1-1-1999

The Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Market of Infants from China)

Michelle Van Leeuwen

Follow this and additional works at: https://digitalcommons.law.uw.edu/wilj

Part of the Family Law Commons

Recommended Citation

Available at: https://digitalcommons.law.uw.edu/wilj/vol8/iss1/17

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
THE POLITICS OF ADOPTIONS ACROSS BORDERS: WHOSE INTERESTS ARE SERVED? (A LOOK AT THE EMERGING MARKET OF INFANTS FROM CHINA)

Michelle Van Leeuwen

Abstract: China is currently the leading source of babies for intercountry adoption in the United States. This Comment explores the causes of this phenomenon, and the ability of the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption to serve the interests of both the abandoned and orphaned children, and the adoptive parents under these specific circumstances.

I. INTRODUCTION

International adoption has long been the subject of varied and oftentimes vociferous debate. It has been discussed in light of the best interests of the child, in cross-cultural perspective, in terms of trade, with regard to East-West relations, and in medical and developmental terms. Given the vastly different factual scenarios underlying the availability of children in various countries and the many issues involved, it is extremely difficult to make uniform determinations governing its practice. Several treaties have tried, most recently the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Convention"), which attempts to provide uniform guidelines for the vastly divergent rules and regulations governing adoptions among nations. The factors contributing to and governing such adoptions vary widely, however, depending on both the sending and the receiving nations. Each adoption case is heavily weighted by unique social, political and cultural factors. Questions concerning the advisability of foreign adoptions must therefore be considered in light of each country’s specific circumstances.

The high numbers of babies being adopted from China to the United States has propelled China to the status of the primary source of foreign-born children for American adoptive parents. The number of Americans adopting mainland Chinese children has increased dramatically over the

---


Due to a variety of factors, international conventions such as the Hague Convention fail to address the underlying social and policy concerns causing the numbers of unwanted children in either country. The inherent nature of international law as a voluntary process with few enforcement mechanisms creates a general framework somewhat at odds with the short-term, immediate needs of children. Moreover, the specific and diverse issues raised by international adoption do not lend themselves to broad, all-encompassing frameworks. With little or no ability to impact the domestic policy issues inextricably linked to adoption, the Hague Convention's reach is limited. Finally, specific shortcomings in the Hague Convention itself, including inefficient implementation mechanisms and unclear definitions, further impede its effectiveness.

In Section II, this Comment looks at the specific internal factors in both China and the United States that have led to the current growth in adoptions of Chinese children by United States citizens. It then assesses the attempt by the Hague Convention to set up uniform systems and safeguards to protect the best interests of children in light of the specific circumstances of Chinese and American children without families. Section III of this Comment analyzes possible solutions to the identified problems posed both by the domestic situations in each country and the attempt to find a governing international solution. This Comment argues that as it stands, the Hague Convention does not serve the interests of children because its implementation procedures are complex and inefficient, and because it lacks clear definitions of its key terms. Even in its ideal form, however, the Hague Convention cannot adequately address the harms to children underlying the need for international adoption. The

---

3 Jackson-Han, supra note 2.
4 Id.
protection of children is most effectively promoted by the nations of origin, whose policies are at the root of their homelessness.

II. BACKGROUND: THE HISTORY AND EVOLUTION OF ADOPTION FROM CHINA TO THE UNITED STATES

A. Origins of Modern Adoption Law

Adoption is an ancient tradition heavily ensconced in the history and culture of the particular society in which it takes place. In the West, modern adoption law was revived in response to the dislocation wrought by the World Wars. In America, the Korean War ingrained intercountry adoption in the national consciousness when a large number of half-Asian children of American soldiers, outcasts of Korean society, became the responsibility of the occupying army.

Since the Korean War there has been an evolution in the mindset that propels Americans to adopt their children abroad. What was at one time an effort to repair the damages of war is now a more general awareness of developing world poverty and developed world privilege. This awareness imbues the hearts of the wealthy with a sympathy for the lost and abandoned overseas. Due to the merger of war relief into the relief of underdevelopment itself, international adoption from South Korea has persisted for over thirty years. This pattern has spread to other developed and developing world scenarios.

Asian adoptive practices, on the other hand, have traditionally revolved around a system of relative adoption. After concubinage was officially disapproved by the Revolution in China, adoption solved the

---


6 BENET, supra note 5, at 121.


8 BENET, supra note 5, at 111.
problem of barren wives, enabling the preservation of the male line.\textsuperscript{9} Such adoptions preferably involved the next of kin of the father's brother's son, or at the very least someone in the patrilineal line.\textsuperscript{10} Non-relative adoption did exist, but was extremely rare. These adoptions centered on an expansion of the household, as large families were much desired.\textsuperscript{11}

In modern times, the adoption of non-relatives into the family remains a rarity, and the concept of seeking such children from overseas, and in particular from other races, is virtually unheard of.\textsuperscript{12} A great many social and political barriers in modern Chinese society only enhance these ancient attitudes, as the following discussion illustrates.

B. China's Internal Child Welfare System

China's political and social structure is intimately bound up with its adoption laws. The Communist emphasis on the precedence of the whole over the individual, the Confucian veneration of age, and the involvement of state in the private affairs of its citizens are all factors that fashion the particulars of China's laws.

The most notable illustration of the impact of socio-political circumstances and values on adoption is China's one-child policy. China today has a notorious population concern, with a citizenry of 1.2 billion people, the vast majority of whom live on forty-six percent of the country's territory.\textsuperscript{13} To combat its exponential population growth and shortage of arable land, China instituted the one child policy in the late 1970s under Deng Xiaoping.\textsuperscript{14} The policy mandates delayed marriage and child bearing, fewer and healthier births, and one child per couple.\textsuperscript{15} Strong and at times overwhelming economic sanctions are implemented to

\textsuperscript{9} Id.
\textsuperscript{10} Id. at 112.
\textsuperscript{11} Id. at 111-13.
\textsuperscript{12} Welfare homes have become the primary means for caring for orphans and abandoned children in socialist China, with more than 1,200 such institutions registered. 'Full Test' of Beijing Issues Child Welfare White Paper, XINHUA NEWS AGENCY, Apr. 3, 1996. Western adoption patterns are virtually unheard of in the East. CHRISTOPHER BAGLEY, INTERNATIONAL AND TRANSRACIAL ADOPTIONS 188-89 (1993).
\textsuperscript{13} 'Full Text' of Family Planning White Paper, XINHUA NEWS AGENCY, Aug. 23, 1995 [hereinafter Family Planning White Paper]. Only 47 percent of the country's territory is considered suitable for living, and only 10 percent of the territory is cultivated. Id.
\textsuperscript{14} In 1981, Deng Xiaoping urged family planning officials: "Use whatever means you must [to enforce the one child policy] but do it!" BAGLEY, supra note 12, at 194.
\textsuperscript{15} Family Planning White Paper, supra note 13.
CROSS-BORDER ADOPTIONS

encourage compliance with the program. The policy combats traditional ideas such as "early marriage, early births" and "more children, greater happiness." Most significantly, it battles a deeply ingrained cultural preference for male children.

The limitation of one child per family reduces the capacity of society to absorb its unwanted children. However, the social preference for boys greatly exacerbates the problem. In a society that reveres tradition, the age-old veneration of male children built into numerous customs and adages, remains embedded in the nation's psyche. Limited as they are to one child, families are even more desperate to have that one child be a boy, both to ensure better support in old age and to carry on the family name. China still relies upon the family as its main source of care for the sick and the elderly. Girls traditionally leave their own families to join the husband's family, and are therefore of little assistance, either for hands-on care or economic support. Although in the cities such trends are gradually changing, in the countryside, where the majority of the population still resides, these economic realities underline the popular preference for male children. Most families have only one or two chances at giving birth to a male. The sanctions imposed for additional children are often too high a price for poorer families to pay (these may involve loss of state benefits, housing or employment). Couples are therefore compelled to abandon their baby girls or relinquish them into alternative care. This has caused a remarkable disparity in recent history between male and female births in China. Official Chinese statistics indicate that from 1980 to 1997, for every 100 female children surviving beyond birth, 120 male children survived.

China's one-child policy has created an estimated 100,000 orphans. Of this host of children, it is estimated that ninety-five percent are baby girls. The few male babies that appear in the orphanages usually bear some special need that led to their abandonment. The little girls suffer a  

---

17 Id. at 194.
18 BAGLEY, supra note 12, at 188-89.
19 Id.
20 Id.
21 Id.
22 United States Adoption of Chinese Babies (NBC Today Show Transcript, Mar. 20, 1997).
23 U.S. Consulate officials estimated that 95 percent of the adopted children were girls. See Americans Fuel Chinese Adoption Boom, AGENCE FRANCE PRESSE, Aug. 10, 1997.
double stigma: they are unwanted and they are female. China’s 1991 Adoption Law stipulates that it “shall not contravene laws and regulations on family planning.” Because couples are allowed only one child per family, and given the serious social and economic consequences of having a girl, there is little or no incentive for Chinese couples to adopt. The cultural undesirability of baby girls along with the one-child restrictions make domestic adoptions exceptionally rare in China.

Age restrictions further impede adoptions. According to the 1991 Adoption Law, only childless adults over thirty-five years of age may adopt. The Adoption Law reflects a cultural veneration of age. Adoption officials say that the Chinese view older parents as more capable and more financially stable. However well intentioned, this law greatly restricts the available population of Chinese adoptive parents.

In theory, a relaxation of the adoption policy to allow younger couples or couples who already have children to adopt would not affect population growth. Chinese officials react with misgiving toward such suggestions however, citing risks of abuse in the implementation. They also worry that any increase in the domestic adoption rate might further encourage the “dumping of unwanted infants”—a common practice in China’s countryside. The increased likelihood that an abandoned child would find its way into a home might alleviate the fears of a parent considering abandoning his or her child. Ultimately, however, experts cite historic and cultural factors as causes of the low mainland adoption rate, rather than the adoption policy itself. Chinese parents have been generally considered unwilling to adopt children whom they fear might leave them later in life.

25 Chinese Adoption Law art. 6. On November 7, 1998 the Standing Committee of China’s National People’s Congress passed an amendment to the Adoption Law that will take effect on April 1, 1999. In it, the minimum age for domestic adoptions by Chinese citizens has been lowered to 30 years of age. See China Amends Adoption Law, XINHUA NEWS AGENCY, Nov. 7, 1998. One of the underlying policy goals for this change is to encourage more native Chinese to adopt. See Maggie Farley, New Chinese Law Loosens Rules for Domestic Adoption, L.A. TIMES, Nov. 7, 1998.
26 Jodie Snyder, China Changes Law on Adoption; Prospective Parents in U.S. Frustrated by Confusion, MILWAUKEE J. SENTINEL, Dec. 15, 1996.
27 Adoption Changes ‘Risky,’ SOUTH CHINA MORNING POST, Jan. 7, 1996.
28 Id.
29 Id.
Coupled with the shortage of adoptive parents is the oft-debated condition of the orphanages in China. Several reports have surfaced in recent years revealing ghastly conditions in the state-run orphanages, where baby girls were reported to be starving to death due to lack of care. The flagrant disregard for human life documented in these reports can be attributed to a host of factors including the cultural disparagement of female children and orphans, the lack of available resources, and the mounting frustrations and eventual cynicism of orphanage workers overwhelmed by the numbers of infants. These reports elicited angry denials from American adoptive parents, fearful that retributive measures by the Chinese government might slow down or cancel their adoption process.

Confirming the dismal conditions in these orphanages is research performed by adoption expert Professor Rene Hoksbergen of the University of Utrecht, which shows that these foreign adoptees often suffer from a behavioral disturbance known as reactive attachment disorder. An American expert has observed that the babies often suffer from poor nutrition as well as psychological damage when they first arrive in the United States. Disorders such as these are common results of institutionalization: the lack of touch and care, the absence of a primary caregiver, as well as poor environment.

The publication of the dismal plight of China’s female children has fueled adoption inquiries in the West, in line with the current trend toward international adoption as an underdevelopment relief pattern. American couples eager to have a child are understandably moved by the photographs and stories of children lost in a child welfare system far below American standards. The dramatic facts and adorable faces of the tiny female infants

31 The author had the opportunity to observe this phenomenon first hand over a period of six months in 1992 in an orphanage in southern China.
35 See supra note 7. “Whenever there is a particularly gripping or controversial aspect that suggests children are at risk, we definitely see an increase in inquiries,” said William Pierce, Director of the National Council on Adoptions. A similar situation occurred in 1991 when media coverage of Romania spurred it into the leading source of adoptees for the United States. See Fears on Further Chinese Adoptions, supra note 30.
easily draw attention away from the plight of the many older children languishing in the American foster care system.\textsuperscript{36}

C. U.S. Internal Child Welfare System

There is a growing disparity in the United States today between the number of children available for adoption and the number of parents willing to adopt those American children. Explanations for this disparity tend to focus on changing societal trends, including: a decline in the U.S. birth rate (largely attributed to the growing infertility of married couples and the availability of abortion); the increased incidence of unwed mothers choosing to parent their children; an American family policy which chooses foster care over adoption as a method of dealing with troubled families and that opposes trans-racial adoption.\textsuperscript{37} Despite these factors, however, large numbers of children continue to enter the foster care system in the United States today.\textsuperscript{38} In fact, their numbers are increasing,\textsuperscript{39} as are the number of children available for adoption.\textsuperscript{40}

A vast majority of adoptable children in foster care in the United States are children of color.\textsuperscript{41} In contrast, the majority of prospective adoptive parents in the United States are white.\textsuperscript{42} Race is a powerful determinant of placement rate. On average, a black child will wait twice as long as a white child before being placed in a permanent home,\textsuperscript{43} and a healthy black infant will wait approximately five times longer than a

\begin{footnotes}
\item[37] Id.
\item[38] See Roger J.R. Levesque, The Failure of Foster Care Reform: Revolutionizing the Most Radical Blueprint, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 8 (1995).
\item[39] In 1995, there were approximately 494,000 children in foster care, almost double the number in 1982. See Douglas J. Besharov, When Home Is Hell: We Are Too Reluctant to Take Children From Bad Parents, WASH. POST, Dec. 1, 1996.
\item[41] For example, a recent analysis of prevalence rates in five different states with large out-of-home care populations (California, Michigan, Illinois, New York and Texas), found that the proportion of African American children ranged from three times as high to ten times as high as the proportion of Caucasian children in care. See Mark E. Courtney et al., Race and Child Welfare Services: Past Research and Future Directions, LXXV CHILD WELFARE 2 (1996).
\end{footnotes}
healthy white infant for placement. One commonly held point of view is that a child's best interest in a racist society is to be placed in a family of the same race. Due to a dearth in available African-American adoptive couples, however, such options are often not available to an African-American child. The absence of available African-American families can be attributed to some degree to the lack of recruitment in African-American communities and lack of institutional representation of African-Americans among social workers and in adoption agencies.

The advent in 1992 of the Multi-Ethnic Placement Act ("MEPA") heralded a change in attitude designed to address the excess number of children languishing in foster care by eliminating discrimination based upon race. Although, in accordance with the Act, federal courts have held that race may not be the sole determinative factor in denying an adoption, in practice adoption professionals may exercise their discretionary powers to "hide race among an array of factors" in exercising their subjective decisions.

---


45 The first official protest among professionals to the black-white trans-racial placements arose at the first annual convention of the National Association of Black Social Workers ("NABSW") in 1972, at which it was said that Black children should be placed only with black families whether in foster care or adoption. Black children belong physically, psychologically and culturally in black families in order that they receive the total sense of themselves and develop a sound projection of their future... Black children in white homes are cut off from the healthy development of themselves as black people... We have committed ourselves to go back to our communities and work to end this particular form of genocide.

Quoted in Arnold R. Silverman, Outcomes of Transracial Adoption, ADOPTION, Spring 1993, at 1. Even amongst a wider representation of social work professionals, it is generally considered that, all else being equal, children's best interests are served by intra-racial placements. STUART FOUNDATIONS ADOPTION & RACE WORK GROUP, ADOPTION AND RACE: IMPLEMENTING THE MULTI-ETHNIC PLACEMENT ACT OF 1994 AND THE INTERETHNIC ADOPTION PROVISIONS ii (1997).

46 For an excellent discussion of issues of public policy addressing the racial inequalities in the adoption system, see Hawley Fogg-Davis, A Race-Conscious Argument for Transracial Adoption, 6 B.U. PUB. INT. L.J. 385 (1997).

47 Interview with Linda Katz, M.S.W., University of Washington School of Social Work, in Seattle, Washington (Feb. 5, 1997).

48 The goals of MEPA and the ensuing Removal of Barriers to Interethnic Adoption of 1996 are to (1) decrease the length of time children wait to be adopted, (2) facilitate the identification and recruitment of adoptive and foster families that can meet the needs of available children, and (3) eliminate discrimination based on the race, color, or national origin of the child or the family involved. STUART FOUNDATIONS ADOPTION & RACE WORK GROUP supra note 45, at i.

49 See, e.g., Drummond v. Fulton County Dep't of Family & Children Servs., 563 F.2d 1200, 1205 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978).
judgments of the best interests of the child. General opposition to trans-racial adoption places further pressure on adoption professionals to avoid such placements. Finally, federal statutes, designed to prevent the long waiting periods for minority children because of race-matching policies, are toothless. In reality, therefore, a vast array of potentially available children are made unavailable to the majority of Caucasian couples willing to adopt across racial lines, despite laws to the contrary.

The heated debates surrounding inter-racial adoptions in America underline the ongoing impact of racism on today's adopted children. In a race-conscious culture, the unfortunate outcome is that many couples are not willing to adopt across racial lines or will adopt only some races but not others. For example, in 1987, black-white trans-racial adoptions were estimated to be 1,169, while adoptions by Caucasians of mainly Hispanic and Asian children were estimated at 5,850.

Other factors hinder the American adoption process. Current domestic adoption law does not provide a great deal of certainty to prospective adoptive parents. Open adoptions, a popular alternative in which birth parents meet or choose the prospective adoptive parents may give rise to contested parental rights of the child. For example, many states have lenient consent laws, allowing birth mothers lengthy periods of time during which they may revoke their consent to the termination of parental rights. A legal bias toward biological parents is also evidenced by the courts' willingness to entertain challenges to adoptions by biological parents. The media further exacerbates adoptive parents' fears.

---


51 Id. at 1195.


An agency, or entity, that receives Federal assistance and is involved in adoption or foster care placement may not delay or deny placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

Id.

53 A 1984 study estimated that out of approximately two million white couples willing to adopt, 68,000 were willing to adopt transracially. See Rosettenstein, supra note 41, at 142.

54 See Silverman, supra note 45, at 106.

55 See Kleiman, supra note 36.

56 Id.
D. The U.S.-China Combination: A Happy Marriage?

China's almost non-existent pool of adoptive parents and growing number of abandoned baby girls calls for an international resource of families for its children. Simultaneously, the pool of adoptive parents in the U.S., frustrated by internal adoption mechanisms and a perceived shortage of children, as well as the increasingly limited supply of children from Korea,\(^7\) has led to an unmet need for children.

The philanthropic thrust for international adoptions is well-met in the much-publicized quandary of China's many unwanted baby girls.\(^5\) Americans in search of an alternative to domestic adoption quickly alight on the Chinese option. According to some reports on Chinese orphanage conditions, if these children were not adopted they would likely suffer malnutrition, neglect, and possibly even death.\(^6\) To a prospective parent, this situation may seem more urgent than America's own pining population of foster kids.

Because of racial tensions at home, the adoption of Asian babies from abroad is perceived as more acceptable than domestic adoptions. Not only are the children taken into homes under the wing of philanthropy, but their adoption is not likely to step on the toes of such organized groups as the National Association of Black Social Workers, or the African-American community in general.\(^6\) The adoption of Asian children in America is also a more common sight.\(^6\) Thus the adoption of Chinese children caters to the interests of the minority of Caucasian adoptive couples willing to adopt cross-racially.

International adoptions are in some senses more convenient than those applied for at home. The Chinese process is a relatively quick eight months.\(^6\) Such an adoption costs families approximately $20,000, including the trip to

---

57 Cases in which birth parents try to reclaim parental rights occur only in an estimated one percent of all U.S. adoptions. See David Ruben, Journey To Adoption, PARENTING, Nov. 1995, at 198.
58 One of the reasons cited for such restrictions has been the perception that Americans are exploiting their country by taking their children away. See Ted Anthony, Bucks Case Highlights Foreign Adoption Problems; Cultural Demands Vary From Country To Country, LEGAL INTELLIGENCER, Sept. 28, 1994, at 3.
59 See supra notes 30-32 and accompanying text.
60 Id.
61 See Silverman, supra note 45.
62 See id. at 106.
63 China Abruptly Limits Adoptions; The New Policy On "Special Needs" is Unclear, and Many American Couples Are Worried They Won't Receive A Child, ORLANDO SENTINEL, Dec. 3, 1996. The increasing demand prompted the U.S. Consulate in Guangzhou to set up its own adoption unit, the first of its kind.
and from China. Although domestic adoption may cost as little as $13,000, adoptive parents today frequently also pay for the birth mother's medical and living expenses during the time that she is pregnant. Furthermore, once the adoption is complete, a trans-national adoption is far less likely to be contested than a domestic adoption. This can be a powerful determinant to adoptive parents whose memories of national headlines remind them how easily a child might be taken from them.

For some prospective parents, China's guidelines provide the possibility of adoption where one would not even exist in the United States. Home studies performed for international adoptions may be less stringent than those performed for adoptions at home. Most U.S. agencies put young, happily married couples at the top of their waiting lists. Single, older, gay, or disabled individuals consequently have less chance of qualifying for an adoption without a considerable wait. On the contrary, the Chinese Adoption Law requires that an adoptive parent be both childless and a minimum age of 35 for both locals and foreigners. No stipulation of marital status exists in the Law. Some of those placed at the bottom of the waiting list in the United States therefore find themselves exceptionally well-placed for adoption of a Chinese child overseas.

Some argue that the influx of U.S. adoptions from China not only helps those baby girls who are given a permanent home, but also the orphanages and children left behind. China usually demands a $3,000 "donation" to the orphanage from which the child adoptee came in return for an adoption. With thousands of adoptions, more than ten million

---

64 United States Adoptions of Chinese Babies, supra note 22.
66 Kleiman, supra note 36, at 343.
68 Kleiman, supra note 36, at 344.
69 Id.
70 See Chinese Adoption Law. Again, the recently passed amendment to China's Adoption Law will lower the minimum age for prospective Chinese parents to 30 beginning April 1, 1999. See China Amends Adoption Law, supra note 25.
71 Id.
72 Because adoption laws vary from country to country, couple can "shop around" for the laws most suited to their characteristics and needs. See Anthony, supra note 58.
73 Peter J. Howe, Pressure Urged on China over Orphanage Deaths, BOSTON GLOBE, Jan. 20, 1996.
dollars was given directly to Chinese orphanages in 1996. Allegedly, this money has significantly and positively changed the conditions in the orphanages. Insiders have contested this, however, saying that the money is going into the pockets of Chinese officials. A combination of the two perceptions is most likely the case. Adoptions have become a lucrative source of income in China. In fact, in 1992, a one-year moratorium was placed on adoptions while the Ministry of Justice and the Ministry of Civil Affairs asserted their jurisdiction over the process. Children are still emerging from China with poor nutritional health, however it is likely that the worst conditions have at least to some extent been alleviated as a result of the exposure and increasing popularity of foreign adoptions.

Others have argued, however, that the prevalence of international adoptions in America is a form of cultural genocide, an option to be discouraged. America’s foster children are languishing in care. One American author argues that we must first care for our own, looking toward amending our own laws to better encourage domestic adoptions. She makes the valid point that until we are able to look after our own, we have no business adopting babies elsewhere. Indeed, the affects of long-term foster care can be highly damaging to a child, particularly as it evolves into attachment disorders related to foster care drift. A permanent placement is not only in the child’s best interest, but in the interest of society as a whole. It alleviates the risk of damaging social behaviors and the revisitation of poorly learned parenting skills upon the next generation.

An attempt to divert the attentions of prospective adoptive parents toward the needs of children at home, however, must necessarily address

75 Id.
76 See Howe, supra note 73.
77 The author observed the moratorium personally while working in China in 1992. The Ministry of Civil Affairs is now the office responsible for receiving, processing and approving all adoption applications by foreigners in China. See U.S. State Department, Update on Adoption in Guangzhou, (visited Sept. 10, 1998) <http://www.state.gov/>.
78 See Kleiman, supra note 36, at 328.
79 Id.
80 Id. at 359.
81 A lack of continuity and physical proximity to a primary caretaker deprives a child of a key sense of security around which to develop physically, emotionally, cognitively and socially. Where such attachments are missing, a child develops a poor conscience, poor impulse control, low self-esteem, poor relationships with peers, trouble learning, and eventually, an inability to parent his/her own children. See Linda Katz et al., Concurrent Planning: From Permanency Planning to Permanency Action 39-41 (1994).
racial issues and special needs. While Caucasian couples may be willing to adopt Asian infants, they may not be willing to adopt African-American infants, or older children, or (as is largely the case) older African-American children. Despite MEPA and other legislation encouraging inter-racial adoption where necessary, the population of prospective parents and the social workers handling their cases may not be so flexible, given their own abilities and needs, and domestic racial tensions. Given the reality of racism in America today, which unfortunately affects all African-American children, the answer lies in creating a broader population of foster and adoptive parents. Expending more funds on educating and recruiting African-American families to adopt, and encouraging more racial diversity in adoptive institutions is a more realistic alternative to the dilemma of caring for our own.

Aside from these specific impacts, a more general concern on the part of developing nations as a whole has been that international adoptions are just another form of colonialism, and are harmful to a nation's morale. Adoption represents "a shameful admission to the world of the government's inability to care for its own, the loss of a vital national asset, and perhaps the ultimate example of exploitation by rich nations of the poor nations of the world." Examples of such sensibilities exist in many of the host nations. A recent United States State Department posting on Chinese adoptions warned parents to act with "discretion and decorum" because "Chinese officials are extremely sensitive about the intrusion of foreign entities." It went on to explain that "(h)igh profile attention to adoption in China could curtail or eliminate altogether adoption of Chinese children by persons from countries causing adoption to become the subject of public attention." In South Korea, formerly the long-time main source of foreign-born children to the United States, such tensions have been credited with the gradual tightening of restrictions on adoptions.

As an increasingly inter-connected worldwide community, we are faced with a dilemma. There is a trend toward greater acceptance of the

---

82 See ADOPTION IN WORLDWIDE PERSPECTIVE, supra note 5, at 79, 89-91, 121, 128, 147.
84 See Youn-Taek Tahk, Intercountry Adoption Program in Korea, in ADOPTION IN WORLDWIDE PERSPECTIVE, supra note 5, for a description of the Extraordinary Adoption Law for Orphans. Since the mid-1970s, the Korean government has limited the number of adoptive countries with the aim of reducing intercountry adoptions. Id. at 83. South Korea announced a ban on intercountry adoption to begin in 1996. Arthur Higbee, South Korea Plans to Ban Foreign Adoptions, INT'L HERALD TRIB., Oct. 15, 1993.
phenomenon of international adoption, however most experts would agree that the ideal solution for a child is to find a permanent home in his or her country of origin. China's self-chosen one-child policy offers a particularly troubling conundrum, because their chosen mode of development specifically incorporates the reduction of family-size on a drastic scale. The social costs have not yet outweighed the benefits of the policy in the eyes of the government, with no indication of change in the foreseeable future. Although foster care programs in China might temporarily stem the flow of children out of the country, ultimately the children are better served by placement in permanent homes. Given the current situation, therefore, the immediate best interests of the Chinese child are served by foreign adoptions.

The best interests of Chinese children would seem to conflict with those of American children. In fact, China has more children available for adoption than will be adopted in the entire world given the current scenario. As an international community, how do we address the plight of China's many abandoned children? As Americans, how do we satisfy the desires of adoptive parents while still safeguarding the interests of our own available children? This comment will now look to the Hague Convention and its forerunners for any guidance they might provide.

III. THE UTILITY OF INTERNATIONAL CONVENTIONS

A. The Hague Convention on International Adoption

It is important to recognize the overall limitations of international agreements to meet such specific circumstances as are described above. For example, no guidelines could adequately address the complex factors underlying China's one-child policy, although it might address general issues of a child's welfare in relation to population control. These agreements are meant to create guidelines and structures that help to protect the child's interests in numerous and highly variable situations.

---

85 See ADOPTION IN WORLDWIDE PERSPECTIVE, supra note 5, at X.
Several agreements have served as forerunners to the current international authority on adoption.\textsuperscript{87} Most recently, the United Nations Economic and Social Council drafted a set of guidelines that was adopted in 1986 as a U.N. General Assembly Resolution entitled "The Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally."\textsuperscript{88} That Declaration, while acknowledging the best interests of the child as paramount, prioritized national adoption and foster care placement over trans-national adoption.\textsuperscript{89} The Declaration offered no specific guidelines for intercountry adoptions or subsequent sanctions for their violation, and as a mere declaration is not considered legally binding. As an assertion of policy, however, it is instructive to compare it with the later Hague Convention.

Both China and the United States, along with sixty-four other nations, participated in the drafting of the Hague Convention, finalized in 1993 after a period of five years.\textsuperscript{90} The Hague Convention states three main purposes: 1) the establishment of safeguards to ensure that intercountry adoptions would take place in the best interests of the child\textsuperscript{91} and with respect for his or her fundamental rights as recognized in international law; 2) the establishment of a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children; and 3) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.\textsuperscript{92}

Perhaps the most notable entry for determining the best interest of the child occurs in the preamble to the document.\textsuperscript{93} This recognizes that the ideal


\textsuperscript{89}Id. arts. V and VII.

\textsuperscript{90}See supra note 1 and accompanying text.

\textsuperscript{91}U.N. Adoption Agreement art. IV (b) requires that the country of origin determine that international adoption is in the best interest of the child.

\textsuperscript{92}Hague Convention art. 1.

\textsuperscript{93}Id. The preamble states that:

*Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,
condition for a child's growth is in a "family environment." The agreement requires each state to take "appropriate measures" to enable the child to remain in his or her family of origin, or in a permanent home in his or her nation of origin, however where this is not possible, the Hague Convention clearly defers to international adoption as a valid alternative solution.

In the above-described preamble, the Hague Convention takes a significant step toward international adoption. Where its predecessor, the U.N. Declaration, set national foster care placement above international adoption, the Hague Convention's new emphasis on a "family environment" recognizes the child's need for a permanent home above his or her need to remain in the nation of origin. The recognition of a child's need for permanent familial relationships above cultural identity is a nod to the popular "attachment theory," which recognizes the incredible harm that interrupted relationships with a string of primary caregivers can do to a child's development. Foster care cannot provide a child with sufficient security; institutionalized care provides even less. As this relates to China under present circumstances, with its given absence of adoptive families, no foster care system would suffice. Rather, according to the Hague Convention:

• Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,

• Recognizing 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,

• Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children,


Id.

94 Id.
95 Id.
96 U.N. Adoption Agreement, supra note 88, art. V and VII.
97 See generally GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1978). The American child welfare system has long adhered to the belief that the highest priority for the well being of a child is to be placed in a permanent home. The drawbacks of long-term foster care are well known. "Multiple placements are not in children's best interests and should be avoided." STUART FOUNDATIONS ADOPTION & RACE WORK GROUP, supra note 45, at iv.
98 Id.
Convention, China’s homeless children are better off being adopted trans-nationally.99

Another distinct characteristic of the agreement as applied to China is its recognition of and attempt to curb international trafficking in children.100 This has been a reported problem in China as well as elsewhere.101 Middlemen, particularly in Southern China, where proximity to the more affluent Hong Kong increased the incidences, have been reported to persuade women to abandon their children for a small sum, forging papers for subsequent adoption.102 By forbidding unreasonable costs for the service provided and by prohibiting improper financial gain, the treaty puts a damper on the black market baby trade.

Through the creation of a system of “Central Authorities” in each country, the Hague Convention seeks to establish a framework for accountability and information sharing.103 It clearly defines the responsibilities of the sending and receiving nations in establishing the eligibility of the child, and in setting minimal standards for all participants in the adoption process. In this respect, the Hague Convention provides thus far the most elaborate and well-thought-out system of uniform rules governing adoptions.

99 See supra note 93 and accompanying text. Studies exist supporting this conclusion. For example, “[n]early a dozen studies consistently indicate that approximately 75% of transracially adopted preadolescent and younger children adjust well in their adoptive homes.” Many of the children in these studies were Korean children, coming from institutionalized settings into permanent American homes. Silverman, supra note 45, at 108.

100 The relevant article under the Hague Convention art. 32, states that:
1. No one shall derive improper financial or other gain from an activity related to an intercountry adoption.
2. Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.
3. The directors, administrators, and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

101 Other countries where such practices have been reported include Colombia, Brazil, Sri Lanka, and the Philippines. Bagley, supra note 12, at 190.

102 Id. and Hague Convention art. 32. See also Ann Scott Tyson, Chinese ‘People Mongers’ Prey on Women and Children, CHRISTIAN SCI. MONITOR, Mar. 29, 1990

103 Hague Convention art. 7.
B. The Definition Difficulty

A challenge to treaties governing international adoptions is the development of clear and uniform definitions of key adoption terms, taking into account the many varying national laws of the countries involved. A weakness in the present Hague Convention is the absence of clearly outlined definitions of some of its key terms. While jurisdictional issues are clarified, definitional differences are left to the discretion of the individual signatories to the Hague Convention. Instead of creating a uniform set of guidelines, the Hague Convention creates a uniform structure (i.e., the Central Authorities), that maintains not only existing differences in the national requirements for adoption, but differing definitions as to what those requirements mean.

First, aside from the standards outlined in the aforementioned preamble, the Hague Convention fails to define what constitutes the best interests of the child. Rather, as in Article 21, it leaves the child’s best interests to the judgment of the Central Authority, which is authorized to take the child out of the care of the prospective adoptive parents or to cancel an adoption, should it deem one of those actions to be in the child’s best interests. Where no clear definition exists, the concept of a child’s best interests can vary enormously depending upon the cultural context. In China, for example, the ideal parents are deemed to be older, while in the United States, younger couples are preferred. While the Hague Convention should allow for some flexibility regarding cultural ideals, a great deal of discretion is placed in the hands of the Central Authority. Rather than streamlining the

---

104 Id. Article 21 provides:

1. Where the adoption is to take place after the transfer of the child to the receiving State and it appears to the Central Authority of that State and the continued placement of the child with the prospective adoptive parents is not in the child’s best interests, such Central Authority shall take the measures necessary to protect the child, in particular —

a) to cause the child to be withdrawn from the prospective adoptive parents and to arrange temporary care;

b) in consultation with the Central Authority of the State of origin, to arrange without delay a new placement of the child with a view to adoption or, if this is not appropriate, to arrange alternative long-term care; an adoption shall not take place until the Central Authority of the State of origin has been duly informed concerning the new prospective adoptive parents;

c) as a last resort, to arrange the return of the child, if his or her interests so require.
process, such discretion merely perpetuates existing differences while adding more administrative hoops through which an adopting couple must jump.

Second, the Hague Convention fails to define key words in adoptions between China and the United States such as "abandonment," "orphan," "special needs," and "exorbitant cost" as it relates to child trafficking. Countries may have very different definitions of these terms. For example, Chinese adoption law differentiates between an "abandoned" child (with one or both parents still living) and an "orphan" child (both parents deceased). Abandoned children may only be adopted by couples over thirty-five and childless, and only one such child may be adopted per couple. Parents seeking to adopt orphan and "special needs" children do not fall under such restrictions.

In the U.S., "abandonment" is defined in both conditional and unconditional terms. "Although never specifically defined by U.S. law, conditional abandonment indicates the 'desertion' of a child without corresponding relinquishment of parental rights." It thus requires a demonstrated intent to relinquish parental rights along with the act of abandonment. Regardless of the length of the "desertion," U.S. law will not recognize orphan status of the child until all parental rights are formally relinquished or the parents are divested of these rights in legal proceedings. Unconditional abandonment, on the other hand, is defined as "neglect and refusal to perform the natural and legal obligations of care and support or conduct which shows a settled purpose to give up all parental

105 The overwhelming majority of adoptions that take place involve "abandoned" children under Chinese law. See supra notes 19-21 and accompanying text.

106 The 1992 Chinese Adoption Law provides that children under 14 who fit in the following categories may be adopted:

a) Orphans who lost their parent(s); b) Abandoned children whose natural parents cannot be found; and c) Children whose natural parents are incapable of providing for them because of unusual hardship.

The Ministry of Civil Affairs and the Ministry of Justice have advised the American Embassy in Beijing that the above categories as defined under the new adoption law mean:

a) An orphan**[sic] is a child whose parents are deceased. b) An abandoned child is a child who has been abandoned by the parents or guardians. c) A child "whose natural parents are incapable of providing for them because of unusual hardship" is a handicapped child.

U.S. State Department, supra note 77.

107 Id.

108 Id.


110 Id.
duties and all parental claims to the child.\footnote{2 C.J.S. Adoption of Persons \textsection 61 (1972), \textit{reprinted in} THE IMMIGRATION OF ADOPTED AND PROSPECTIVE ADOPTIVE CHILDREN, M-249-Y (1990).} The Immigration and Naturalization Service ("INS") definition of abandonment does authorize a third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency or an orphanage) to act in the capacity of the parent to relinquish a child into custodial care \textit{where the child welfare laws of the foreign-sending country so permit}.\footnote{Abandonment under the relevant U.S. law is defined as follows: Abandonment by both parents means that the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring these rights to any specific person(s). Abandonment must include not only the intention to surrender all rights, obligations, and claims to the child, and control over or possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such capacity. A child who is placed temporarily in an orphanage shall not be considered abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child who has been given unconditionally to an orphanage shall be considered abandoned.} Similar differences occur in the Chinese and U.S. definitions of orphan status.\footnote{8 C.F.R. \textsection 204.3 (b) (1998).} The Immigration and Naturalization Act ("INA") defines a child eligible for adoption as one who is "under the age of sixteen at the time petition is filed [and] . . . an orphan because of the death, or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption. . . ."\footnote{The definition of orphan under Chinese law is different from the definition of orphan under U.S. immigration law. Satisfying the requirements of one country will not necessarily satisfy the requirements of the other country's law. This is important to understand because in order to adopt a child and bring that child to the U.S., a child must be fully and finally adopted under Chinese law and must meet the requirements of U.S. immigration law. U.S. State Department, \textit{supra} note 77.} Thus abandonment under U.S. immigration law classifies the child as an orphan, while Chinese law differentiates between the two terms.

The Hague Convention's clear jurisdictional premises allow for such differing definitions by giving the State of origin the authority to determine a child's adoptability, and placing the assessment of prospective parents in the hands of the receiving State. In practice, however, the lack of definitions can be confusing. A State Department notice warns parents that satisfying the requirements of one country will not necessarily satisfy the requirements of the other country's law. This is important to understand because in order to adopt a child and bring that child to the U.S., a child must be fully and finally adopted under Chinese law and must meet the requirements of U.S. immigration law.

The absence of clear definitions of "special needs" has been of particular concern to adoptive parents in recent years. As the enforcement of Chinese adoption law has grown more stringent, parents under thirty-five or with one or more children must make sure that their new child qualifies for "special needs" status, which may include age, vision impairments, mental issues, and a host of other ailments. Definitions have differed as to what constitutes "special needs" according to both Chinese and American law. The approval of a child as special needs still lies largely at the discretion of

---

115 Hague Convention arts. IV and V.
116 See supra note 113 and accompanying text.
117 See supra note 2 and accompanying text.
118 What Constitutes Handicapped: China Adoption authorities advise the American Embassy in Beijing that children are designated as handicapped according to the criteria of handicapped children approved by the State Council in October 1986. There are five categories for handicapped children: defects in vision, hearing and language, mental deficiency (such as low I.Q. and development), handicap/impairment of arms and legs, and mental illness. The determination is made based on "hindrance or loss of social function." The Ministry of Civil Affairs indicated that after review and investigation, it might establish additional criteria for handicapped children. U.S. State Department, supra note 77.
119 Some infirmities, which might be considered a handicap in the United States, are not considered a handicap in China. For example, the Embassy is aware of a case involving a child born with only one ear. The impairment was not considered a handicap under China's Adoption Law since it could be corrected by surgery. Prospective adoptive parents should be very clear in their applications as to whether they are interested in adopting a handicapped child. The medical report provided by the CAO should provide specific details about any handicap or medical abnormality which does not constitute a handicap under Chinese law. When in doubt about the specificity of information received, prospective adoptive parent(s) should feel free to request clarification from Chinese authorities directly or through their U.S. licensed adoption agency. If at any time prior to signing the final contract adopting parent(s) believe that a handicap or medical condition not defined as a handicap under Chinese law may be more serious than presented in medical reports, an independent medical examination may be desirable and should be requested. It is not clear that this is permitted under Chinese procedures. Lists of physicians are available from the U.S. embassy or consulates. Id.
Chinese doctors and Civil Affairs officials. This provides uncertain legal standing for both the adoptive parent and the child.

Another major loophole in the treaty is created in the authorization given to states to refuse to recognize an international adoption where the state finds it to be "contrary to public policy." Because public policy is not defined, an infinite number of political, social and cultural reasons might be made to refuse to recognize an adoption. In the case of China, for example, one of an infinite number of arguments might be that the increase in adoptions encourages the abandonment of its children making enforcement of the one-child policy more difficult. States must have some freedom to determine issues of public policy as they deem fit. A possible qualifier, however, might lie in a clearer definition of what constitutes the "best interests of the child," and a commitment to safeguard those interests.

IV. ANALYSIS

A. Short-term Possibilities

As shown above, the dilemmas facing both American and Chinese children in need of adoption are extremely complex. The need for a uniform system such as that defined by the Hague Convention is paramount. The current system, however, does not adequately respond to the specific circumstances before us. Not only is the Hague Convention inadequately defined, it also fails to address specific international concerns such as inadequate domestic public policies that both fail to address and sometimes cause abandonment, and the balancing of both domestic and foreign responsibilities toward children. The Hague Convention can hardly be expected to solve China’s population crisis. However, incentives should exist to safeguard a child’s interests and protect them from lack of care, malnutrition, and even death in institutional settings.

The primary weakness of solutions sought by an international treaty is the difficulty of implementation. The United States, as a nation that has signed this treaty, is legally bound by its precepts. China, however, has

---

120 Id.

121 Hague Convention art. 24. The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

122 The United States signed The Hague Convention on March 31, 1994. Beginning in August 1996, the U.S. State Department, the U.S. Department of Health and Human Services and the U.S. Immigration and
not yet ratified the contents of the agreement, despite having participated in the lengthy drafting process. Without the participation of both the sending and the receiving nation, the treaty's usefulness to the children on both ends of the Chinese-American adoption equation is greatly reduced.

Even where nations do ratify the treaty, the problems of monitoring and enforcement continue to exist. Although Central Authorities are mandated to handle adoption issues, they still exist at the mercy of their hosts, and are inadequately equipped to deal with such overwhelming dilemmas as the thousands of unwanted baby girls spilling out of a nation's internal population policies and age-old traditions. To some extent, our best hope for domestic change in China arises out of the financial incentives and international exposure brought about by adoptions. At the same time, babies are not market commodities, and their best interests remain in finding permanent families in their country of origin. Like Korea, China may tire of its reputation as a bustling baby market, in which case the scales may tip in favor of internal policy changes to alleviate abandonment and encourage domestic adoption. In the meantime, however, the Hague Convention does its best to direct the children to permanent homes in as efficient a manner as possible.

It is at this point in the Hague Convention's problem-solving process that the most straightforward improvements may be sought. For example, basic implementation of the convention's precepts has been extremely inefficient. The United States ratified the treaty in 1994, however legislation regarding its implementation is still making its way through the bureaucratic ranks. The interagency group working on drafting implementing legislation estimates that it will take up to two years from the time legislation is passed by Congress before the U.S. will be ready to deposit its instrument of ratification with the Netherlands Government and open for business as a full party country. Similar delays would be very likely to occur in China given its bureaucratic make-up, and history of long

---

Naturalization Service began an extensive round of interagency meetings to arrive at commonly agreed upon principles to implement the Convention in uniform fashion throughout the U.S. Draft legislation implementing the Convention in the U.S. has been prepared and is now circulating for comment and clearance within the Executive Branch. United States Dept. of State, Status of U.S. Efforts to Ratify the Hague Adoption Convention (visited Nov. 14, 1998) <http://travel.state.gov/ratify.html>.

123 See id.
124 Id.
delays in adoption legislation.\textsuperscript{125} However helpful the Hague Convention might be to Chinese children, then, it will be of no use whatsoever until the next century.

The Central Authorities (the main administrative bodies responsible for implementing the Hague Convention) are a further demonstration of unnecessary inefficiency. Not only are these bodies long in the making; they replace one form of bureaucratic red tape with another. Although a centralized and specialized administrative system is a good idea, each country’s singular means of constructing these will initially cause a great many inefficiencies in both trans-national and domestic transactions. The parties remain numerous, including, still, the adoption agency, the adoptive parents, the sending institution, the INS, and any middlemen, as well as the two central agencies of the sending and receiving nations. Furthermore, the Hague Convention fails to set any periods for placement, calling merely for “expedient” proceedings.\textsuperscript{126} Realistically, then, whatever the possible long-term benefits of the Hague Convention, it provides no short-term possibilities whatsoever for the case at hand.

The lack of clear definitions of key adoption terminology used by the administrative bodies in the implementation process will further hinder communications between the agencies. The Hague Convention is in great need of a set of uniform definitions of its key terms, most notably for “abandonment,” “orphan,” “special needs,” “unreasonable cost,” and “public policy.” Without these, the treaty’s implementation will fail to provide the uniformity so urgently sought to regulate the diverse parties and rules involved in trans-national adoptions.

\textbf{B. Looking Ahead}

What then does the current treaty resolve for us? It does give us a set of internationally agreed upon norms regarding the best interests of the child. Thus, the Hague Convention emphasizes the importance for the child of inhabiting a “family environment” which strongly indicates that adoption, first nationally and then internationally, is preferred over foster placement. To achieve agreement on this point in a world of differing

\textsuperscript{125} See, e.g., \textit{Chinese Adoptions Put on Hold by Wary Government}, CNN, July 6, 1992 (discussing the one year moratorium on adoptions in 1992 when the Chinese government chose to review adoption procedures).

expert views as to what constitutes a child’s best interests, particularly where loss of cultural identity may hang in the balance, is no small feat. As demonstrated in the continuing American debates over trans-racial adoption, and the difficulty of creating and implementing statutes to address such concerns, any clarity with regard to the child’s best interests does indeed serve children in an attempt to seek permanent solutions for them.

While the Hague Convention allows for trans-national adoption where the immediate interests of the child are thereby served, it does not forget to emphasize that the ideal situation for an abandoned or orphaned child is to be placed in a permanent family in his or her country of origin. All of the international agreements above-described have agreed on this.127 The large majority of Chinese children today are being placed with Caucasian families in the United States.128 Although the trend has been to make the fact of adoption more acceptable and open in the home, and although parents today are perhaps more likely to educate themselves and their children about their cultural origins and the realities of racism in America, these children will grow up somewhat additionally displaced, not only by the fact of their adoption but by the fact of their ethnic identity.129 Given the current circumstances in which these children find themselves in China, these adoptions are laudable and satisfy the immediate needs of both the children and the adoptive parents. It is in the long-term benefits to future children that such proclamations of ideal goals may serve some function. Again, Korea is a noteworthy example.

The priority placed upon domestic adoptions in the Hague Convention may to some extent stem from a larger overriding concern: that the flow of children across national borders, particularly from developing to developed countries is something we must attempt to avoid wherever possible. There are various reasons for this concern. Fundamentally, international law is based on a premise of national sovereignty. Nations wherever possible seek to define and maintain their national ethnic and cultural integrity. Furthermore, attitudes toward adoption are shaped by moral judgment and personal and social values.130 These are often economically and politically loaded issues in the adoption world today. America is an affluent nation and the primary market for babies from

127 See UN Convention arts. IV and V; Hague Convention Preamble.
128 The majority of adoptive parents in the United States are white. See Rosettenstein, supra note 42.
129 See John Triseliotis, Identity and Genealogy in Adopted People, in ADOPTION: INTERNATIONAL PERSPECTIVES, supra note 33, at 42-43.
130 See also Hoksbergen, supra note 33, at 4.
CROSS-BORDER ADOPTIONS

around the world. China still considers itself a developing nation, and is unable to support its huge population, hence the public policies that have led to the widespread abandonment of its children. The national pride born of these circumstances has at times endangered the welfare of its children with immediate life or death needs. During the one year moratorium on adoptions, for example, babies suffering in less than ideal orphanage conditions were dying, while a host of adoptive parents eagerly waited to provide. Unfortunately, it is more costly for nations, even affluent nations, to invest in public policies to eliminate the factors causing children to be taken into public care than it is to administer adoptions and childcare. There is an adoption market. Black markets aside, adoption, both nationally and internationally, is a profitable business.

International efforts to protect the children of the world must therefore respect the integrity of the sending nations. Our primary effort must be to help those nations to take care of their own. Such attempts will further the healing of the massive economic and social destruction caused by colonial relationships. They will also better serve the best interests of the child. International adoptions alleviate the immediate crisis. Wherever possible, our attentions should also be drawn toward consideration of longer-term solutions.

China is a peculiar case in point, because to some extent its one-child policy and adoptions share the same goal: to alleviate the nation’s overwhelming population burden. The U.S. response to China’s one-child policy has been one of indictment, however. Enforcement of the one-child policy has infringed upon human rights according to American standards (infringement upon the freedom of reproductive rights, among others), constituting grounds for asylum in the United States. Although the levels of force used to implement the policy have outraged many, few people have provided palatable alternatives that still address the nation’s population crisis.

---


132 For a description of the most extreme orphanage conditions during this period, see Death By Default: A Policy of Fatal Neglect in China’s State Orphanages, supra note 30.


134 “The policy is enforced by a combination of incentives and punishments. Asylum applicants often complain of the most extreme punishments, namely forced abortion and sterilization. However, the penalties may range from physical force and imprisonment to mere persuasion and economic sanctions.” Charles E. Schulman, Note, The Grant of Asylum to Chinese Citizens Who Oppose China’s One-Child Policy: A Policy of Persecution or Population Control?, 16 B.C. THIRD WORLD L. J. 313, 317 (1996).
Research as to whether or not the encouragement of internal adoptions, even to families already housing one child, would indeed facilitate abandonment (as some Chinese officials fear) would be extremely useful in this situation. Foster care, even prior to adoption, would alleviate the effects of institutionalization on child development. And wherever the destination of the child, an efficient placement as soon as possible in a permanent home should be the greatest priority. None of these are perfect solutions for children abandoned or orphaned by their parents. But under realistic circumstances, these are the first steps toward a clearly defined best interest.

Those best interests hold true for American as well as Chinese children. Unfortunately, we cannot change the make-up of adoptive parents or of society as a whole. It is important as we seek solutions to recognize that those adults seeking children abroad are not necessarily prospective parents for American foster children. Whether because they desire an infant, or because they prefer to adopt one race over another, or because they wish to assist a developing nation with an over-burdened population and rampant poverty, their desires may never match the available children. At best, prospective parents can only be educated as to their choices. In light of the child's best interests in American society, with its aforementioned challenges, resources are best spent broadening and diversifying the population of adoptive parents. That way, all the various needs may be met, of American adoptive couples and of the many parentless children, both Chinese and American.

Underlying all of the above discussion are questions of race and culture. The main issues regarding the child's best interests in this case are to a large degree based on the issue of racial identity. Experts have identified three important ingredients contributing to the development of a child's identity: the quality of a child's experiences within his or her natural or substitute family; knowledge and understanding about his or her background and genealogy; and community perceptions and attitudes toward the child. These experts state that adopted children are no less likely than children raised by their biological parents to have identity problems, although a set of additional tasks may be necessary for them to perform. Both internally and internationally, inter-racial adoption is an issue only because we live in a racist society, in which we are defined as much by our ethnicity as by the culture we grow up in. Thus, children

---

135 Triseliotis, supra note 129, at 36.
136 Id. at 43.
adopted from China as infants know no other home and culture except that in which they were raised. But by virtue of their skin color, not only is the fact of their adoption constantly apparent, but they are less equipped by their parents and their environment to deal with the labels placed upon them by their community or society as a whole. The same goes for African-American children raised in white homes.\textsuperscript{137}

It is no wonder that Chinese-American adoptions have elicited such controversy. They are born out of a variety of grievances. In China, these stretch from the individual birth parent to the general social and economic history of ills of the nation. In the United States, these stretch from the individual childless couple to the many foster children languishing in our care for their own sets of complex social ills. Ultimately, few solutions arise from such vague administrative systems as are set up by the Hague Convention. Rather, Americans should look to their own social policy failings and those of the nations upon whom they subsist. While maintaining a willingness to assist and embrace those children whose needs are immediate, they must look toward long-term policies that alleviate the need for international adoptions.

V. CONCLUSION

International adoption satisfies two sets of immediate needs: those of the parentless child and those of the childless parent. It also points towards the internationalist’s dream: that racial and cultural barriers might be broken down by the acceptance into our homes and families of those less fortunate, regardless of race and ethnicity. Ideally, international adoption may be a vehicle to improve cooperation and understanding among nations. At the same time, however, it is born out of grief.

Ultimately, a child’s best interests are served by the opportunity to grow up in a loving family environment in his or her own country with his or her own birth parents. Adoptions both within and without borders are the result of the painful separation of an infant or child from his or her birth parents. Particularly where such separations become commonplace fixtures in our social landscape, an alarm bell should sound; there are cracks in our

\textsuperscript{137} Studies have shown that African-American children growing up in white homes tend to be well adjusted and unharmed in any apparent way. Furthermore, they tend to be comfortable with both races, and are more likely to date and marry inter-racially. For a discussion of the various studies, see Silverman, \textit{supra} note 45, at 108-14.
social make-up and the children are falling through. Adoption creates a whole from what is broken, but it still leaves scars.

The Hague Convention recognizes this point, while at the same time attempting to serve the immediate needs of children for a permanent home. To effectively meet those needs, however, the Hague Convention must streamline its administrative processes and broaden its definitions. Countries such as the United States and China must prioritize the ratification and the implementation of its precepts. Otherwise, the treaty sounds only a hollow note in the bustling international baby trade.