibility of their parents.

Neither the Preamble nor the Articles of the CRC define best interests of the child, but the phrase is used throughout the document.

18. Liu, supra note 4, at 193.
20. Principle 6, 1959 DECLARATION.
21. Id.
The Preamble to the CRC recognizes that "in all countries of the world there are children living in exceptionally difficult conditions and that such children need special consideration."\(^{22}\) It is incumbent upon the States Parties to the CRC to "respect and ensure the rights set forth in the [CRC] to each child within their jurisdiction without discrimination of any kind."\(^{23}\) As part of that responsibility, the CRC recognizes that in order for a child's personality to adequately develop, that child "should grow up in a family environment, in an atmosphere of happiness, love and understanding."\(^{24}\) The CRC also guarantees "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 [to] special protection and assistance provided by the State."\(^{25}\)

Unfortunately, large numbers of the world's children have no opportunity to develop in accordance with the rights established under the principles of the United Nations (U.N.)\(^{26}\) as delineated in the CRC and conferred by the legally binding provisions of the CRC. The language of the CRC calling the conditions under which they live "difficult" is an understatement of monumental proportions.\(^{27}\) Clearly, U.N. mandates are not being met when children survive by stealing, selling themselves as prostitutes, and living on the streets or being forced to become combatants in armed conflicts.\(^{28}\) Nor are a child's best interests being met when children are trapped in orphanages or foster care systems.\(^{29}\) U.N. documents\(^{30}\) state a general preference for adoptive or other family placement over institutional placement,\(^{31}\) but those same documents also stipulate that intercountry adoption should be considered as an alternative only after placement in the child's country of birth is determined to be impossible.\(^{32}\) There are, and undoubtedly will continue to be, differences of opinion among religious sects, ethnic groups, and national political leaders as to whether intercountry adoption is in the


\(23.\) CRC, supra note 5, Art. 2.

\(24.\) Id., Preamble.

\(25.\) Id., Art. 20.

\(26.\) The United Nations (U.N.) was chartered in 1945 with a membership of 51 states. Membership has grown to include virtually all the independent states of the world. Among its several charges, the U.N. is charged with the promotion of human rights and fundamental freedoms without discrimination.

\(27.\) CRC, supra note 5, Preamble.

\(28.\) Liu, supra note 4, at 189.

\(29.\) RITA J. SIMON & HOWARD ALTSTEIN, ADOPTION ACROSS BORDERS 7 (2000).


\(31.\) Id. at 259 n.56.

\(32.\) Id. at 259.
best interest of a particular child.

B. Motivation for Intercountry Adoption—Why do adoptive parents choose intercountry adoption rather than domestic adoption?

Historically, in the wake of catastrophic events, adoption at the international level seemed to have been motivated primarily by humanitarian concerns—the best interests of orphaned and abandoned children in stricken nations, and the desire to provide them with a better life. As times and political climates have changed, the motivating factors for intercountry adoption have become less clear. Although humanitarian concerns almost certainly continue to play a role in a prospective parent’s decision to pursue intercountry adoption, those concerns may no longer be the foremost motivation. Instead, the question now being asked is whether the primary motivation for intercountry adoption is every child’s right to a family or a more self-centered parental motivation of every family’s right to a child.33

A 1993 report issued by the U.S. Government Accounting Office (GAO) found that adoptive parents chose intercountry adoption because they believed it could be completed in less time and would be easier than domestic adoption.34 Only 9% of those responding to the GAO survey said they chose intercountry adoption because they wanted to “help disadvantaged children.”35 This study refutes the supposition that humanitarian concerns are the primary reason why prospective parents choose intercountry adoption.36

C. Arguments for and Against Intercountry Adoption

It is critical to recognize that U.N. declarations and conventions proscribe that intercountry adoption, as a means of furthering the best interests of children, exists only where the laws of the states parties permit the practice.37 Bridget Hubing and Margaret Lieu articulate the arguments of many scholars and activists that intercountry adoptions are in the best interests of the child and families and, thus, are a good practice that should be encouraged. On the affirmative side of the argument, according to Hubing, intercountry adoptions “appear to be the

34. SIMON & ALTSTEIN, supra note 29, at 88-89.
35. Id. at 89.
36. The author’s own experience with family members and friends who have chosen intercountry adoption as an alternative to domestic adoption supports the 1993 GAO study’s findings.
37. CRC, supra note 5, art. 20 § 2.
best solution for the international problem of children without families and families without children."\textsuperscript{38} Liu agrees, taking the position that intercountry adoption "saves lives."\textsuperscript{39} All children deserve the right to grow up in loving homes and communities that can provide them with security, stability and love.\textsuperscript{40} For Liu, the argument in favor of intercountry adoptions is simple: the most effective solution for the millions of children wandering the streets or living in unsanitary conditions would involve bringing them together with adults interested in adoption, many of whom reside outside the child's nation of birth and residence.\textsuperscript{41} Hubing's support for intercountry adoption is the fact that overwhelming numbers of children are living and dying in conditions of deprivation, neglect, abuse, and exploitation.\textsuperscript{42} The bottom line, according to Hubing is that there are families willing and able to provide children with love, support, and an adequate standard of living, and the emphasis should be on meeting children's needs, even if those needs are met outside the child's home nation.\textsuperscript{43}

Conversely, both authors present the arguments of opponents who say that intercountry adoptions "promote imperialism and exploitation of children."\textsuperscript{44} Arguing against the practice, Liu says that saving a child from horrible living conditions is not sufficient motivation for intercountry adoption.\textsuperscript{45} One of the most formidable arguments against intercountry adoption is the evolution of what many see as the black market of baby selling. It cannot be denied that the high demand for children has produced rings of entrepreneurs who will find and sell children by any means without regard for the best interests of children.\textsuperscript{46} The danger, say both authors, is that children become products valued only for the financial gain that can be realized from their sale on the international market\textsuperscript{47} to "selfish people who want a little child in their home."\textsuperscript{48} Finally, opponents of the practice point out that intercountry adoption tends to remove poorer, non-white children from their racial, cultural, and national communities and place them in middle and upper

\textsuperscript{39} Liu, \textit{supra} note 4, at 193.
\textsuperscript{40} See Hubing, \textit{supra} note 38, at 663; Liu, \textit{supra} note 4, at 193.
\textsuperscript{41} Liu, \textit{supra} note 4, at 194.
\textsuperscript{42} Hubing, \textit{supra} note 38, at 664.
\textsuperscript{43} \textit{Id.} at 665.
\textsuperscript{44} \textit{Id.} at 663.
\textsuperscript{45} Liu, \textit{supra} note 4, at 195.
\textsuperscript{46} See \textit{id.} at 194; Hubing, \textit{supra} note 38, at 665.
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} Liu, \textit{supra} note 4, at 194.
class white families in the world’s industrialized nations. It can, however, be argued that such placements are good for parents, children, and the community as a whole because they will learn to appreciate one another’s racial and cultural heritage, “while at the same time experiencing their common humanity.”

Even if intercountry adoption were proven always to be in the best interests of children, no nation is compelled under international law to permit or endorse the practice. Ultimately, the determination about permitting intercountry adoption must always be that it is in the best interests of each child.

II. International Instruments Dealing with the Rights of Children and Intercountry Adoption

There are a number of differently titled international instruments and pieces of legislation dealing with the rights of children and intercountry adoption. A subtle but critical distinction exists between declarations and conventions. The fundamental difference between the two is that a declaration evidences intent and acts as a moral code; whereas, conventions create rights and obligations and legally bind the states parties ratifying the convention.

Treaties are by far the most common written instruments used to regulate international transactions. However, depending on the power of the state involved, it may: enter into a treaty because it is convenient, interpret the treaty as it desires, and break or ignore the treaty when changing internal climates make it inconvenient. The real effect of treaties is to raise the political and reputational costs of noncompliance.


50. Id.

51. This raises the question of whether the laws, constitutions and religious beliefs of certain states parties to treaties are thwarting the best interests of their children by depriving them of choices and alternatives available to children in other nations.

52. EUGENE VERHELLEN, CONVENTION ON THE RIGHTS OF THE CHILD, 49-50 (1997). Countries signing declarations are evidencing their intent to comply with the principles set forth in that declaration. Thus, declarations become a kind of moral code upon which nations can act. Ratification of a convention translates moral intention into a legal reality and provides states parties with a legal basis for taking action. It is for this reason that ratification of any convention is taken seriously by every country signing it.

53. PER SEVASTIK, THE BINDING FORCE OF TREATIES UNDER INTERNATIONAL LAW, 21 (1997). Treaties are an evolving process. There is a negotiation stage and government acceptance stage before a treaty enters into force. Treaties can be signed and ratified with reservations and can be amended and terminated. The process can take years, and some signing countries never ratify treaties they have signed.

54. DUNOFF, supra note 11, at 37.

55. Id. at 38. It is a state’s reputation in the international community and the
Multilateral treaties\textsuperscript{56} are currently the best vehicle for imposing binding rules on states. The 1969 Vienna Convention on the Law of Treaties (VCLT)\textsuperscript{57} is the closest the international community comes to having treaty legislation. However, because no central authority exists with power to compel compliance with international rules, treaties do little to influence a state's behavior.\textsuperscript{58} Several important instruments provide the international community with criteria for use in protecting the best interests of the world's children and providing them with the education and tools to become leaders of future generations. Declarations and treaties of the U.N. play a compelling role in the field of human rights, of which children's rights are an integral part. Preceding those declarations and treaties was an important document that the League of Nations adopted in 1924.

A. The Declaration of Geneva

Many commentators regard The Declaration of Geneva\textsuperscript{59} (Geneva Declaration) as the first international human rights instrument dealing with the rights of children.\textsuperscript{60} The General Assembly of the League of Nations adopted and solemnly proclaimed the Geneva Declaration on September 20, 1924. Ten years later, in 1934, the League of Nations' General Assembly reconfirmed the Geneva Declaration, and the member states 'promised' to enact its principles in their own legislation.\textsuperscript{61} The Geneva Declaration became the cornerstone upon which later discussions and declarations on children's rights were built.

Indirectly, then, the Geneva Declaration might be the foundation for practices like intercountry adoption. It focuses on helping and protecting children who are not cared for as they should be. While the framers of political fall-out it may suffer that are frequently the determining factors in whether states implement and abide by the rules to which they bind themselves in signing and ratifying treaties.

\textsuperscript{56} Multilateral treaties are between three or more parties. Parties to multilateral treaties may include States, international organizations, or other subjects of international law having the capacity to enter into treaties.

\textsuperscript{57} VIENNA CONVENTION ON THE LAW OF TREATIES, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT]. The VCLT was adopted in 1969 and came into force on Jan. 27, 1980. As of June 2002, 94 states are parties to the VCLT. It is widely accepted and relevant to international agreements involving states, international organizations and even insurgent groups. The United States is not a party to the 1969 Vienna Convention but considers it to state the international law on the subject of treaties.


\textsuperscript{59} GENEVA DECLARATION, supra note 1.

\textsuperscript{60} VERHELLEN, supra note 52, at 64.

\textsuperscript{61} Id. at 65.
the Geneva Declaration did not specifically mention intercountry adoption (the concept would not be fully developed until years later), the document is crucially important when we want to look at how the best interests of the child have evolved in the arena of transnational adoption.

B. Declaration on the Rights of the Child (1959)

The concept of children's rights developed further after World War II and the establishment of the U.N. Attempts were made to have the U.N. adopt the Geneva Declaration.\textsuperscript{62} Preparations for the Universal Declaration of Human Rights\textsuperscript{63} were already under way, and the member states decided that the Geneva Declaration would be a good basis for discussion in view of changing attitudes about children's rights.\textsuperscript{64} By a unanimous vote of the seventy-eight members of the U.N. General Assembly, the Declaration of the Rights of the Child (1959 Declaration) was adopted.\textsuperscript{65} This document declared that "mankind owes to the child the best it has to give."\textsuperscript{66} The 1959 Declaration functioned as a weapon

\textsuperscript{62} 
VERHELLEN, supra note 52, at 65.

\textsuperscript{63} 

\textsuperscript{64} 
VERHELLEN, supra note 52, at 65.

\textsuperscript{65} 
1959 Declaration, supra note 19. This Declaration is more precise than the Geneva Declaration and refers not only to tangible needs of children but also to the need for love and understanding. Apart from the Preamble, the Declaration contains ten principles:

\begin{enumerate}
\item enjoyment of all rights without discrimination,
\item special protection and the opportunity to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity,
\item the entitlement to a name and a nationality,
\item the benefits of social security, adequate nutrition, housing, recreation and medical services,
\item a child who is physically, mentally or socially handicapped is entitled to special treatment, education and care,
\item a child, where possible, shall grow up in the care and under the responsibility of his parents. Society and public authorities shall have the duty to extend particular care to children without a family or adequate means of support,
\item entitlement to a free and compulsory education, at least in the elementary stages,
\item child shall in all circumstances be among the first to receive protection and relief,
\item child is to be protected from neglect, cruelty and exploitation, including trafficking, and shall not be employed before an appropriate minimum age, and
\item child shall be protected from racial, religious and any other form of discrimination.
\end{enumerate}

\textit{Id.}

\textsuperscript{66} 
1959 Declaration, supra note 19.
to improve the position of children rather than as a legal standard.\textsuperscript{67} Normally, a declaration of the U.N. would be addressed to member states or institutions of other international organizations.\textsuperscript{68} The 1959 Declaration, however, has a horizontal effect in that it calls upon everyone to recognize children’s rights, and it is individuals, rather than governments, who are responsible for its implementation.\textsuperscript{69} It is this author’s position that those who are responsible for ensuring the rights of children, whether nations or individuals, must consider intercountry adoption as a viable alternative for orphaned children who face lives of poverty or exploitation in their own countries.

It is easy to look at a document with no specific language addressing adoption and make a case that it does not apply. The 1959 Declaration is an especially important document because it comes in the aftermath of World War II and the Korean War when the world was just beginning to see the concept of intercountry adoption taking shape. Almost thirty years passed before the next declaration specifically addressing adoption.

C. \textit{1986 Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally}

The 1986 Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally (Declaration on Protection of Children)\textsuperscript{70} specifically addresses issues of child welfare and intercountry adoption. It reaffirms concern for children who are abandoned or orphaned because of violence, internal disturbance, armed conflicts, natural disasters, economic crises or social problems.\textsuperscript{71} The provisions of the instrument dealing with adoption are found in Section C, Articles 13-24.\textsuperscript{72} While the document establishes general guidelines

\textsuperscript{67}. VERHELLEN, \textit{ supra} note 52, at 69.
\textsuperscript{68}. \textit{Id.} at 70.
\textsuperscript{69}. \textit{Id.}
\textsuperscript{70}. \textit{DECLARATION ON SOCIAL AND LEGAL PRINCIPLES RELATING TO THE PROTECTION AND WELFARE OF CHILDREN, WITH SPECIAL REFERENCE TO FOSTER PLACEMENT AND ADOPTION, G.A. Res. 41/85, U.N. GAOR, 41\textsuperscript{ST} Sess., U.N. Doc. A/41/898 (1986) [hereinafter \textit{DECLARATION ON PROTECTION OF CHILDREN}].
\textsuperscript{71}. Liu, \textit{ supra} note 4, at 195-96.
\textsuperscript{72}. \textit{DECLARATION ON PROTECTION OF CHILDREN, supra} note 70 arts. 13-24. Particular attention is given to those articles dealing with intercountry 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
for the foundation of intercountry adoption, it does not explicitly support adoption as the best solution for protecting children and says “children should be considered for international adoption only if they cannot be placed in a foster or adoptive family in their own country.” As with other relevant documents, the guidelines of the Declaration on Protection of Children focus on the best interests of the children involved. A closer look at the language of the Declaration on Protection of Children shows pervasive use of the auxiliary verb “should.” This language, while properly giving states the flexibility to establish their own laws and procedures regarding orphans, also gives states a little too much flexibility in deciding whether to follow or disregard the guidelines.

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

** **

**Article 17**
If a child cannot be placed in a foster or 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**
Government 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 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 agents 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 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.

73. DECLARATION ON PROTECTION OF CHILDREN, supra note 70, art. 17.
74. THE RIGHTS OF THE CHILD, 249-54 (Maria Rita Saulle and Flaminia Kojanec,
Where there are political or financial issues to be considered, the use of the verb “should” allows a way out that is unconscionable. When it comes to protection of children, there must be no such leeway. The problem the international community faces is that there is no single organization or enforcement agency with the power to mandate compliance. Until there is, children will continue to suffer. International organizations and nations alike must promote the practice of intercountry adoption wherever it serves the best interests of the world’s children.

Many of the guidelines set forth in the Declaration on Protection of Children were expanded upon in 1993 by The Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (the 1993 Hague Convention or Hague Adoption Convention). The provisions of the Hague Adoption Convention recognize “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.”

III. Effect of Historical and Political Events on the Practice of Intercountry Adoption by U.S. Citizens.

Determining why U.S. citizens have, in the past, embraced the practice of intercountry adoption and will continue to embrace the practice, now and in the future, demands that we look at and understand the effect of historical and political events on intercountry adoption. There has never been a shortage of political turmoil, war and disease in the world. As a result, there has been no shortage of orphaned children available for placement through intercountry adoption. While it has been true that children from certain countries appear to be more adoptable than those from other countries, we cannot allow that to deter us from understanding just how important intercountry adoption has been and can be in protecting the rights of orphaned children.

A. World War II

Prior to World War II, the practice of intercountry adoption was

eds., 1995).
75. 1993 HAGUE CONVENTION, supra note 17.
76. Id. See also Hubing, supra note 38.
77. Speculation about why certain children are more adoptable ranges from an adoptive family’s desire to have children most ethnically like themselves to the belief that children of certain races are more intellectually superior to others. Strong opposition to transracial adoption, particularly by African-Americans, has contributed to reluctance by some families to adopt across racial lines and makes it unlikely that some Caucasian families will adopt children from Latin American and African nations.
virtually non-existent in the U.S. In the aftermath of the war, concern for dislocated families and refugee children spurred a humanitarian effort, spearheaded by U.S. military personnel, to save thousands of orphaned children. In the early post-war years, the main sending countries were those defeated in the war—Greece, Italy, Germany and Japan. The U.S. Congress responded to public interest in intercountry adoption by enacting the Displaced Persons Act (DPA) in 1948. The DPA was to be a temporary solution to problems in Europe. It provided for the immigration of over 200,000 refugees from Germany, Austria and Italy and allowed 3,000 displaced orphans to be admitted to the United States, regardless of their country's immigration quota. Between 1948 and 1962, U.S. families adopted 1,845 German and 2,987 Japanese children.

B. The Korean War

The onset of the Korean War in 1950 kept intercountry adoption at the forefront of U.S. immigration law. Once again, military personnel witnessed the plight of orphaned children in a war-ravaged country. Korean society does not view adoption in the same way as most Americans. Lineage and family heritage are defining characteristics in identity formation for Koreans. Because adoption by foreigners would effectively strip a Korean child of the lineage and heritage that define that child, it seems out of context for Koreans to permit their children to be adopted by foreigners.

War, though, modifies societal and cultural norms. Large population shifts to urban areas, a breakdown of the extended family, and large numbers of orphaned children, many of whom were fathered by U.S. servicemen, forced changes in the way Korean society cared for its orphans. The Republic of Korea turned to American social welfare agencies for help in coping with the staggering number of parentless children. The U.S. Congress enacted emergency legislation allowing

79. Liu, supra note 4, at 192.
80. Selman, supra note 8, at 9.
82. Id.
83. Id.
84. See id. This provision expired automatically after two years.
86. SIMON & ALTSTEIN, supra note 29, at 7.
87. Id.
88. Id.
military personnel who adopted or wanted to adopt Korean children to receive non-quota orphan visas. 89

Over the next decade, Congress continued to extend and amend temporary immigration laws to allow for intercountry adoption. 90 Congress amended the Immigration and Nationality Act (INA) in 1961 to create a permanent provision for the immigration of adoptable children. 91 From 1989 through 1994, the U.S. issued more immigration visas to orphans from Korea than from any other country. 92 It is estimated that between the early 1950s and the mid 1980s, foreigners, many of whom were U.S. citizens, adopted more than 100,000 Korean-born children, 93 accounting for more intercountry adoptions than any other country in the world.

It is a source of national pride that the Republic of Korea is now able to provide for its own orphans, and since 1998, the number of children foreigners have been allowed to adopt has been declining. 94 South Korea is working toward the elimination of all intercountry adoption of its children. 95 The fact that there may no longer be Korean orphans available for intercountry adoption should not negate the message already sent that intercountry adoption is a success story. The emphasis will undoubtedly be transferred to other parts of the world where there are orphans who could benefit from the practice just as Korean orphans did a generation ago.

C. Vietnam War

From 1965 to 1973, the United States was engaged in armed conflict in the jungles of Vietnam, Cambodia and Laos. 96 Many children fathered by U.S. servicemen were left behind at the end of the war. 97 Following the withdrawal of U.S. troops from South Vietnam, the North

91. Id.
94. SIMON & ALTSTEIN, supra note 29, at 8.
95. Id. at 19.
96. The author remembers well the turmoil surrounding the U.S. involvement in Vietnam during the early sixties, and had friends who fought and died there. Except to the extent that the conflict had an impact on intercountry adoption, this section of the comment is not about the "war." Visit http://www.historyplace.com/unitedstates/vietnam/index-1965.html for a more comprehensive history of U.S. involvement in Southeast Asia.
97. SIMON & ALTSTEIN, supra note 29.

D. Romania after the fall of Ceausescu

With the exception of the years immediately following the Second World War, Europe never played a major role in intercountry adoption, either as a sender or receiver of children to be adopted. That all changed in 1991 when pictures of wide-eyed, sad-faced Romanian orphans became front-page news around the world. During the reign of Nicolae Ceausescu, the government instituted a draconian policy of procreation. Under the policy, the state required women to have at least five children, and artificial contraception and abortion were banned. Failure to have the required number of children resulted in the loss of jobs, housing and medical coverage. State-operated orphanages housed thousands of those mandatory children when families were unable economically and/or emotionally to support them. Humanitarian efforts by foreigners to rescue children from the appalling conditions of Romanian orphanages resulted in a steady flow of Romanian children to the West for adoption. To curb the flow, the government of Romania terminated practically all intercountry adoptions. Adoption of Romanian children by U.S. citizens numbered 2,594 in 1991 and plummeted to 121 in 1992, in spite of the large

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98. Id. at 12.
99. Id.
100. Id.
101. Id.
102. See id.
103. Id. at 15.
104. Id. at 12.
106. SIMON & ALTSTEIN, supra note 29, at 16.
107. Id.
108. Id.
numbers of children remaining in Romanian orphanages. Statistics show that beginning in 1996, the number of Romanian children adopted by U.S. citizens began to rise once again, and the number continued to increase moderately, year by year, until it reached 782 in 2001.111

A de facto suspension of international adoptions took effect when Prime Minister Nastase took office in December 2000,112 and the Romanian Adoption Committee announced a one-year moratorium on intercountry adoptions beginning June 21, 2001.113 Attempts to have the moratorium lifted were made during Prime Minister Nastase’s October 30-November 3, 2001 visit to the United States.114 In spite of continued dialog with Romania, the moratorium was extended to November 15, 2002.115 On November 8, 2002, only days before the expiration of the moratorium, the U.S. State Department announced that the Romanian government had extended its adoption moratorium until February 1, 2003, pending enactment of new adoption legislation.116 Information from the U.S. State Department in January 2004 indicates that the actual date of enactment and implementation of the new legislation cannot be predicted at this time, and the Romanian government’s moratorium on intercountry adoptions continues.117

E. Governmental Family Planning Policies in China

China is one of three countries that have dominated the story of intercountry adoption in the past decade.118 Over-population, the government-imposed limitation allowing Chinese couples to have only one child, and gender preference for male children have made large numbers of Chinese children adoptable.119 Adoptions by American families of Chinese orphans, primarily girls, ballooned from 206 in 1992120 to 5,053 in 2002.121 Some observers estimate that there are

110. Id.
111. Id.
113. Id.
114. Id.
115. Id. Even with the moratorium, however, 168 immigrant visas were issued to Romanian orphans coming to the U.S. See Immigrant Visa Statistics at
116. Id.
117. UNITED STATES DEPARTMENT OF STATE, INTERNATIONAL ADOPTION, ROMANIA,
118. Romania and Russia are the other two countries. Since 1995, however, China and Russia have accounted for more than half of the intercountry adoptions by U.S. citizens. Selman, supra note 8, at 16.
119. SIMON & ALTSTEIN, supra note 29, at 9.
hundreds of thousands of children in China's state-run orphanages, and that number is likely to increase. It is estimated that about 150,000 girl babies are abandoned every year, and unknown numbers are drowned.122 From 1995 to 2002, China has ranked first or second in number of children adopted by U.S. citizens.123 During that period of time, the only nation outranking China has been Russia.124

F. Political Upheaval in the former Soviet Union

Adoption of Russian children exploded after the fall of the Soviet Union and the influx of capitalism.125 The adoption process has now become strictly regulated, and there must be proof that no Russian citizen is interested in adopting a child before an intercountry adoption may proceed.126 While that may seem to be a difficult hurdle to clear, the current economic crisis in Russia and in other Eastern European nations makes it unlikely that this restriction will prevent any significant number of children from being placed through intercountry adoption. In fact, in 2002 Russia allowed U.S. citizens to adopt 4,939 of its children.127

IV. World Events Impacting Intercountry Adoption

The world continues to have problems that make intercountry adoption important. Those same problems, however, can also make intercountry adoption difficult or impossible. Because of worldwide improvements in mortality rates for adults in traditional childbearing years, the number of orphans should be declining.128 Instead, there is a crisis as overall orphan rates continue to rise.129 As hostilities escalate in the Middle East and the HIV/AIDS pandemic spreads, that number is unlikely to decline. Worldwide, by 2010, an estimated 106 million children under age fifteen are projected to have lost one or both parents. A staggering twenty-five million of those will be orphaned due to HIV/AIDS.130

121. Id.
122. SIMON & ALTSTEIN, supra note 29, at 11.
124. Id.
126. Zappa, supra note 90, at 171.
127. SIMON & ALTSTEIN, supra note 29, at 18.
128. Children on the Brink, supra note 3.
129. Id. at 5.
130. Id. at 3.
A. Hostilities

1. Kosovo.

As hostilities in the former Yugoslavia escalated, the U.S. State Department posted notices on its adoption website\textsuperscript{131} applauding U.S. citizens' humanitarian concern for the children of Kosovo and the desire to assist them in their time of need. "However," states the website, "at this point in time, adopting children from this region is not a feasible way to assist them. In particular, most Kosovar children are not adoptable."\textsuperscript{132} Among the reasons why children from Kosovo are not adoptable is that the laws in the former Yugoslavia (Serbia/Montenegro) give priority to their own citizens and make adoptions by foreigners very difficult. It is generally believed that "[e]ven when children have been truly orphaned or abandoned by their parents, they are often taken in by other relatives [and that] staying with relatives in extended family units is generally a better solution than uprooting the child completely."\textsuperscript{133}

2. Bosnia and Herzegovina.

Bosnia and Herzegovina are divided into two entities—the Republika Srpska (RS) and The Federation of Bosnia and Herzegovina. Both entities have maintained the old law of the former Yugoslavia that regulates adoptions. There is nothing in Bosnian law that specifically prohibits foreigners from applying to adopt a Bosnian child, but the law stresses that there must be overwhelming justification and exceptionally compelling reasons for a foreigner to be permitted to adopt a Bosnian child.\textsuperscript{134} "Foreign adoption is a particularly sensitive subject to Bosnian authorities and to the people of Bosnia. Having lost so many lives in the recent war, Bosnians have strong feelings against permitting Bosnian children to be removed from their homeland."\textsuperscript{135} Bosnian law gives absolute priority to adoptions by Bosnian citizens, and there are no indications that adoption laws will be changed to make foreign adoptions easier.\textsuperscript{136} "Furthermore, in a country that is still recovering from a long

\begin{itemize}
\item \textsuperscript{131} United States Department of State, International Adoption, Kosovo, http://travel.state.gov/adoption_kosovo.html (last visited Feb. 23, 2004).
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} United States Department of State, International Adoption, Bosnia, http://travel.state.gov/adoption_bosnia.html (last visited Feb. 23, 2004).
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id.
\end{itemize}
and brutal conflict, it can be extremely difficult to determine if the whereabouts of a parent are simply unknown or if the child is truly an orphan." According to U.S. State Department Statistics, almost 3,000 children without parental care were living with relatives or in foster homes; fewer than 500 were residing in orphanages.138

3. Afghanistan.

Adoption is prohibited in Afghanistan where Afghan family law and the Afghan judicial system are based on a strict interpretation of Islamic law.139

4. Iraq.

Once again, in the wake of armed conflict, American citizens have inquired about humanitarian aid in the form of intercountry adoption. There have been reports of U.S. soldiers marrying Iraqi women, but it remains to be seen whether there will be any significant number of U.S. fathered children following this war as there were in Korea and Vietnam. In any case, the U.S. State Department has posted notification on its website that it is not currently possible to adopt Iraqi children.140

There is no adoption under Iraqi law, only guardianship; however, Iraqi law has not permitted foreigners to obtain legal guardianship of Iraqi children.141 The U.S. Bureau of Citizenship and Immigration Services in the Department of Homeland Security (Homeland Security) and the Board of Immigration Appeals have deemed guardianship insufficient for the purposes of immigration under the Immigration and Nationality Act.142 The U.S. State Department also states that it "does not know at this time whether Iraqi nationals living abroad may obtain legal guardianship of Iraqi orphans."143 Even if Iraqi law did permit intercountry adoption, the situation in Iraq currently makes it extremely difficult to know for certain whether children are truly orphans.

137. Id.
138. Id.
141. Id.
142. Id.
143. Id.
5. The HIV/AIDS Pandemic and its effect on intercountry adoption in Sub-Saharan Africa.\(^{144}\)

HIV/AIDS is a global emergency. Although Asia has the highest number of orphans,\(^{145}\) the greatest proportion of children who are orphans is in Africa,\(^{146}\) particularly in sub-Saharan Africa.\(^{147}\) In 2001, 12% of sub-Saharan African children were orphans.\(^{148}\) By 2010 an estimated twenty million sub-Saharan African children will be orphaned due to HIV/AIDS.\(^{149}\) The plight of sub-Saharan African orphans is complicated by a number of factors, but especially so by Africa's deeply rooted kinship system.\(^{150}\) In Africa, families have great pride in taking care of their own. Thus, intercountry adoption of an orphaned child would be psychologically unimaginable. Relatives are still largely absorbing the burden of AIDS orphans,\(^{151}\) but surveys suggest that extended family caregivers are over-burdened.\(^{152}\) The extended family of aunts, uncles, and grandparents that has been resilient for a long time is now extremely stretched by increasing numbers of orphaned children.\(^{153}\) In many cases, those providing care are already impoverished, often elderly.\(^{154}\) Families care for the sick for long periods, and this is very costly.\(^{155}\) The average income drops below the poverty level when resources evaporate.\(^{156}\) Still, few African orphans are being placed through intercountry adoption.\(^{157}\) The U.S. State Department statistics

\(^{144}\) Almost the entire continent of Africa is included in the area designated as Sub-Saharan. Only the northernmost countries of Morocco, Algeria, Tunisia, Libya and Egypt are excluded.

\(^{145}\) Due to Asia's large population, the number of orphans is much larger than Africa. In 2001, there were 65 million orphans in Asia, 2 million orphaned due to AIDS. *Joint Press Release, UNICEF & UNAID,* http://www.unicef.org/newsline/02pr43b2ink.htm (July 10, 2002).

\(^{146}\) *Id.* In 2001, thirty-four million children in sub-Saharan Africa were orphans, one-third of them due to AIDS. *Joint Press Release, UNICEF & UNAID,* http://www.unicef.org/newsline/02pr43b2ink.htm (July 10, 2002).

\(^{147}\) *Id.* (UNICEF finds that orphan populations are concentrated). Twelve countries in sub-Saharan Africa accounted for seventy percent of the orphans. Some of the countries hardest hit by the HIV/AIDS orphan crisis are Ethiopia, Zimbabwe, Malawi, Zambia, Namibia, Kenya, Nigeria, Congo, and South Africa. Nigeria, Ethiopia, and Democratic Republic of Congo had the greatest number of orphans.

\(^{148}\) *Children on the Brink,* supra note 3, at 6.

\(^{149}\) *Id.* at 3.

\(^{150}\) *Id.*

\(^{151}\) *Children on the Brink,* supra note 3.

\(^{152}\) *Id.*

\(^{153}\) *Id.*

\(^{154}\) *Id.* at 9.

\(^{155}\) *Id.*

\(^{156}\) *Id.*

\(^{157}\) *Immigrant Visa Statistics,* supra note 10. In order to compile exact numbers, the webpage for each African nation must be accessed from the U.S. State Department's
show only 700 adoptions of sub-Saharan African children by U.S. citizens over the past six years. Why that is true remains unclear, but it returns us to the question of whether the reason for intercountry adoption is humanitarian concern or self-interest. In the face of prior catastrophic events, U.S. citizens adopted thousands of orphaned children every year. That has not been the case with HIV/AIDS orphans. Some sub-Saharan African nations have prohibited foreign adoption, placing an even greater burden on both individual and states' resources.

The Republic of South Africa's 1996 constitutional change deserves a closer look with regard to restrictions on intercountry adoption. Until passage of the new constitution, the Child Care Act 74 of 1983 (Child Care Act) was the governing South African legislation on adoption, and Section 18(4)(f) of the Child Care Act prohibits the adoption of a South African born child by non-South Africans. South African children's rights are explicitly protected in the 1996 Constitution of the Republic of South Africa (RSA Constitution), and the Constitutional text explicitly commits all South Africans to sustaining and protecting all children. The Child Care Act was incorporated into the South African constitution and provides the legal mechanism for implementation of the Constitutional provisions. The South African Law Commission is drafting new comprehensive child care legislation to take the place of the

alphabetical listing.

159. As of Aug. 26, 1997, war-torn Rwanda has had a moratorium on intercountry adoptions, ostensibly to exhaust all possibility of family reunification before allowing its children to be placed for intercountry adoption. There is no indication when or if this moratorium will be lifted, at http://travel.state.gov/adoption_rwanda.html (last visited Feb. 28, 2004).
160. Child Care Act, supra note 16.
161. Section 18(4)(f) reads as follows:

A children's court to which application for an order of adoption is made in terms of subsection (2), shall not grant the application unless it is satisfied—

* * *

(f) in the case of a child born of any person who is a South African citizen, that the applicant, except an applicant referred to in section 17(c), or one of the applicants is a South African citizen resident in the Republic, or the applicant has or the applicants have otherwise the necessary residential qualifications for the grant to him or them under the South African Citizenship Act, 1949 (Act No. 44 of 1949), of a certificate or certificates of naturalization as a South African citizen or South African citizens and has or have made application for such a certificate or certificates.

164. Id. at 17.
Child Care Act.\(^{165}\)

In *Minister for Welfare and Population Development v. Fitzpatrick and others (Fitzpatrick)*,\(^{166}\) the Constitutional Court of South Africa\(^{167}\) held the prohibition against adoption of South African born children by non-South Africans to be unconstitutional. The Court suspended the order of invalidity for a period of two years to enable Parliament to correct the defect in the legislation.\(^{168}\) The Court ruled that the prohibition was inconsistent with the provisions of section 28(2) of the RSA Constitution, which requires that the best interests of a child are to be paramount in every matter concerning the child.\(^{169}\)

Section 28 of the RSA Constitution is entitled "Children." This section of the RSA Constitution draws upon the African Charter on the Rights and Welfare of the Child (1990)\(^{170}\) and the CRC in enumerating rights accorded children.\(^{171}\)

Section 28(1) (b) of the RSA Constitution contains a provision that every child has the right "to family care or

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167. The Court was established in 1994 under South Africa's first democratic constitution. It is the highest court in the land for all constitutional matters. The judgments of the Court are based on the South African Constitution as the supreme law of the land. They are binding on all organs of government including Parliament, the Presidency, the police force, the army, the public service and all courts. When interpreting the Constitution, the Court is required to consider international human rights law and may consider the law of other democratic countries. [http://www.concourt.gov.za/about.html](http://www.concourt.gov.za/about.html).


171. Woodhouse, *supra* note 162. The enumerated rights include rights to name and nationality, to parental care, to "positive" or "welfare" rights—including shelter, nutrition, and medical care—to representation of counsel, and to have decisions based on the child's best interests.
parental care, or to appropriate alternative care when removed from the family environment." In South Africa, a child's right to alternative care arises where parental or family care is lacking. Rarely does this alternative care include intercountry adoption. Looking at the evolution of those instruments that became the defining documents with respect to intercountry adoption helps us to recognize that the best interests of children can be served in numerous ways.

V. Defining Documents

A. United Nations Convention on the Rights of the Child

1. Drafting and Adoption.

In 1978, anticipating the International Year of the Child, Poland submitted a draft Convention on the Rights of the Child to the Commission on Human Rights (HR Commission). The HR Commission solicited responses on the idea of a convention from the member states and organizations. No state objected, and the HR Commission set up an open working party to draft the convention. In the end, drafting the convention took more than ten years. On November 20, 1989, the U.N. General Assembly gave final approval to the treaty. The treaty establishes a set of globally defined children’s rights and provides that in all actions concerning children,

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172. Child Care Act, supra note 16, provides the legal mechanism for implementation of the Constitutional provision.
174. The U.N. proclaimed 1979 as The International Year of the Child. VERHELLEN, supra note 52, at 73.
175. VERHELLEN, supra note 52, at 73. Poland wanted to commemorate the 20th anniversary of the 1959 Declaration by adopting a separate children’s rights convention during the International Year of the child. Id.
176. Id.
177. It was questionable whether the 1979 deadline could be met because of the complexity of the subject matter and the infrequency of working group meetings. Id. at 74.
178. Id. at 75. There were numerous reasons why it took more than ten years to draft the convention. The Commission on Human Rights Open Working Party met only once a year; there were numerous proposals and counterproposals; the number of participants, each with their own ideas, gradually increased; many elements of children’s rights had to be discussed; many different legal and cultural traditions were involved; there was a language problem.
179. VERHELLEN, supra note 52 at 76.
the best interests of the child shall be a primary consideration.\textsuperscript{181} The CRC is the most comprehensive and universally ratified treaty dealing with children's rights to date, but it omits any specific reference to adoption.\textsuperscript{182} In conjunction with the 1993 Hague Convention,\textsuperscript{183} the CRC has been the most effective document dealing with intercountry adoption. States accepting the treaty "recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development,"\textsuperscript{184} the language in the treaty most closely equivalent to "best interests" of the child. By 1997, almost every country in the world\textsuperscript{185} had ratified the CRC.\textsuperscript{186}

More than any other global human rights treaty, the CRC integrates civil and political rights with social and economic rights.\textsuperscript{187} The common theme is the requisite dignity for children.\textsuperscript{188} Best interests of the world's children are achieved when children are rights-bearers, not when they are viewed only as objects of protection.\textsuperscript{189} That is the focus of the CRC, and certain social and economic rights guaranteed by the CRC could almost certainly be achieved by allowing children to be adopted by foreigners.

The Preamble of the CRC further recognizes the importance of international cooperation for improving living conditions of children in every country.\textsuperscript{190} Part I of the CRC defines specific rights and states' responsibilities with respect to those enumerated rights.\textsuperscript{191} One way of classifying the CRC's enumerated rights is to place those rights into four groups: survival rights, membership rights, protection rights, and

\begin{itemize}
\item \textsuperscript{181} MALCOLM N. SHAW, INTERNATIONAL LAW, 201 (1991).
\item \textsuperscript{182} JEREMY ROSENBLATT, INTERNATIONAL CONVENTIONS AFFECTING CHILDREN, 87 (2000).
\item \textsuperscript{183} 1993 HAGUE CONVENTION, supra note 17.
\item \textsuperscript{184} CRC, supra note 5, art. 27.
\item \textsuperscript{185} VERHELLEN, supra note 52, at 9. To date, 191 countries have ratified the Convention on the Rights of the Child (Somalia and the United States are the only ones that have not yet done so). The Convention was adopted unanimously by the UN General Assembly on November 20, 1989, sixty-five years after the Geneva Declaration, thirty years after the adoption of the Declaration of the Rights of the Child, and 10 years after the International Year of the Child. \textit{Id}.
\item \textsuperscript{186} CRC, supra note 5.
\item \textsuperscript{187} LEBLANC, supra note 58, at xix.
\item \textsuperscript{188} Andrews & Kaufman, supra note 180, at xii.
\item \textsuperscript{189} LEBLANC, supra note 58, at xvi
\item \textsuperscript{190} CRC, supra note 5, Preamble.
\item \textsuperscript{191} Part I of the CRC is comprised of Articles 1-41. This comment does not address each individual article, but rather looks at how the goals set forth in the classes of rights might be attained through intercountry adoption.
\item \textsuperscript{192} LEBLANC, supra note 58, at xix. In the introduction to his treatise on the CRC, Mr. LeBlanc identifies and compares various researchers' classifications and descriptions of children's rights and explains his decision to highlight those that were the most difficult for the drafters to reach agreement on and those that were considered most
empowerment rights.  

a. Survival Rights.

Article 6 of the CRC sets forth the inherent right to life and the states' obligation to ensure a child's survival and development. According to Article 4 of the CRC, the measures taken by states parties to guarantee the survival and development of the child and the right to an adequate standard of living are to be undertaken "to the maximum extent of their [the states parties] available resources." Primary responsibility for the actual provision of this standard of living belongs with a child's parents. The state is to provide "material assistance and support." Where there are no parents or extended family, and the states' resources are stretched beyond the ability to care for orphaned children, it is hard to argue that intercountry adoption would not be a viable means of promoting the survival rights delineated in the CRC. In all likelihood, allowing orphaned or abandoned children to be placed for intercountry adoption would provide more opportunity for survival and development than permitting children to remain in substandard conditions with little hope for a better life.

b. Membership rights.

Individuals exist as part of a large community. The safety of living in a caring community is especially important to vulnerable

controversial or important to representatives of governments and organizations interviewed by him in completing his research. Id.

193. Id. at xviii. Jack Donnelly and Rhoda Howard's classification scheme is broadly applicable to human rights in general but works well in classifying the articles of the CRC. The classification groups are described generally as: "survival" rights, including the right to life itself and those rights that sustain life, such as the rights to food and health care; "membership" rights, including those that relate to a person as a part of the community, such as nondiscrimination and family rights; "protection" rights, guarding the individual against abuses of power by the states; and "empowerment" rights, including freedom of thought, conscience, and religion, freedom of association and assembly, and the right to education, broadly classified as the rights that make a person a member of the community in which he or she exists. Id.

194. CRC, supra note 5, art. 6 §§ (1) and (2); see also LEBLANC, supra note 58, at 65.

195. Article 37(a) deals with the death penalty. Many states have not brought their laws into compliance with this provision. Article 27 deals with maintaining an adequate standard of living, and Articles 24 and 25 deal with health care. There is a qualifying statement that these mandates are to be accomplished within a states' ability to do so. That qualification is perceived by some to weaken the principles endorsed by the CRC; that is, it creates a rather large "loophole" through which states can escape responsibility.

196. LEBLANC, supra note 58, at 78.

197. Id. at 78-79; CRC, supra note 5, Art. 27.
children.198 Article 2 establishes the obligation of states to protect children from discrimination.199 Because the CRC is child-specific, its provisions are drafted to ensure that children cannot be punished or discriminated against for the actions, beliefs or political opinions of a child’s parents, legal guardians, or family members.200

Children with mental or physical disabilities are protected from discrimination under Article 2 and are given further affirmative rights under Article 23.201 Perhaps the greatest area of need is to locate adoptive parents for orphaned children with mental and physical handicaps, but they are frequently the least adoptable through intercountry placement. Healthy, non-handicapped children are favored in any adoption process and intercountry adoption is no exception. Special needs children are likely to be left behind. “[O]ne of the greatest threats facing disabled children is that they will become isolated and cut off from their society, community, family, and other children.”202 These children are frequently not enrolled in school, perhaps reflective of an insensitivity by society in general.203

Crucial to a child’s identity are rights to a name and nationality.204 Articles 7 and 8 of the CRC affirm those rights205 within the boundaries of national laws on citizenship and immigration.206 Opponents of intercountry adoption argue that rather than promoting a child’s identity, the practice strips it away and replaces it with a name and identity chosen by the adoptive parents. Proponents of intercountry adoption focus on the importance of affirming an adopted child’s birth heritage in conjunction with the assumption of a new name and nationality. There is little argument from adoption proponents that it is important for intercountry adoptive families to affirm a child’s culture and heritage.207

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198. LeBlanc, supra note 58, at 94.
199. The provisions of Article 2 apply to all children, without exception, within a states’ jurisdiction and prohibits discrimination irrespective of the “child’s or his or her parent’s or legal guardian’s” race, color, gender, religion, etc.
200. CRC, supra note 5, art. 2, § 2 was designed to prevent children from being tortured or imprisoned because of the actions of others.
201. Id., art. 23. The rights of these children extend to special care, education and training that ensure dignity, promote the greatest possible self-reliance, and facilitate active participation in the community and society.
202. LeBlanc, supra note 58, at 103.
203. Id. at 104.
204. Id. at 107.
205. CRC, supra note 5, art. 7 § 1 provides that a child shall be “registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality. . . .” Art. 8 sets forth the states obligation to protect and, if necessary, re-establish a child’s name, nationality and family ties. (cite)
206. Id. art. 7 § 2 allows states parties to comply with this provision “in accordance with their national law.”
207. Simon & Altstein, supra note 29, at 45-47.
In large measure, adoptive families can, and do.\textsuperscript{208}

Family is a fundamental unit of society, and the CRC addresses certain rights within the family structure.\textsuperscript{209} Article 5 provides that the states are to respect the rights and responsibilities of parents and extended family.\textsuperscript{210} Article 18 gives parents and legal guardians primary responsibility for the upbringing and development of the child and delegates to the state a responsibility to provide “appropriate assistance” in meeting those responsibilities.\textsuperscript{211} The CRC strives for a balance between the responsibility of states and parental duty.\textsuperscript{212}

The CRC emphasizes that the family has primary responsibility for caring for children. It recognizes that under some circumstances, alternative means of care might become necessary, either temporarily or permanently.\textsuperscript{213} Children who are permanently or temporarily deprived of living with their birth families are entitled to protection from the state, and alternative care must be assured for such children, including adoption and fostering.\textsuperscript{214}

Adoption philosophy, as reiterated repeatedly in international instruments, is that any adoption placement should first and foremost be in the best interests of the child being adopted. According to Article 20 of the CRC, intercountry adoption is to be used only when a child cannot be adopted or placed in foster care within the child’s country of origin.\textsuperscript{215} This article was included to guarantee that every effort would be made to ensure that a child would not lose his ethnic, religious, or linguistic background.\textsuperscript{216} Unfortunately, documents fail to reflect or take into consideration the ability and desire of adoptive families outside that of a child’s origin to provide opportunities for children to understand and embrace their heritage. In practice, adoptive parents can and do provide such opportunities. Further, there is an inherent presumption that adoptive parents will be of different backgrounds from adoptive children. Instead, the adoptive parents might actually be of the same ethnic, religious, or linguistic background as that of the orphaned child.

Intercountry adoption was a controversial issue for drafters of the CRC.\textsuperscript{217} The final version of the CRC contains no mandate requiring

\begin{footnotesize}
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\item \textsuperscript{208} Hubing, \textit{supra} note 38, at 671-72.
\item \textsuperscript{209} LEBLANC, \textit{supra} note 58, at 112-14.
\item \textsuperscript{210} CRC, \textit{supra} note 5, art. 5.
\item \textsuperscript{211} All these duties and responsibilities are to be undertaken with the best interests of the child as the primary concern.
\item \textsuperscript{212} CRC, \textit{supra} note 5, art. 5
\item \textsuperscript{213} Id. art. 19; VERHELLEN, \textit{supra} note 52, at 161-62.
\item \textsuperscript{214} CRC, \textit{supra} note 5, art. 20 § 1.
\item \textsuperscript{215} CRC, \textit{supra} note 5, art. 20.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} LEBLANC, \textit{supra} note 58, at 121-22.
\end{itemize}
\end{footnotesize}
states to permit adoption, either nationally or internationally.\textsuperscript{218} Article 21 was made applicable only to states "that recognize and/or permit the system of adoption."\textsuperscript{219} It provides that States permitting adoption must ensure that the best interests of the child are paramount. Opponents of intercountry adoption have charged that many children are not orphaned but rather abandoned or sold for profit.\textsuperscript{220} This suggests that the best interests of the child might simply be a way for desperate parents to legally and morally abandons their children in an effort to provide them with a better life. In the U.S., we allow parents to voluntarily terminate their parental rights in order to do just that. Intercountry adoption legislation should do the same in the best interests of a child. It is up to the law enforcement officials of individual countries to identify and prosecute those who are selling children for profit.

c. Protection rights.

The CRC covers a broad range of important issues and problems from the standpoint of shielding children from harmful acts and practices.\textsuperscript{221} Many of the articles of the CRC deal with protecting children from various forms of abuse and mistreatment.\textsuperscript{222} However, the CRC is intended to be a declaration of children’s rights, and some human rights proponents find that the CRC is too strongly oriented toward placing children in the passive role of receiving protection rather than the active role of being the bearers of substantive rights which they are entitled to exercise.\textsuperscript{223}

The main protection issues the CRC deals with are sexual and economic exploitation; abduction of, sale of, and trafficking in children; and the use of children as combatants in armed conflicts.\textsuperscript{224} Drafters of the CRC recognized the extent of the exploitation problem and addressed

\textsuperscript{218} Id. at 143-44.
\textsuperscript{219} CRC, supra note 5, art. 21 provides:
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: . . .
\textsuperscript{Id.}
\textsuperscript{220} Liu, supra note 4, at 194.
\textsuperscript{221} LEBLANC, supra note 58, at 123.
\textsuperscript{222} CRC, supra note 5, arts. 11, 19, 21, 32-38, and 40. Additionally article 39 provides that states have an obligation to provide rehabilitative care to child victims of armed conflicts, torture, neglect, maltreatment or exploitation.
\textsuperscript{223} LEBLANC, supra note 58, at 123.
\textsuperscript{224} Id. at 124-27 (explaining that sexual exploitation of children is primarily for prostitution and pornography. Prostitution is a widespread problem, and indications are that it is growing in spite of laws regulating the practice. Corruption among authorities indicates that legal intervention at the international level will be required to curb this exploitation.)
it in Article 34. Even the most zealous opponents of intercountry adoption would find it difficult to argue that a life of exploitation through prostitution, pornography, or forced labor is preferable to an intercountry adoption.

Child labor is the most common form of economic exploitation. People worldwide reacted with indignation to the revelation of children being exploited in the factories owned and controlled by Nike, Reebok, and Kathie Lee Fashions. Although enormous progress has been made, and child labor under abusive conditions in industrialized nations has been virtually eliminated, eradication of child labor has been elusive. Poverty levels in some countries promote the exploitation of children for economic gain. Article 32 of the CRC does not call for the eradication of child labor; rather, it requires protecting children from exploitation and the harmful effects caused by it.

Nothing, including intercountry adoption, can save all orphaned

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225. CRC, supra note 5, art. 34 provides:

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practices;
(c) The exploitative use of children in pornographic performances and materials.

Id.

226. LEBLANC, supra note 58, at 131. Many of the industrialized nations have mandatory primary and secondary level education for children and have adopted laws regulating when children may enter certain occupations and the conditions under which they can work. In the poorer countries of the world, however, the problem continues to be an enormous one.


228. Talk-show host Kathie Lee Gifford’s apparel was being produced in Honduras where ten percent of the work force was 13-15 years old. In 1995, investigators discovered deplorable conditions and forced overtime prohibiting children from attending grammar school at night. Only two bathroom breaks per day were permitted and there was no such thing as health care or sick days, at http://www.uniteunion.org/sweatshops/sweatshoparchive/kathieleekathielee.html.

229. LEBLANC, supra note 58, at 131.

230. Id.

231. CRC, supra note 5, art. 32 provides:

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to
children from exploitation. Although it would almost certainly remove some orphans from the labor pool, it is unlikely that intercountry adoption would ever be able to place a sufficient number of children to completely stop the abusive practice of child labor. If intercountry adoption saves even a few, however, it is this author's opinion that the practice is validated as one alternative that protects the best interests of children against exploitation.

Abduction of and trafficking in children have attracted international attention in recent years. Although the drafters of the CRC failed to take unequivocal stands on either issue, Articles 11 and 35 do affirm basic principles regarding the protection of children from abduction and trafficking.232 Intercountry adoption proponents have met resistance in this area because some opponents believe that intercountry adoption has the potential itself to become a form of trafficking in children.233 Exerting improper pressure on both wed and unwed mothers may provide greater numbers of children for adoption. Officials conducting improper home studies and recommending removal of children would also add to the numbers. In neither case is it certain that a specific adoption would be in the best interests of the child.234 Falsification of documents and unwarranted financial gain, either by parents or adoption officials, amounts to trafficking and sale of children.235 The number of potential adoptive parents and the emergence of unscrupulous "baby brokers" make this a valid concern. It is only through implementation and enforcement of international agreements that this potential is mitigated. Paragraph (e) of Article 21 of the CRC urges states parties to promote the conclusion of international agreements dealing with intercountry adoption.236

interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

To this end, . . . States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admissions to employment;
(b) Provide for appropriate regulation of the hours and conditions of employment; and
(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Id. 232. LEBLANC, supra note 58, at 142-43.
233. Id.
234. Id.
235. Id.
236. CRC, supra note 5, art. 21 (e) provides that states parties shall:
(e) promote, where appropriate, the objectives of this 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
d. Empowerment rights.

"The category of 'empowerment' rights includes all those rights that relate to a person being heard on matters that affect his or her life."\textsuperscript{237} Parents have the right to make decisions regarding their children, and children have the right to make personal decisions.\textsuperscript{238} A child has the right, under Article 13 of the CRC, to make his or her feelings and views known unless doing so would violate the rights of others.\textsuperscript{239} Subject to parental guidance and national law, children have the right to freedom of thought, conscience, and religion\textsuperscript{240} as well as the right to freedom of association and peaceful assembly.\textsuperscript{241} Infants and very young children are unable to express their desires with respect to intercountry adoption. Older children, as an expression of their individual rights, should be permitted to have input regarding a potential intercountry adoption. Unfortunately, there is no magic age at which a child becomes old enough to contribute his or her opinion. The right age varies with the individual child.

One important empowerment right is the right to education.\textsuperscript{242} In poor countries where orphaned or abandoned children are taken in by family members, studies show those children do not always receive the educational advantages of birth children in the family and frequently do not attend school at all.\textsuperscript{243} Children placed in over-crowded orphanages may receive only a rudimentary education because it is economically impossible to provide anything more.\textsuperscript{244} Empowerment through education is covered by two articles of the CRC.\textsuperscript{245} States parties have
an obligation to implement the CRC directly through their education policy. Current economic crises around the world suggest that a great deal of attention will have to be paid to the condition of educational systems and standards in poor countries. Because most children placed through intercountry adoption are adopted by families in countries where all children receive free, compulsory education at least through high school, adopted children are likely to reap enormous educational advantages.

2. Implementation and Enforcement.

By signing and ratifying the CRC, states parties agree to implement its provisions in their countries. Primary responsibility for the implementation of the CRC falls on legislative, administrative, and judicial institutions of the ratifying states. International accountability of states is possible only through monitoring. Some studies, including those conducted by the U.N., raise doubts as to the effectiveness of such monitoring.

With the entry into force of the CRC, there is, for the first time, a child-specific international mechanism designed to implement the provisions of the convention among ratifying states. That mechanism is the Committee on the Rights of the Child (Committee).

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attendance... and the reduction of drop-out rates.”

Article 29 expands on the basic right to education and recognizes that education should also develop a child’s talents and personality and prepare the child for adult life.

246. Verhellem, supra note 52, at 107.
247. LeBlanc, supra note 58, at 180.
248. Primarily in the United States, where thousands of children adopted through intercountry adoption are placed every year.
249. Verhellem, supra note 52, at 89.
250. LeBlanc, supra note 58, at 286.
251. Id. at 186.
252. A treaty enters into force for those states that give the required consent. Typically, the provisions of a treaty determine the date on which the treaty enters into force (becomes effective). Bilateral treaties may provide for their entry into force on a particular date, upon the day of their last signature, upon exchange of the instruments of ratification or upon the exchange of notifications. In cases where multilateral treaties are involved, it is common to provide for a fixed number of states to express their consent for entry into force. Some treaties provide for additional conditions to be satisfied by specifying that a certain category of states must be among the consenters. The treaty may also provide for an additional time period to elapse after the required number of countries have expressed their consent or the conditions have been satisfied. A treaty may also provide that, upon certain conditions having been met, it shall come into force provisionally. Art. 24, VCLT 1969.
253. LeBlanc, supra note 58, at 187.
254. See id. at 189. The CRC establishes an international monitoring mechanism through the creation of a ten-member Committee. To ensure impartiality and objectivity, Committee members are elected not as representatives of their governments, but in their
of the CRC establishes the Committee for the purpose of examining the progress made by states parties in realizing the obligations assumed by ratifying the CRC.\textsuperscript{255} One concern of the drafters was that the nomination and election processes for selection of the Committee members would be negatively influenced by political climates in the states parties to the convention, raising questions about objectivity and impartiality.\textsuperscript{256} Members of the Committee may be nominated only by states that have ratified the CRC.\textsuperscript{257} Nominations are submitted to the Secretary-General (of the U.N.) who compiles the list and submits it to the states parties two months before the election.\textsuperscript{258} Members are then selected by secret ballot at states parties meetings that are convened by the U.N. Secretary-General.\textsuperscript{259}

Committee members are elected for four-year terms and may be re-elected.\textsuperscript{260} Terms are staggered so the entire committee will not change at the same time.\textsuperscript{261} Vacancies on the Committee are filled according to the procedure set forth in section 7.\textsuperscript{262} Progress of states parties in implementing the provisions of the CRC is examined by the Committee in accordance with Articles 44 and 45. Parties are required to submit periodic reports.\textsuperscript{263}

The Committee held its first meeting in 1991 and began reviewing

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\textsuperscript{255} CRC, supra note 5, art. 43 § 1 provides:

Proponents of the Committee format say that it advances the cause of human rights by building a body of jurisprudence for interpretation of Human Rights Treaties and provides a basis for criticism of policies and practices because governments must defend their reports before a committee of experts. Critics say that governments will use the reports to create the impression that they are concerned when, in fact, they are inattentive or unconcerned. Further, if submitted at all, the reports are likely to be of poor quality and reflect only those things that make them look good.

\textsuperscript{256} LEBLANC, supra note 58, at 200-01.

\textsuperscript{257} Id. at 200.

\textsuperscript{258} Id.

\textsuperscript{259} Id. at 205.

\textsuperscript{260} CRC, supra note 5, art. 43 § 6. Only states that have ratified the CRC can nominate people for election to the Committee.

\textsuperscript{261} This was achieved by setting the terms of five of the members elected in the first election at two years. Which five members were to serve only two years was chosen by lot by the Chairman of the initial meeting. Committee elections are conducted every two years.

\textsuperscript{262} CRC, supra note 5, art. 43 § 7

"... the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee."

\textsuperscript{263} Id. art. 44 §§ 1(a) and (b).

Each state party is required to submit its first report within two years of the entry into force of the convention and thereafter every five years. These reports are to be available to the public in the state party's own country.
states parties' reports in 1993. Although the Committee is required to meet annually, the volume of work has required it to meet three times a year since 1995. Each four-week session includes one week for pre-sessional working groups and three weeks for scrutiny of states parties' reports. The importance of the reporting requirement cannot be overemphasized since it is the heart of the CRC's implementation system. Progress has been slow. Almost from inception, reports have been overdue, and the Committee faces serious problems of non-submission of reports by many states parties.

Implementation and enforcement of the CRC have not been without controversy. In certain countries, some of the CRC's provisions can be invoked directly in court, without need for legislation. The French Cour de Cassation ruled in 1993 that the CRC cannot be directly invoked in a French court. In contrast, the Juvenile Court in Mons, Belgium, decided in an appeal case to recognize minors as litigants in a civil law procedure by virtue of the self-executing force of Article 12 of the CRC. The provisions of the CRC that ensure that every child has the opportunity to reach his full potential are strong. The Committee should have the tools and the authority necessary not only to monitor, but also to enforce, the convention. Alternatively, standing to sue to compel compliance in international courts of justice must be granted to individuals, organizations, or states.

The Committee can support the practice of intercountry adoption by making sure that all the members are familiar with the practice and understand its importance. Limitation of Committee powers should not preclude the members from actively promoting the practice of intercountry adoption in those countries that permit it. Encouraging those countries that do not permit intercountry adoption as a possible alternative in furthering the best interests of orphaned children should be a priority.

265. Id.
266. Id.
267. Id.
268. L E B L A N C, s u p r a n o t e 5 8 , at 2 3 3 .
269. Id. at 235. Of fifty-seven initial reports due in 1992, only thirteen were submitted.
270. Id. at 287. A lack of resources or trained personnel are legitimate reasons why some states have been unable to meet reporting requirements, but most states that fail to report could do so if they were willing.
271. V E R H E L L E N, s u p r a n o t e 5 2 , at 8 9 .
272. Id.
273. Id.
D. Instruments Drafted Since Adoption of the CRC

The rights of the international community’s children have been addressed in a number of instruments drafted since adoption of the CRC.

1. The Charter on the Rights and Welfare of the African Child.\textsuperscript{274}

The Charter of the African Child contains forty-eight articles. The Preamble notes “with concern that the situation of many African children remains critical as a result of inadequate social conditions, disasters, armed conflicts, economic deprivation, exploitation, hunger and disability.”\textsuperscript{275}

2. The World Summit Declaration on the Survival, Protection and Development of Children (World Summit Declaration).\textsuperscript{276}

The World Summit undertook a joint commitment to give every child a better future. One of the Challenges the World Summit Declaration specifically identified was AIDS.

3. Draft European Convention on the Exercise of Rights by Children.\textsuperscript{277}

This document was drafted in compliance with Article 4 of the CRC requiring States Parties to undertake “all appropriate legislative, administrative and other measures for the implementation of rights…” set forth in the CRC.

4. The 1993 Hague Convention in Respect of Intercountry Adoption.

Prior to the 1993 Hague Convention, the CRC was the most comprehensive international document to address the practice of intercountry adoption.\textsuperscript{278} In May of 1993, delegates from more than sixty countries met in the Netherlands to discuss intercountry adoption.\textsuperscript{279}

\textsuperscript{274.} CHARTER OF THE AFRICAN CHILD, supra note 170.
\textsuperscript{275.} Id., Preamble.
\textsuperscript{276.} WORLD DECLARATION ON THE SURVIVAL, PROTECTION AND DEVELOPMENT OF CHILDREN. United Nations World Summit for Children, New York, 30 September 1990 [hereinafter WORLD SUMMIT DECLARATION].
\textsuperscript{277.} DRAFT EUROPEAN CONVENTION ON THE EXERCISE OF RIGHTS BY CHILDREN, Council of Europe, Strasbourg, September 1993.
\textsuperscript{279.} Bisignaro, supra note 105, at 139.
The 1993 Hague Convention, which evolved from the meeting, promotes the best interests of the child as the primary goal in intercountry adoption. It "does not purport to standardize adoption laws. Rather, it seeks to establish minimum standards to be followed by sending and receiving countries," and to unify procedures regarding the adoption of children globally. Differing intercountry adoption procedures and rules from one country to the next produce enormous bureaucratic red tape and the opportunity for corruption. The rise and fall of political regimes may determine how many children are available for adoption by foreigners in any given country in any given year.

Direct reference to the CRC is made in the Preamble to the 1993 Hague Convention. The legislative history of the 1993 Hague Convention details an interesting evolution. Its first draft was a treaty aimed at allowing nationals of one state to adopt children from another state. The final version evinces a significant shift in focus from a family's right to a child to the child's right to a family. To date, forty-two states have ratified the 1993 Hague Convention, the latest being Uruguay on December 3, 2003. Seven states have signed but not ratified the Convention. The U.S. is among the nations that have signed but not yet ratified the 1993 Hague Convention.

F. United States Immigration Policy and Action Taken on the CRC and the 1993 Hague Convention


The U.S. is one of only two countries that has not ratified the CRC. U.S. opponents to ratification of the CRC interpret several
articles as threatening parental rights. Further discussion of the reasons why the U.S. has not ratified the CRC will not be addressed in this comment.


On June 11, 1998, President Clinton transmitted to the Senate of the United States the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. The President recommended that consent be given to the ratification of the Convention. On September 20, 2000, the Senate provided advice and consent to ratification of the Convention, subject to the passage of implementing legislation, which President Clinton signed into law on October 6, 2000. It is anticipated that the U.S. will ratify the 1993 Hague Convention and bring it into force sometime in 2004.

The implementing legislation of the 1993 Hague Convention in the U.S. is the Intercountry Adoption Act of 2000 (IAA). The IAA provides that the State Department will serve as the U.S. Authority and will establish and oversee the process of accreditation/approval of U.S. adoption service providers. The Secretary of State and the Attorney General will establish a case registry for all incoming and outgoing adoptions covered by the 1993 Hague Convention and non-Convention intercountry adoptions. The Immigration and Nationality Act (INA) is

292. According to Susan Kilbourne in her article “Placing the Convention on the Rights of the Child in an American Context,” published in the Spring 1999 issue of Human Rights, opposition organizations “paint a picture of the CRC as a radical and dangerous document that will guarantee unlimited government interference in family life.” She concludes that opponents have made “effective use of inflammatory and prejudicial rhetoric,” leaving children’s advocates to explain to America why the CRC is “good for our children—and not “the most insidious document ever signed by an American president.” 26-SUP HUM. RTS. 27 (1999).

293. This is the first step in the ratification process.


296. The U.S. Department of State extended by 30 days the public comment period for the proposed rules on the Accreditation of Agencies and Approval of Persons under the Hague Convention on Intercountry Adoption, the Intercountry Adoption Act of 2000, and the Preservation of Convention Records. The proposed rules were published in Part II of the Federal Register on Sept. 15, 2003 (68 FR 54064; 68 FR 54119). In response to public requests for additional time, the Department is extending the public comment period closing date from Nov. 14, 2003, to Dec. 15, 2003 for Parts 96 and 98. This action allows interested persons additional time to prepare and submit comments. Comments had to be received on or before Dec. 15, 2003, at http://travel.state.gov/extension22cfr.html (last visited Feb. 19, 2004).

297. IAA, supra note 295.

298. Id. supra note 295, at Title I.

299. Id.; 42 USCA § 14912.
amended by providing for a new category of children who are qualified to receive immigrant visas either because of their Convention adoption abroad or their placement abroad with U.S. prospective adoptive parents for Convention adoption in the United States.\(^{300}\)

The United States has also passed the Child Citizenship Act of 2000 granting automatic citizenship to foreign-born children of U.S. citizens upon receipt of their permanent resident status and finalization of their adoption.\(^{301}\) This is a major step forward for parents adopting foreign-born children. Its major drawback is that it is not retroactive.\(^{302}\)

3. Immigration Policies.

Immigration policies and laws also have an effect on intercountry adoptions by U.S. citizens. If an adopted child has not resided with the adoptive parent for two years (or if the child has not yet been adopted), the child must qualify under the U.S. INA in order to apply for an immigrant visa.\(^{303}\)

When a foreign adoption is completed, adoptive parents can apply at the U.S. consular office for an immigrant visa.\(^{304}\) Visas are not permission to enter the United States. Final authority rests with the INS

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300. IAA, supra note 295.
302. The CCA became effective on Feb. 27, 2001 and automatically conferred U.S. citizenship upon thousands of children then in the U.S. However, the Act's provisions are not retroactive. Individuals who were eighteen years of age or older on Feb. 27, 2001 were unable to take advantage of the CCA.
303. Section 101(b)(1)(F) of the Immigration and Nationality Act (INA) lists the following requirements:
   - The adoptive or prospective adoptive parent must be an American citizen;
   - The child must be under the age of 16 at the time an I-600 Petition is filed with the INS on his or her behalf;
   - If the adoptive or prospective adoptive parent is married, his or her spouse must also be a party to the adoption;
   - If the adoptive or prospective adoptive parent is single, he or she must be at least 25 years of age;
   - The child must be an orphan, as defined by U.S. regulations.
   Although the definition of an orphan found in many dictionaries is "A child whose parents are dead," U.S. immigration law and regulations provide for a somewhat broader definition. Children who do not qualify under this definition, however, may not immigrate to the U.S. as an orphan even if legally adopted by an American citizen. The Department of State encourages Americans to consider if a particular child is an orphan according to U.S. immigration law and regulations before proceeding with an adoption. A detailed description of the orphan definition used by INS can be found at http://www.ins.usdoj.gov.
304. IR-3 immigrant visas are granted for a child adopted abroad; IR-4 immigrant visas are granted for a child to be adopted in the United States http://www.state.gov/m/dghr/flo/rsrscs/pubs/7321.htm (last visited Feb. 28, 2004).
at the port of entry. Visual inspection of the child by U.S. consular officials is a requirement as is a medical examination of the child by a designated physician approved by the U.S. embassy or consulate. The primary focus of the medical examination is to detect certain serious contagious diseases or disabilities that may be the basis for an ineligibility. If any of these illnesses or disabilities is discovered, no visa will be issued until the illness is treated or a waiver of the ineligibility is approved by the INS. This is a serious deterrent to people who might be willing to adopt special needs children.

On September 25, 2002, Congress codified as law the U.S. immigration policy classifying any alien who is determined to have a communicable disease of public health significance, including the AIDS virus, ineligible to receive visas or to be admitted to the United States. With passage of this legislation, Congress slammed the door on the possibility for HIV positive orphans to be adopted by U.S. citizens. Without intercountry adoption as an alternative, millions of HIV/AIDS orphans in sub-Saharan Africa will continue to live on the streets or remain in orphanages, unadoptable and branded as inadmissible aliens.

VI. Conclusion

Even with many countries permitting intercountry adoption, the policies in others make it questionable whether the best interests of children are being properly served. In many nations, intercountry adoption is considered to be in the best interests of the child only after all in-country placement options have been exhausted. Sub-Saharan African countries continue to place numerous restrictions on adoption. Those restrictions include moratoria, age restrictions on both children and prospective parents, health restrictions by both sending and receiving countries, and other policies that may interfere with adoption.

305. The U.S. State Department publishes requirements, forms, and helpful information on its website at http://travel.state.gov.
306. Id.
307. 8 U.S.C. § 1182, P.L. 107-227. Aliens are inadmissible for health-related reasons including communicable diseases, physical or mental disorders with behavior dangerous to self or others, or determined to be a drug abuser or addict.
308. Id. The Attorney General may waive the inadmissibility as set forth in 8 U.S.C. § 1182(g).
309. Id.
310. Id.
311. In 1997, the U.S. State Department announced that the Government of Rwanda had issued a moratorium on intercountry adoptions because it was still pursuing family reunification of persons, including children, displaced during its "recent" war. As of Feb. 19, 2004, the U.S. State Department reports that the moratorium is still in effect, http://travel.state.gov.
312. For example, Burundi says prospective parents must be at least thirty years of age and a minimum of fifteen years older than the age of the child to be adopted, and the
countries and procedural restrictions. In addition, some African Islamic nations may also have religious and ethnic restrictions. Throughout the world, there are continuing problems that need to be overcome if intercountry adoption is to provide more orphaned children with a better life.

In China, only children processed by China’s central authority for international adoptions, the Chinese Center for Adoption Affairs (CCAA) are available for intercountry adoption. The CCAA matches individual children with prospective adoptive parent(s) whose completed applications have been submitted to the CCAA by a licensed U.S. adoption agency whose credentials are on file at the CCAA. Romania’s moratorium was extended again in January 2004, pending enactment of new adoption legislation.

In spite of restrictions and laws in many regions, however, intercountry adoption remains a positive mechanism through which the international community can achieve its goal of promoting the best interests of its children. Intercountry adoption offers significant legal, economic, social and psychological benefits for children who might otherwise be homeless or living in orphanages. Many potential

adoptive child must be an orphan under fifteen living with prospective parents for at least 6 months; in Ethiopia the prospective parents must be twenty-five years or older, but there is no maximum age but states no requirement on the age of the child; in Zimbabwe, prospective parents must be twenty-five years old and at least twenty-one years older than the adoptive child; in Guinea, anyone at least thirty-five years old may adopt another if the difference in age is at least fifteen years; and in Liberia, any adult may adopt children, or./travel.state.gov/adoption_burundi.html; (last visited Feb. 23, 2004); or./travel.state.gov/adoption_ethiopia.html; (last visited Feb. 23, 2004); or./travel.state.gov/adoption_zimbabwe.html; (last visited Feb. 23, 2004); and or./travel.state.gov/adoption_guinea.html (last visited Feb. 23, 2004). Until new legislation is passed in South Africa, it is unclear whether any age restrictions will exist.

313. In Malawi, adoptive parents must retain a lawyer to handle the application and comply with the Adoption Act 26:02 of the law of Malawi; in Guinea those seeking to adopt should retain an attorney who is a member of the Guinean bar association; in Ethiopia, there are only two adoption agencies approved by the Ethiopian government, and prospective adoptive parents must deal with one of them; in Malawi, there are no adoption agencies; in Nigeria foreigners must first obtain temporary custody (for several months or several years, depending on the state), or./travel.state.gov/adoption_malawi.html (last visited Feb. 23, 2004); or./travel.state.gov/adoption_guinea.html (last visited Feb. 23, 2004); or./travel.state.gov/adoption_ethiopia.html (last visited Feb. 23, 2004); and or./travel.state.gov/adoption_nigeria.html (last visited Feb. 23, 2004).

314. Some African Islamic nations are Burkina Faso, Chad, Guinea, Guinea-Bissau, Mali, Mozambique, Niger, Sierra Leone and Somalia.

315. This information is provided by the U.S. State Department at or./travel.state.gov/adoption_china.html, last updated Apr. 2003 (last visited Feb. 19, 2004).

316. U.S. State Department, supra note 112.

317. CHILDREN’S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE
adoptive parents who attempt an intercountry adoption become frustrated. Procedures in sending countries and receiving countries often impede, rather than facilitate, adoptions and do not “serve the basic principles” of the CRC. Some countries’ laws and policies “operate to the detriment of the very children intercountry placements are intended to serve.” The 1993 Hague Convention holds the promise that there will someday be uniform procedures governing intercountry adoption and that a child’s right to a family will not be thwarted by political disputes and cultural differences.

International human rights treaties of the U.N. remain the primary means of accomplishing what is in the best interests of the world’s children, particularly those who are orphans. Currently, the best chance children have to protect their basic human rights is the Convention on the Rights of the Child. Because the international community has no standing to enforce the treaty, penalties for non-compliance are nowhere near as swift, severe, and meaningful as they ought to be. Still, implementation and enforcement of the CRC through the Committee on the Rights of the Child holds the promise that the international community will keep its promise to do for its children what is in their best interests.

Every person’s actions are interrelated, and we cannot say that our actions affect us alone. Everyone has the responsibility to work for the best interests of children. We face a bleak future if children do not have the fullest opportunity to grow, be healthy, learn, speak, and fulfill their potential. We have a choice. Should the orphaned children of the world live, or should we let them die? Intercountry adoption could be the vehicle through which many children have the chance to live.

CHILD COMPARED WITH UNITED STATES LAW, Joan Heifetz Hollinger and Alice Bussiere, The Child’s Rights in Adoption and Foster Care, 260 (Cynthia Price Cohen and Howard A. Davidson, eds., American Bar Association 1990).

318. Id. at 263.
319. Id.