The Hague Convention on Intercountry Adoption and American Implementing Law
Implications for International Adoptions by Homosexual Couples or Partners

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and Regulations for Adoptions of Children by Gay and Lesbian Adults

A. The Hague Convention and Its Potential Significance

One of the most important developments in international adoption law and practice has
been the promulgation of the 1993 Hague Convention on Protection of Children and Co-
operation in Respect of Intercountry Adoption, which is generally known as “the Hague
Convention on Intercountry Adoption” (herein “Hague Convention” or “Convention” or
“HCIA”). As of March 1, 2007, seventy-four (74) nations have signed, ratified, or acceded to this
Hague Convention, and the HCIA has entered into force in seventy-one (71) nations. The
United States Senate has approved the Hague Convention on Intercountry Adoption, and it will
be deemed ratified and take effect in this country shortly, when the legal mechanisms for its
implementation have been established.

1 I have benefitted from feedback, advice, and information from my colleagues Richard G.
Wilkins and A. Scott Loveless, and from ____. The very useful research assistance of Cliff
Arthur and Kelly Schaeffer-Bullock, and the valuable computer word processing assistance of
Marcene Mason is also gratefully acknowledged. For the final paper, including all its errors, I
must take personal responsibility.

2 Hague Conference on Private International Law, Convention of 29 May 1993 on Protection of
Children and Co-operation in respect of Intercountry Adoption, available at
http://www.hcch.net/index_en.php?act=conventions.text&cid=69 (last seen March 1, 2007),

3 Status table for Convention of 29 May 1993 on Protection of Children and Co-operation in
respect of Intercountry Adoption, available at
Fifty-two (52) nations have signed this Convention; forty-nine (49) nations have ratified it,
twenty-two (22) nations have acceded, and forty-nine (49) nations have both signed and ratified
the Convention, and a total of seventy-four (74) nations have taken some step to join by signing
and/or ratifying and or acceding. Id.

4 Id.

5 Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation
of Agencies; Approval of Persons and Intercountry Adoption – Preservation of Convention
Records; Final Rules, 22 CFR Part 96, at I. Background, in 71 Federal Register 8063, 8064 (Feb.
http://a257.g.akamai.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/06-
1067.htm (last seen February 27, 2007). See also Anna Mary Coburn, et al, International Family
When the Hague Convention was being drafted, between 1988 and 1993, the adoption of children by gays and lesbians was generally prohibited. Indeed, such adoptions were not allowed in any country, and in only one American state. Today, by contrast, adoption by lesbian and gay couples is allowed in several nations, and in nearly half of the American states. However, there have been expressions of concern about potential deception and misrepresentation by lesbian and gay couples seeking to adopt internationally.

This paper reviews the Hague Intercountry Adoption Convention text, legislative history, and U.S. implementing laws and regulations to see their potential impact on lesbi-gay adoption. May sending countries under the Convention refuse to allow adoption by lesbian and gays? May receiving countries refuse to recognize lesbi-gay adoptions under the Convention? Are such adoptions mandated or prohibited under the Hague Convention? Do the American statutory and regulatory law and rules address the issue? Do any of the Hague Convention, statutory, or regulatory provisions raise any constitutional issues? These are some of the questions that are addressed in this paper.

B. The Significance of Intercountry Adoption Generally

The reasons these questions are so important is because intercountry adoption is so important. Intercountry adoption involves the removal of a child from one country (the State or origin) to another country (the receiving State) for the purpose of being adopted by residents of the second country. While undoubtedly some intercountry adoptions involve adoptions by relatives (as when a child is adopted by members of his or her extended family who have immigrated from the State or origin to the receiving state, or vice versa), most intercountry

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adoptions are “stranger” adoptions of children by adults who are unrelated to them and usually who never knew them before beginning the adoption process. The need for intercountry adoption today is undeniable. While the exact number of parentless children in the world today is not known, “UNICEF estimates about 100 million street children exist in the world today. About forty million are in Latin America, twenty-five to thirty million in Asia, and ten million in Africa.” The numbers are rising; it is predicted that by 2010, there will be at least 25 million (and possibly up to 100 million) “AIDS orphans,” aged newborn to 15 years old, in developing countries. Parentless children often become “homeless persons” or “street children.” It is said that in Bogota, Colombia, 200,000 abandoned street children roam the streets. “The number of street children is predicted to grow by tens of millions as poverty in the Third World becomes increasingly urban-based . . . .” “In Mexico City . . . with a population of 23 million, . . . 13,000 children . . . live on the streets . . . .” A 2002 UNICEF, UNAIDS study reported that in 2001 there were 108 million orphans (including 13 million AIDS orphans) living in 88 less-developed nations in Africa, Asia and Latin America

8See Elizabeth Bartholet, International Adoptions, PLI Order No. 7583, 2005 Adoption Law Institute, 203 PLI/Crim 9, 11 (December 2005).
9See Wardle, Parentlessness, supra note __, at 325-330. [** UPDATE these 3 paragraphs**]
10Susan O’Rourke Von Struensee, Violence, Exploitation and Children: Highlights of the United Nations Children’s Convention and International Response to Children’s Human Rights, 18 Suffolk Transnat'l L. Rev. 589, 616-17 (1995). See also Seitles, supra, at 159. Actually, the 100 million figure is not just children, but is mostly women and children.
15Lopez, supra note __, at 619.
and the Caribbean, and that by 2010 there would be 107 million orphans (including 25 million AIDS orphans), in those nations.\textsuperscript{16}

The plight of parentless children is extreme. Many parentless children are unable to survive - they die, and often not tidily, not anaseptically, not with dignity, but horribly of starvation, with bloated bellies, listless, bony bodies, and huge pain-drenched eyes, with cries of hunger and fear. Their suffering and death stuns us and should shame us. The United Nations estimates that approximately 50,000 human beings die every day as a result of poor shelter, water, or sanitation,\textsuperscript{17} and parentless children are especially vulnerable to these ravages. They are also vulnerable to many kinds of miserable exploitations, abuses and being murdered, especially when living on the street, and they often desperately turn to crime to survive – and to die.\textsuperscript{18}

Intercountry adoption is one small way that adults and families in more affluent countries can make a dent in the huge problem of global parentless children. Intercountry adoption can make an incredible, wonderfully life-changing difference in the lives of all involved, especially in the otherwise tragic and wasted lives of some of the must fragile, most vulnerable, most hopeless young human beings on the earth.

We do not know the exact number of intercountry adoptions because there is no existing mechanism to collect that data. Even the Hague Convention on Intercountry Adoption authorities could not provide such information, for it applies in only about one-third of the nations in the world. Some nations do not keep such records. In 2001, a British demographer at a general population conference reported that the best data indicates that in the entire decade of the 1980s there were a total of 162,000 intercountry adoptions, averaging 16,000 per year.\textsuperscript{19} Selman estimates that during the 1990s, the number of intercountry adoptions ranged from about 19,000 to a little over 32,000 in 1997-99.\textsuperscript{20}

We know that adoption of unrelated children historically has not been widely practiced in many nations. Indeed, legal adoption for the sake of the child is a modern innovation, first


\textsuperscript{18}Seugling, supra note __, at 885-86; see also Annette Lopez, Comments, Creating Hope for Child Victims of Domestic Violence in Political Asylum Law, 35 U. Miami Inter-Am. L. Rev. 603, 610 (2004).


\textsuperscript{20}Id.
introduced in the United States (in Massachusetts) in 1851. In many countries, there still remain significant cultural, social and customary barriers to the practice of adoption. As a result, many orphaned and abandoned children are doomed to be raised in state- (or charity-) run institutions (like large orphanages or small orphanages that are euphemistically called “group homes”) and in temporary “foster” care. The silver lining of that tragedy is that such organizations can provides a pool of children for and can facilitate their intercountry adoption, unless there are political or legal barriers to such adoptions. Such barriers exist in many countries.

C. The Significance of Intercountry Adoptions in the United States

The 2000 Census reported that over 2 million adopted children under age were 18 living in American homes, and that 2.5 percent of all minor children were adopted. Astoundingly, data on adoptions has not been collected by the government since 1992 when a total of 126,951 children were adopted. The National Council for Adoption (a consortium of American adoption agencies) tries to compile adoption data. It found that by 1996 the number of domestic adoptions had fallen about 5% from 1992, from 115,689 domestic adoptions to 108,463 domestic adoptions, but international adoptions had doubled in the same period, rising by nearly 5,000 intercountry adoptions, to nearly offset the drop in domestic adoptions. Approximately 45% of all American adoptions are step-parent adoptions, and another 15% were foster-parent adoptions. Approximately 65,000 adoptions in 1996 were of unrelated children, including domestic and foreign children. Since then, the number of intercountry adoptions has increased by about 10,000.

The United States of America has always been, and still is the largest single “importer” of foreign children for intercountry adoption. For example, in 1998, when nearly 16,000 intercountry adoptions in the United States, the country with the next most intercountry

\[\text{\underline{23}}\text{Id.}\]
\[\text{\underline{24}}\text{Paul J. Placek, National Adoption Data, in Adoption Factbook III 24 (Connaught Marshner & William I. Pierce, eds., 1999).}\]
\[\text{\underline{25}}\text{Id. at 31.}\]
\[\text{\underline{26}}\text{Id.}\]
\[\text{\underline{27}}\text{Id.}\]
\[\text{\underline{28}}\text{See supra note .}\]
\[\text{\underline{29}}\text{See generally Nili Luo & David M. Smolin, Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives, 35 Cumb. L. Rev. 597 (2004-05); **}\]
adoptions, Sweden, had well under 1,000 adoptions. Of course, if relative populations are compared, the Swedes are doing very well. By 1998, the US rate of adoption per 100,000 population was 5.7, while it was 22.7 in Sweden, and 14.6 in Norway. In 1999, the best estimate is that there were just over 32,000 intercountry adoptions in the world, and over half, 16,363 adoptions, were of children coming to the United States. Thus, the United States alone accounts for as many intercountry adoptions as all of the other nations of the world combined.

Over the last decade, the number of intercountry adoptions to the United States has more than doubled, and it trebled in just fifteen years. In fact, the number of intercountry adoptions into the United States far exceed the total number of intercountry adoptions into all the other nations in the world. Between 1971 and 2001, it is reported that Americans adopted over 265,000 children from other countries. More than 20,000 adoptions in the United States out of approximately 70,000 adoptions of unrelated children (excluding step-parent adoptions) were intercountry adoptions of children from other nations. It is estimated that about 500 American children are placed for adoption in other countries every year.

Yet it appears that international adoptions of children to the United States are beginning to wane. “After tripling over the past 15 years, the number of foreign children adopted by Americans dropped sharply in 2006, the result of multiple factors that have jolted adoption advocates and prompted many would-be adoptive parents to reconsider their options.” Moreover, the drop in international adoptions in the United States was not trivial but the number fell 10% in one year, from 22,728 international adoptions in America in fiscal 2005 to only 20,679 in fiscal 2006 – a very substantial one-year change. The impact on the children who are not adopted is very profound. As a spokesman for the National Council for Adoption, said, “It’s not just numbers - it’s a tragedy.”

II. Overview of the Hague Convention and of American Implementing Laws and Regulations

A. Origins of the Hague Convention

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30 Selman, supra note __, at 7, Table 2 (USA 15,774 intercountry adoptions; Sweden - 928 intercountry adoptions).
31 Id.
33 Appendix 2, Immigrant Visas Issued to Orphans Coming to the United States.
35 Id. at n.31, citing Jill Smolowe, Babies for Export, Time Magazine, Aug. 22, 1994, at 64.
37 Id. (“Overall, according to new State Department figures, international adoptions by Americans fell to 20,679 in the 2006 fiscal year from 22,728 in 2005 - the first significant decline since 1992.”).
38 Id.
The Hague Convention on Intercountry Adoption is a multilateral treaty governing intercountry adoptions of children who leave their countries (of origin) to be adopted into families in other (receiving) countries. It is one of three Hague conventions drafted since 1980 that deal specifically with legal protection of children in transnational context.40

In October, 1988, the delegates from the member states to the Sixteenth Diplomatic Session of the Hague Conference on Private International Law voted to consider a convention on intercountry adoption at their next Diplomatic Session, to be held several years later.41 That decision set the drafting process in motion. Over the next two years, the Hague Conference’s Permanent Bureau prepared a lengthy study of intercountry adoption,42 and a preliminary draft of the text of a convention was prepared during three two-week sessions of a preparatory commission between June 1990 and February 1992.43 In September 1992 that preliminary text and a report were circulated to and written comments were solicited from the members nations of the Hague Conference; nearly forty member nations responded to the call for input. Additionally, about thirty non-member nations with significant intercountry adoption emigration and eighteen international organizations participated in the deliberations before and during the Seventeenth Diplomatic Session of the Hague Conference at which the proposed Hague Convention on Intercountry Adoption was considered in May, 1993. On May 29, 1993, by unanimous vote of 55 nations present, the Hague Conference adopted the final text of the Hague Convention on Intercountry Adoption.44

The Hague Convention on Intercountry Adoption built upon several prior international agreements drafted to govern adoption.45 In 1964 the Hague Conference had promulgated the


43*Id.* at 651. McDermott, *supra* note __, at 381.


45See generally Rosanne L. Romano, Comment, *Intercountry Adoption: An Overview for the Practitioner*, 7 Transnat’l Law. 545 (1994); Howard E. Bogard, Comment, *Who Are the
Hague Convention on Jurisdiction, Applicable Law, and Recognition of Decrees relating to Adoption.\textsuperscript{46} It was approved by only three European nations (Austria, Switzerland and the United Kingdom), and they later withdrew from the Convention.\textsuperscript{47} While the overall structure and some of this Convention were sound,\textsuperscript{48} it left too many serious substantive conflicts unresolved and “contain[ed] exceptions, reservations and restrictions to satisfy nationalistic viewpoints to such an extent that its usefulness [wa]s questionable.”\textsuperscript{49}

In 1967 the European Convention on the Adoption of Children was drafted and the following year became effective upon signatory member states of the Council of Europe.\textsuperscript{50} Eventually eleven European nations signed the European Convention. However, its provisions proved inadequate because they focused on children orphaned by the death of their parents and failed to account for voluntarily abandoned children; children whose parents had voluntarily relinquished parental rights were ineligible for international adoption under the European Convention.\textsuperscript{51}

Two United Nations compacts also promoted interest in and provided examples of drafting international standards for international adoptions. In 1986, the United Nations approved the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption (herein “Declaration”).\textsuperscript{52} “The Declaration’s twenty-four articles address issues pertaining to family and child welfare, foster care, and domestic problems, as well as concerns regarding intercountry adoption . . . .”\textsuperscript{53} However, the Declaration embodied a preference for in-county institutional care over

\begin{footnotesize}
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\item[48] For example, it vested jurisdiction in the authorities of the state where the adopter habitually resided or had nationality, applied the consent law of the nation of the child’s nationality, allowed revocation under the law of the state that granted the adoption only. Bogard, \textit{supra} note __, at 592-94. In some respects, the 1993 HCIA contains more developed versions of some provisions included in primitive form in the 1964 Hague Convention.
\item[49] Bogard, \textit{supra} note __, at 594, quoting 2 Dept St. Bull. 265, 267 (Feb. 22, 1965) (statement of Joe C. Barrett) (report of the United States delegate to the Hague Convention recommending that the adopting authorities apply the law of the national state of the child when deciding issues concerning the consent of a child to adoption).
\item[51] Romano, \textit{supra} note __, at 567-68.
\item[53] Romano, \textit{supra} note __, at 569.
\end{enumerate}
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international adoption, was ambiguous in significant areas, and endorsed application of the status quo in standard of “safeguards and standards” to international adoptions.\(^{54}\)

In 1989, the General Assembly of the United Nations approved the Convention on the Rights of the Child (herein “CRC”),\(^{55}\) which has become fabulously popular world-wide; it has been signed and endorsed by all but two of the sovereign nations in the world.\(^{56}\) Article 21 of the CRC addresses adoption, providing that where adoption was allowed “that the best interests of the child shall be the paramount consideration,” committed the nations to specific procedural protections (supervision, information, and informed consent), to “[r]ecognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;” agreed to apply to international adoption the same “safeguards and standards equivalent to those existing in the case of national adoption;” to “[t]ake all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it; and to “[p]romote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.”\(^{57}\) While these C.R.C. provisions repeated the defective principles of the 1986 Declaration (including no preference over in-country foster care, and application of status quo domestic adoption standards to international adoptions), the general popularity of the C.R.C. and the express commitment to enter into “bilateral or multilateral” treaties to protect the interests of children in international adoption gave the movement to draft the Hague Convention on Intercountry Adoption a definite boost.\(^{58}\)

Both of these U.N. instruments, the Declaration and the C.R.C., directly influenced the development and content of the Hague Convention on Intercountry Adoption. Indeed, the preamble of the Hague Convention explicitly notes and acknowledges that the Convention “take[s] into account the principles set forth in” the U.N. Declaration and C.R.C.\(^{59}\)

The progress of the Hague Convention also benefitted from a globally galvanizing scandal that began with the discovery in 1989-90 of the horrific conditions in which orphaned and unwanted children had been warehoused in Romania under the regime of Nicolae


\(^{56}\)Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (as of 09 June 2004), available at http://www.unhchr.ch/pdf/report.pdf (last seen February 27, 2007). The United States has signed but not ratified the CRC.

\(^{57}\)C.R.C., art. 21.


\(^{59}\)HCIA, supra note 1, at Preamble.
Ceausecu, and continued with the subsequent unregulated flood of well-intentioned persons and organizations from other countries who poured into Romania to rescue and adopt neglected Romanian children. “Individuals and entities rushed in, some with humanitarian and others with profit motives to facilitate international adoptions, resulting in gray and black market practices.” The chaos of the adopting rescuers and the unethical practices some of them used to rescue for adoption children they considered vulnerable led to a counter-reaction of severe restriction of adoption in Romania. For several years after the Romanian orphanage-and-adoption debacle, “[i]nternational adoption . . . received an unprecedented amount of media coverage . . . much of it unfavorable,” underscoring the need for international regulation of international adoption. Thus, when the respected, nonpartisan, collaborative Hague Conference promulgated its Convention on Intercountry Adoptions in 1993, the time was right and the international community was very supportive.

B. Overview of the Hague Convention

The Hague Convention on Intercountry Adoption consists of 48 Articles organized into seven Chapters, the main provisions of which are herein summarized. Chapter 1 described the scope of the convention. The objectives are to establish safeguards to ensure the best interests of children will be protected in intercountry adoption, prevent trafficking in children, and ensure recognition of intercountry adoptions. The Convention applies when “a child [under 18 years of age] habitually resident in one Contracting State (‘the State of origin’) has been, is being, or

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64 See supra, notes __ through __, and accompanying text.
65 See Appendix 1.
66 HCIA, supra note 1, at Art. 1.
67 Id., at Art. 3.
is to be moved to another Contracting State (‘the receiving State’) either for the purpose of permanent adoption or after such adoption.\textsuperscript{68} Chapter II sets forth the requirements for intercountry adoption under the Convention, including that “competent authorities” in the State of origin establish eligibility of the child for adoption, that placement in the other State is in the child’s best interests, that required counseling and consents have been given properly and without improper financial inducement,\textsuperscript{69} that “competent authorities” in the receiving State have determined that the prospective adoptive parents are eligible and suitable to adopt, and that “the child is or will be authorized to enter and reside permanently in that State.”\textsuperscript{70} Chapter III defines and regulates central authorities and accredited bodies. Each signatory State must designate at least one Central Authority to fulfill convention obligations,\textsuperscript{71} and to accredit competent bodies that are non-profit, staffed by qualified, ethical, supervised persons.\textsuperscript{72} Chapter IV sets forth procedural requirements applicable in intercountry adoptions between the party States. The intercountry adoption process begins with application by the adopters in to the Central Authority of the state of their habitual residence.\textsuperscript{73} If satisfied that the applicants are eligible and suited to adopt, the Central Authority sends a report to the Central Authority in the child’s State or origin.\textsuperscript{74} If satisfied that the child is adoptable, and that all consents have been properly obtained, the Central Authority in the State or origins sends back a report to the Central Authority in the receiving State.\textsuperscript{75} Agreement to the adoption and compliance with the standards by both Central Authorities is repeatedly emphasized.\textsuperscript{76} Central Authorities may designate other public authorities and accredited bodies and competent persons to perform Central Authority functions under its supervision.\textsuperscript{77} Chapter V governs recognition and effects of intercountry adoption under the Convention. “An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States,”\textsuperscript{78} and recognition includes recognition of the child-adoptive parent relationship, parental authority, and termination of prior parent-child relationship if according to the law of the State of adoption,\textsuperscript{79} or after adoption by the law of the receiving State.\textsuperscript{80}

\textsuperscript{68}Id. at Art. 2. The Convention does not apply to adoptions of persons who are eighteen years of age or older. Id. Art. 3.
\textsuperscript{69}Id., at Art. 4.
\textsuperscript{70}Id., at Art. 5.
\textsuperscript{71}Id. at Art. 6.
\textsuperscript{72}Id. at Arts. 10, 11, & 13. A body accredited in one state can only act in other states if also accredited there. Id. at Art. 12.
\textsuperscript{73}Id. Art. 14.
\textsuperscript{74}Id. at Art. 15.
\textsuperscript{75}Id. at Art. 16.
\textsuperscript{76}Id. at Arts. 17 & 19.
\textsuperscript{77}Id. at Art. 22.
\textsuperscript{78}Id. at Art. 23(1).
\textsuperscript{79}Id. at Art. 26.
\textsuperscript{80}Id. at Art. 27 (conversion subject to proper consent).
Recognition may be refused “only if the adoption is manifestly contrary to [such State’s] public policy, taking into account the best interests of the child.”  

Chapter VI contains general provisions. The Convention allows but does not require the State of origin to be the place of adoption, generally forbids contact between adoptive and biological parents or guardians until proper consents have been taken, and allows only payment of actual costs, expenses and reasonable professional fees but prohibits “improper financial or other gain” from intercountry adoption. In states with federal or plural legal systems, it provides that the laws and authorities of the applicable local unit of habitual residence apply. It generally forbids reservations to the Convention, and makes the Convention applicable to all applications received after the Convention is in force in the receiving State and State of origin.

Chapter VII contains “Final Clauses” of administration and logistics. The Ministry of Foreign Affairs of the Kingdom of the Netherlands is the depositary of the Convention, and instruments of ratification, acceptance or approval by Hague Conference member States and other States who participated in the HCIA Session are to be deposited there, as well as instruments of accession by other States. States with federal or plural legal systems may make the Convention applicable to all those units or only certain units. The Convention enters into force in a State three months after it deposits its ratification, acceptance, approval or accession. A State may withdraw from the Convention by depositing notice of denunciation, effective twelve months later.

C. American Endorsement of the Hague Convention

The United States signed the Hague Convention on March 31, 1994, indicating an intent to ratify the HCIA. In 1998, after an extensive review of the terms of the Convention was completed by the U.S. State Department, President Clinton transmitted the Convention to the Senate for advice and consent to ratification. Interestingly, conservative Senator Jesse Helms

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81 Id. at Art. 24. However, if the adoption is in derogation of certain Articles of the Convention by bilateral treaty states may choose to deny recognition to such adoptions. Id. Arts. 25 & 39(2).
82 Id. at Art. 28.
83 Id. at Art. 29.
84 Id. at Art. 32.
85 Id. at Art. 40.
86 Id. at Art. 41.
87 Id. at Art. 43. The depository is obliged to notify the Hague Conference States and other party States of signatures, ratifications, acceptances, approvals accessions, and denunciations. Id. at Art. 48.
88 Id. at Art. 44(1) & (2). But the Convention obligations do not apply between that State and any Party State who timely objects to the newly acceding State. Id. at Art. 44(3).
89 Id. at Art. 45.
90 Id. at Art. 46.
91 Id. at Art. 47.
92 Pfund, supra note __, at 654 Carlson, supra note __, at __; McDermott, supra note __, at 382.
led the movement for Senate consent to the Convention and its implementing statute. On September 20, 2000, the U.S. Senate gave its advice and consent to U.S. ratification of the Hague Convention subject to the completion of the implementing laws and regulations. Since the implementing laws and procedures are not completed, the ratification of the United States is not final.

Three months after the U.S. instrument of ratification is deposited with the Netherlands Ministry of Foreign Affairs, the Hague Convention will enter into force in the United States and be legally applicable to adoptions between the United States and the other countries that have ratified the Convention. The process of drafting regulations seems to be about over; and the accreditation of adoption agencies in the various states and nationally is underway. It has been predicted that the Hague Convention will become effective in the United States at the end of 2007.

D. Overview of the American Implementing Laws and Regulations

“Countries that become parties to the Hague Convention are required to adopt procedures, typically by implementing legislation, to comply with the Hague Convention’s obligations and requirements.” Upon transmittal of the Hague Convention by the President to the Senate, both the Senate and the House began to consider implementing legislation. There were several hurdles to developing such legislation. In October 1999 committees in both houses held hearings on proposed implementing legislation. In September, 2000, about the same time as the Senate approved ratification of the Hague Convention on Intercountry Adoption, both houses of Congress passed the Intercountry Adoption Act of 2000 (herein “IAA”), which President Clinton signed into law on October 6, 2000.

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94Kleem, supra note __, at 332. Helms was Chair of the Senate Foreign Relations Committee. He and Democratic Senator Mary Landrieu introduced the Hague Convention and implementing legislation to the Senate. *__.
96Coburn, supra note __, at 494.
97McDermott, supra note __, at 384. However, the same prognosticator earlier predicted that the Hague Convention would come into force in the United States in 2006. Mark T. McDermott, Intercountry Adoptions: Hague Convention Update, 200__ Adoption Law Institute, PLI Order No. 8637, 20__ PLI/Crim __ (________).
98Coburn, supra note __, at 493.
101McDermott, supra note __, at 382.
The IAA consists of five titles containing a total of 21 sections. Though shorter and more compact than the Hague Convention that it implements, in structure, the IAA largely resembles the HCIA, and in content, the Act largely tracks, follows and complements the provisions of the Convention.

The stated purposes of the IAA are –
(1) to provide for implementation of the Hague Convention by the United States;
(2) to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children's best interests; and
(3) to improve the ability of the federal government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States.

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To implement the IAA, the Department of State, which will act as the Central Authority for the United States under the Hague Convention, has gone through three cycles of rule making. The regulations that they have promulgated are contained in 22 C.F.R. Parts 96, 97, and 98.

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III. Controversies About International Adoptions by Gays and Lesbians

A. The Increase of Controversial Adoptions by Gays and Lesbians


103 See Appendix 3.
104 Id. § 14902 (b)(1)-(3).
105 _Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. 54064 (proposed on Sept. 15, 2003) (to be codified at 22 C.F.R. pt 96); *; *
While the HCIA was being drafted from 1988 to 1993, no country allowed gay couples to adopt. Even Denmark (which had pioneered same-sex domestic partnership in 1989), the Netherlands (which pioneered same-sex marriage globally in 2001), and Scandinavia (which was the first global region to generally allow same-sex partnerships) prohibited adoptions by gays and lesbians in 1993.

Today, by contrast, adoptions by gay or lesbian partners is allowed by appellate court decision or legislation in the District of Columbia and at least a dozen American states. It appears that about fifteen nations allow some same-sex couples to adopt at least some children in at least some circumstances (often limited to adoption of the biological children of a registered same-sex domestic partner).

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107 The first jurisdiction to permit adoption of children by gay or lesbian partners was the small American state of Vermont, and that occurred the same year as (just two months before) the Hague Convention was promulgated. See In re B.L.V.B., 628 A.2d 1271 (Vt. 1993).


109 See generally Lynn D. Wardle, The “Inner Lives” of Children in Lesbigay Adoption: Narratives and Other Concerns, 18 St. Thomas L. Rev. 511, 513 (2006). The American jurisdictions in which lesbigay adoption has been approved by statute or appellate court precedent are: California, Connecticut, District of Columbia, Illinois, Indiana, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont. Id. at 513-514, n. 3. However, such adoptions are expressly forbidden by statute or appellate court ruling in at least eight other states. Id. at 514, n.4.

110 The Netherlands, Denmark, and Iceland currently allow same-sex couples to adopt each other’s children as long as they are registered partners. The Netherlands has gone one step further and allowed registered partners to adopt unrelated children, thus mirroring the adoption rights that heterosexual couples enjoy. . . . Catalan law [] does not preclude a gay man or lesbian from adopting a child as an individual . . . .

Richard R. Bradley, Making a Mountain Out of A Molehill: A Law and Economics Defense of Same-Sex Foster Care Adoptions, 45 Fam. Crt. Rev. 133, 135 (2007); Alfonso Cardinal Lopez
Adoption by same-sex couples and partners is extremely controversial globally. Even some nations that allow some form of same-sex unions generally forbid adoption by gays and lesbians, especially couples. Polls in progressive Europe show that most people in most EU nations oppose allowing gays and lesbians to adopt. For example, in 2003, the European Omnibus Survey (EOS), based on interviews with over 15,000 persons living in 30 European countries, found that in only four of the thirty countries in Europe did a majority of those surveyed favor legalization of adoption of children by same-sex couples, while in 26 nations (eleven of the fifteen liberal nations of Old Europe, both non-EU nations, and all 13 of the countries of New Europe), at least 50% of the population (up to 87% of the population) opposed legalization of adoption by same-sex couples throughout Europe.

Gay adoption remains very controversial in United States, as it is in most countries. The fact that after more than a decade of aggressive gay rights movement gains in many areas of law, only one quarter of the states have legalized adoption by gay and lesbian partners and couples and that just a handful of the 191 sovereign nations of the world allow children to be adopted by homosexuals is clear indication of the controversial nature of gay and lesbian adoptions.

Adoptions by gays and lesbians are controversial as a matter of public policy because the deviate from the global ideal of child-raising by a mother and father. Giving a child to two “mothers” or to two “fathers” to raise insures that the child will be deprived of the parenting


An undocumented internet source reports that adoption by same-sex couples is legal also in at least some situations in Andorra, Belgium, Germany, Guam, Norway, Ireland, Israel, Sweden, and in some provinces in Canada and some parts of Australia. Adoption by same-sex couples, Answers.com, available at http://www.answers.com/topic/adoption-by-same-sex-couples (undated, last seen March 1, 2007). In 2007 France reaffirmed that adoption by gay and lesbian couples was prohibited. ___ See Bradley, supra at 135 ("However, Norway, Sweden, France, Spain, and Germany prohibit homosexual adoptions outright despite recognizing the union of homosexual couples.")

[GET LATEST GALLUP POLL EUROPE].


Id.
influence of the missing gender-parent. Concerns about the social pathologies resulting from fatherlessness makes this controversial to begin with. Also, adoptions by gays and lesbians have a political-ideological dimension to them, and seem to reflect an adult-centric (what pleases the adult adopters) rather than child-centric perspective. Third, potential detriment to the child from being raised in a gay or lesbian environment is a serious concern. Homosexual lifestyle is often characterized by hyper-sexualization; indeed, even the nature of “gay” and “lesbian” relationships is defined by sexuality. Concerns about children being influenced or recruited into the gay or lesbian lifestyle are not unfounded, as many studies, including some designed and conducted by pro-gay parenting advocates, have found disproportionate rates of premature sexualization, homosexual identification, and homo-erotic behaviors. Concerns about religious and moral effects on children of being raised by gays and lesbians are not insubstantial, given the significant moral objections to homosexuality of most religious traditions in the world. Concerns about the impact upon the integrity of the adoption system, of the willingness of parents to relinquish children they cannot care for to adoption, must be considered. Thus, adoption of children (especially unrelated children) raises many serious policy issues.

B. Concerns About Abuses, Deceptions and Frauds in Some International Adoptions by Gays and Lesbians

Apart from the controversy surrounding the policy of allowing parentless children to be placed for adoption with gays and lesbians, especially gay and lesbian couples, shady international adoption practices by some gays and lesbians and their supporters in some adoption agencies have added to the controversy surrounding international adoptions by gays and lesbians. For example, “Chinese regulations explicitly prohibit adoption by homosexual persons.” Yet, [a] significant number of gay or homosexual individuals reportedly have been adopting Chinese orphans under the form of single parent adoption. It appears that some social workers within the United States are willing to create ‘home studies’ of homosexual individuals and couples that portray the home as simply that of a ‘single’ person, thus permitting gay individuals and couples to largely escape the force of laws or customs in sending nations prohibiting or disfavoring gay adoptions. Social workers within the United States may perceive these actions as supported by principles related to equal rights for gay persons, the best interests of children, or simply privacy. The result is that the United States sends over documents key to the intercountry adoption process that could be viewed from a

114, 115, 116, 117, 118, 119, 120, 121, 122

Chinese perspective as fraudulent or at least as uninformative. Under these circumstances, one practical means for China to enforce its limit on gay adoption is to limit adoption by single persons. Thus, it is possible that the Chinese policy on single parent adoption is, at least in part, a means of enforcing its prohibition of gay adoption.\textsuperscript{123} 

This deception and fraud has been going on for at least a decade.\textsuperscript{124}

\textit{IV. Questions About How the Hague Convention on Intercountry Adoption and Implementing American Statutes and Regulations Will Affect intercountry Adoption by Gays and Lesbians in the United States?}

The recent drop in international adoptions coincides to some extent with the rise of gay and lesbian adoptions in the United States and several other countries. It also appears to coincide with the implementation of the Hague Convention on Intercountry Adoption. Both of those correlations may be purely coincidental. As one of the assumed purposes of the Hague Convention on Intercountry Adoption is to promote and encourage international adoption,\textsuperscript{125} it would be ironic if the effect of adoption of the HCIA was to burden and reduce the numbers of legitimate international adoptions.

\textit{A. Potential for Influencing Adoptions by Gays and Lesbians}

The potential for some impact of the Hague Convention on adoptions by gays and lesbians in America has been contemplated, at least in the Netherlands. When the Dutch parliament in 2004 was considering generally legalizing adoptions by gays and lesbians (which it later did), the parliament asked the government of The Netherlands to investigate whether the United States would allow American children to be adopted by Dutch same-sex registered or married partners.\textsuperscript{126} The Dutch Minister of Justice notified parliament that in 2005 a new survey would be undertaken to see which other countries of origin would be prepared to allow such adoptions. He specifically mentions the United States as one country to be surveyed. He also “announced that if the United States would ratify the Hague Convention on Intercountry Adoption, he would investigate whether another supplementary bilateral treaty on the matter

\begin{footnotes}
\item[125] See supra notes ___ and accompanying text.
\end{footnotes}
could be agreed upon between the Netherlands and the United States.\textsuperscript{127} Ratification of the Hague Convention by the United States was apparently seen by Dutch authorities as critical to facilitating intercountry recognition of adoptions by gays and lesbians in the United States.

There are three ways in which the Hague Convention and implementing laws and regulations might influence adoptions by gays and lesbians (and other controversial adoptions) in the United States – by direct substantive adoption law requirements, by indirect procedural requirements, and by interjurisdictional adoption recognition requirements. The constitutionality of any such impacts upon American laws must also be considered. Thus, there are seven questions about the potential impact of the Hague Convention and implementing regulations in this area.

1. Does the HCIA substantively require or prohibit adoptions by gays or lesbians?
2. Do American implementing laws or regulations substantively require or prohibit adoptions by gay or lesbian individuals or couples?
3. Will HCIA procedures influence adoptions by gay or lesbian individuals or couple?
4. Will American implementing laws or regulations procedures influence adoptions by gay or lesbian individuals or couple?
5. Does the HCIA require or prohibit recognition of adoptions by gays or lesbians?
6. Do American implementing laws or regulations require or prohibit recognition of adoptions by gay or lesbian individuals or couples?
7. Do the HCIA or American implementing laws or regulations violate the Constitution of the United States in any of these respects?

B. Impact of HCIA and IAA on Substantive Adoption Policies

1. Does HCIA substantively require or prohibit adoptions by gay or lesbian individuals or couples?

With regard to the substantive policies regulation adoption, the Hague Convention incorporates the domestic laws of the State of origin and the receiving State. The Convention commits party Nations to a few general policies (favoring best interests of children, opposing profiteering and child-selling, preventing undue influence, requiring informed consent, respecting the religious and cultural values of the families, etc.\textsuperscript{128} None of those policies or principles endorses or opposes adoptions by gays and lesbians. Nothing in the text of the Hague Convention provides any requirement or indicates any intent to directly promote (or discourage) adoptions by gays and lesbians. Nothing in the commentary on or of the drafting history of the Convention evidences any such intent. The Convention is “clean” - neutral and nonpartisan - regarding whether adoptions by gays and lesbians is permitted.

However, some of the substantive standards used the Convention could operate to prevent placing children for adoption with American gays and lesbians. It uses the local standard of “eligibility and suitability” to define whether an adoption by particular adults is appropriate.\textsuperscript{129} Central Authorities in both states must agree that the adoption is “suitable.”\textsuperscript{130}

\textsuperscript{127}Id. at 574-75 (2004).
\textsuperscript{128}HCIA, supra note 1, at Arts. ** *.
\textsuperscript{129}Id. at Arts. 5(a); 15(1)-(2).
\textsuperscript{130}Id. at Art. 17(c) & (d).
The Central Authority in the receiving State must consider and report on the “suitability” of the prospective adopters, including their “background, family and medical history, social environment, [and] reasons for adoption.” The Central Authority in the State of Origin must consider “the child’s upbringing . . . [and] ethnic, religious and cultural background,” and the child’s “background, social environment, [and] family history” in determining that an adoption is “suitable.” The match with the prospective parents must be “in the best interests of the child.” If followed, these standards could weed out some of the most gay-centric or politicized or dangerous attempted international adoptions by gays, lesbians and other prospective adopters.

2. Do American implementing laws or regulations substantively require or prohibit adoptions by gay or lesbian individuals or couples?

It appears that nothing in the International Adoption Act or its implementing regulations on its face mandates, requires or encourages adoptions by gays and lesbians, or directly overturns state adoption policies on this issue. Consistent with the Convention, the IAA provides that “a state or political subdivision thereof [is not preempted] from enacting any provision of law with respect to [intercountry adoption]” so long as it is not inconsistent with the Convention or the IAA.

C. Impact of HCIA and IAA on Procedural Adoption Policies

1. Will HCIA procedures influence adoptions by gay or lesbian individuals or couple?

The Hague Convention establishes and requires compliance with some significant procedural protections before intercountry adoptions between party Nations can occur. None of those procedures directly promote or prevent adoptions by gays and lesbians. Nothing in the text of the Hague Convention provides any requirement or indicates any intent to directly promote (or discourage) adoptions by gays and lesbians.

However, the procedures are not “neutral” entirely. Some of the procedural provisions of the Convention appear to be designed to prevent the kind of fraud, deception and abuse whereby some American gays and lesbians have adopted children from foreign countries in violation of foreign adoption policies against placing children with gays and lesbians for adoption. For example, the mandatory disclosure of information to the Central Authorities in the receiving State about prospective adopters’ “background, family and medical history, social environment, [and] reasons for adoption,” and the mandatory transfer of such reports to the Central Authority in the State or origin to determine if the adoption is “eligible” and “suitable” could

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131 Id. at Art. 15(1).
132 Id. at Art. 16(1)(b).
133 Id. at Art. 16(1)(a).
134 Id. at Arts. 16(1)(d) (best interests); 15(1) (“characteristics of the children for whom they would be qualified to care”).
135 Id. at * ___.
136 Id. at Art. *
137 Id. at Art. 15(1).
prevent some abuses. Mandatory disclosures and mandatory informed consent procedures applicable to the parents or guardians of the child, and the child,\textsuperscript{138} and prohibition of inducing payments,\textsuperscript{139} also may prevent some fraud and some buying of babies by controversial would-be adopters.

2. \textit{Will American implementing laws or regulations procedures influence adoptions by gay or lesbian individuals or couple?}

It appears that nothing in the procedural requirements of the International Adoption Act or its implementing regulations directly encourages or discourages adoptions by gays and lesbians, or directly overturns state adoption policies on this issue. However, like the HCIA, the IAA establishes procedural protections that could prevent fraud, deception, buying children and other illicit practices by gays, lesbians and other controversial potential adopters. For example, the IAA requires the agency that is facilitating the adoption to “ensure[] that a thorough background report (home study) on the prospective adoptive parent or parents has been completed in accordance with the Convention and with applicable Federal and State requirements and transmitted to the Attorney General with respect to each Convention adoption.”\textsuperscript{140} That report is to include:

\begin{itemize}
\item a full and complete statement of all facts relevant to the eligibility of the prospective adopting parent or parents to adopt a child under any requirements specified by the central authority of the child's country of origin...including, in the case of a child emigrating to the United States for the purpose of adoption, the requirements of the child's country of origin applicable to adoptions taking place in such country.\textsuperscript{141}
\end{itemize}

The U.S. Secretary of State is responsible for annually requesting the central authorities from all other Party States to “specify...restrictions on the eligibility of persons to adopt, with respect to which information on the prospective adoptive parent or parents in the United States would be relevant,”\textsuperscript{142} and to make that information available to all “agencies, persons, or entities...performing home studies.”\textsuperscript{143} This procedures may catch attempts to circumvent adoptions by persons ineligible to adopt under the law of the State of the child’s origin. Similarly, required certification that the adoption is in the best interests of the child may reduce some dangerous adoptions.\textsuperscript{144}

***

D. \textit{Impact of HCIA and IAA on Adoption Recognition Policies}

1. \textit{Does the HCIA require or prohibit recognition of adoptions by gays or lesbians?}

\begin{itemize}
\item \textsuperscript{138} Id. at Art. 4(c)(1)-(3).
\item \textsuperscript{139} Id. at Art. 4(c)(1)-(3).
\item \textsuperscript{140} 42 U.S.C. § 14923(b)(1)(a)(ii).
\item \textsuperscript{141} Id.
\item \textsuperscript{142} 42 U.S.C. § 14912(b)(2).
\item \textsuperscript{143} 42 U.S.C. § 14912(b)(3)
\item \textsuperscript{144} Id. at 12932(a)(2).
\end{itemize}
One of the express purposes of the Hague Convention is to “secure the recognition in Contracting States of adoptions made in accordance with the Convention.”\textsuperscript{145} Article 23 express requires recognition by Party States of adoptions between Party States done pursuant to the Convention. Such intercountry adoptions “shall be recognized by operation of law in the other Contracting States.”\textsuperscript{146} However, one express provision of the Hague Convention appears to protect the right of American states to refuse to recognize foreign adoptions by gay and lesbian partners and couples. Article 24 provides: “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.”\textsuperscript{147} This \textit{ordre public} or public policy exception to recognition of foreign judgments reflects the historic private international law rule concerning judgment recognition.\textsuperscript{148}

Clearly, this nonrecognition provision in the Convention is intended to embody a narrow exception. It is qualified first by the requirement that the adoption be “manifestly contrary to . . . public policy” in the forum State. Where a state has a statute or unambiguous appellate court ruling that forbids adoption by gay or lesbians partners or couples, for example,\textsuperscript{149} that requirement would seem to be clearly satisfied. The other qualification, that the nonrecognition decision also take into account the “bests interests of the child” adds another factor intended to discourage (but not deny) exercise of the power to deny recognition. Thus, if the child would be abandoned, or left without legal support or guardian, that could influence (but need not dictate) the decision. However, since the Convention provides that if an adoption fails, the child may be placed with another prospective adopter in the receiving State, suggesting the Convention is comfortable with alternative child-care arrangements, it is unlikely that nonrecognition of particular gay or lesbian adoptions would clearly harm the best interests of the child in many cases.

2. \textit{Do American implementing laws or regulations require or prohibit recognition of adoptions by gay or lesbian individuals or couples?}

What the Convention gives in the way of a public policy exception, Congress may have taken away under the IAA. It provides: “A final adoption in another Convention country, certified by the Secretary of State pursuant to subsection (a) of this section or section 14932(c) of this title, shall be recognized as a final valid adoption for purposes of all Federal, State, and local laws of the United States.”\textsuperscript{150} The certification is to be given to American citizens who adopt children abroad pursuant to the convention.\textsuperscript{151} In principle, the adoption by gays or lesbians in a foreign country will not be allowed if it would not be permitted in the home state of the adopting American.\textsuperscript{152}

\textsuperscript{145}Id. at Art. 1(c).
\textsuperscript{146}Id. at Art. 23(1).
\textsuperscript{147}Id. at Art. 24.
\textsuperscript{148}See generally Seymore, supra note __, at 381. See further **
\textsuperscript{149}See supra note __, and accompanying text.
\textsuperscript{150}42 U.S.C.A. § 14931(b).
\textsuperscript{151}Id. at § 14931(a).
\textsuperscript{152}But in some cases, a person may begin an adoption in Massachusetts, where lebigay adoption is permitted, then move to Florida which disallows such adoption, where the adoption is
However, this provision only applies to adoptions by American citizens of foreign children. It does not appear mandate recognition in the United States of Dutch lesbi-gay adoptions by Dutch citizens, for example. The language of the House Committee Report otherwise is simply oversimplification.

E. Constitutionality of Such Provisions

Should the Hague Convention be interpreted as requiring states to allow or recognize adoptions of children by lesbians and gays, it would create serious constitutional questions. Many Supreme Court decisions have held that the Constitution cannot be amended by Treaty.

* * *

V. Conclusion

Ironically, encouraging intercountry adoption is not one of the formal objectives of the Convention. Establishing safeguard and procedures, and stopping abuses that have existed in a small-but-sensational minority of international adoptions are explicit objectives of the HCIA, and one way to achieve those objectives is to significantly reduce international adoptions, to slow them to a trickle of exactingly screened, perfectly comfortable adoptions. From the very restrained language of the Hague Convention, it seems almost as if the drafters of it believed that the abuses they wanted to stop were caused in some part by too much enthusiasm for intercountry adoption, and that they were afraid that if they expressed direct support for intercountry adoption, however phrased and limited by the qualification of intercountry adoptions pursuant to proper procedures protecting the rights of all concerned, that official encouragement of intercountry adoption might lead or open the door for more abuses.

Thus, a skeptic might view the HCIA as an anti-intercountry adoption instrument. However, the Convention “[r]ecogniz[es] 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 or origin,” obligates Central Authorities to co-operate, and “as far as possible, eliminate any obstacles” (at least “to application of the Convention,”), mandates Central Authorities to “facilitate . . . and expedite proceedings with a view to obtaining the intercountry adoption[s],” and to “take all necessary steps to obtain permission for the child to leave the

completed. The action of the Florida authorities would be necessary to prevent violation of state policy.
State of origin and to enter and reside permanently in the receiving State.” 161 As a practical matter, the institutions, organization, procedures and requirements established by the Hague Convention have created a system for international adoptions that could facilitate and lead to more, rather than fewer, intercountry adoptions. Indeed, in the first dozen years of its existence, the number of international adoptions steadily increased.

Because international adoption is seen by some as evidence of failure of the country of origin to adequately provide for all of its children, or of imperialistic intrusion by the foreign countries into which the children are sent for adoption, or as exploitation of the poverty of parents in the sending country by adoptive couples from the rich receiving country, countries that send significant numbers of children to be adopted abroad seem to go through cycles of permissive and restrictive adoption. 162 To some extent, the Hague Convention appears to have been drafted during one of the restrictive cycles in international adoption, responding to several of high-profile abuses of lax international adoption policies in a number of nations and exploitation of the lack of integrating mechanisms between countries in such adoptions.

The Hague Convention might also be viewed by a skeptic as a device intended to restrict, limit, impose upon and give the international community control over and supervision of adoptions in the United States – at least adoptions of foreign children by American citizens. Since the United States of America receives and effectuates more intercountry adoption of children from foreign countries than all other nations in the world combined, 163 that will be the practical effect of the Hague Convention when it comes into force in the United States. In structure, design and content, the Hague Convention reflects a “civilian” approach (unitary standards, central government control, government pre-approval requirements, expansive government supervision, extensive government bureaucracy, distrust of and limited scope for private initiative) that is at variance with the American tradition of encouraging private endeavors, laissez-faire assumptions, generally trusting private individuals and organizations (until they prove untrustworthy), flexible government regulation, pragmatic supervision, etc. 164

Whether (and, if so, how) creation of a Central Authority in the United States and implementation of bureaucratic requirements of the Convention here will impact the flow of intercountry adoptions into the United States remains to be seen, once the Hague Convention comes into force here. The abuses of government under-regulation of intercountry adoption may be replaced by abuses of oppressive government over-regulation. The abuses of a few private adoption agencies initiative may be replaced by the tyranny of centralized authorities. The occasional tragedies of over-zealous enthusiasm for intercountry adoption may be replaced by the even more frequent tragedies of unhelped parentless children being relegated or abandoned to institutional care in miserable warehouses for unwanted children in third-world countries, while families yearning to love and raise those children remain childless and child-deprived in the most affluent nation on earth. The HCIA and its implementing laws could become instruments for the international promotion and mandatory intercountry recognition of lesbigay adoptions.

161 Id. at Art. 18.
162 Wardle, Parentlessness, supra note __, at ___; Kleem, supra note __, at 338-341.
163 See supra notes ___ through ___ and accompanying text.
Alternatively, the institutions, standards, and procedures established by the Hague Convention may significantly reduce or eliminate many current intercountry adoption abuses (such as baby-selling, profiteering, and fraud). The Convention organizations, structure and requirements may work to facilitate intercountry adoptions of the world's parentless, abandoned, and institutionalized children even greater numbers. It may eliminate the deception, fraud and disregard of national policies in many countries by ineligible prospective adopters, including some lawless or defiant gays and lesbians. It may encourage finding homes with a mother and a father for thousands more of the world's parentless children, and may protect the policies of states that have high dual-gender parenting standards for couple adoptions. The Hague Convention has that great potential, but whether the Hague Convention will go down that path of positive development or another path of detrimental development depends upon many decisions that will be made by American and other nation’s policy-makers in the future.

Thus, the future and outcome of the Hague Convention on Intercountry Adoption is in our hands. May we all work diligently toward the goals of implementing the Hague Convention in ways that will make intercountry adoption more abuse-free, more lawful, more respectful of each nation’s adoption policies and values, more successful, more commonplace, and more accessible to provide responsible family homes to more of the millions of this world’s needy, parentless children.
Appendix 1:

Outline of the Hague Convention on Intercountry Adoption

Chapter I - Scope of the Convention

Art. 1 Objectives to establish safeguards, protect BIC, prevent child trafficking, ensure recognition of intercountry adoptions.

Art. 2 Convention applies when “a child habitually resident in one Contracting State (‘the State of origin’) has been, is being, or is to be moved to another Contracting State (‘the receiving State’) either for permanent adoption or after such adoption.

Art. 3 Convention applies only to adoption of children under 18 years old.

Chapter II - Requirements for Intercountry Adoption

Art. 4 “Competent authorities” in the State of origin establish eligibility of the child for adoption, that placement is in the child’s best interests, that required counseling and consents have been given properly and without improper financial inducement. However, if the adoption is in derogation of certain Articles of the Convention by bilateral treaty states may choose to deny recognition to such adoptions.

Art. 5 “Competent authorities” in the receiving State must determine that the prospective adoptive parents are eligible and suitable to adopt, and that “the child is or will be authorized to enter and reside permanently in that State.”

Chapter III - Central Authorities and Accredited Bodies

Art. 6 Each signatory State must designate at least one Central Authority to fulfill convention obligations.

Art. 7 Central Authority must co-operate with central authorities in other party States to protect children, accomplish the purposes of the Convention, and take, give and keep information.

Art. 8 Central Authority must prevent improper gain from adoption.

Art. 9 Central Authority must get and provide information needed to complete intercountry adoptions, to provide useful reports, and promote adoption counseling.

Art. 10 Central Authority must accredit only competent bodies.
Art. 11  Accredited bodies must be non-profit, staffed by qualified, ethical, supervised persons, and to communicate to the Hague Permanent Bureau information about designation and accreditation.

Art. 12  A body accredited in one state can only act in other states if also accredited there.

Art. 13  Central Authorities must exchange contact and organizational information.

Chapter IV - Procedural Requirements in Intercountry Adoptions

Art. 14  The intercountry adoption process begins with application by the adopters in to the Central Authority of the state of their habitual residence.

Art. 15  If satisfied that the applicants are eligible and suited to adopt, that Central Authority sends a report to the Central Authority in the child’s State or origin.

Art. 16  If satisfied that the child is adoptable, and that all consents have been properly obtained, that Central Authority sends a report to the Central Authority in the receiving State.

Art. 17  Agreement to the adoption and compliance with the standards by both Central Authorities required.

Art. 18  Both Central Authorities to facilitate immigration of child.

Art. 19  Both Central Authorities to comply with all requirements before child is transferred.

Art. 20  Cooperation and communication between the Central Authorities is emphasized.

Art. 21  Procedures governing failed adoptions. If after transfer of the child but before adoption is completed the Central Authority determines the adoption is not in the child’s best interest, another placement in the receiving State is preferred.

Art. 22  Central Authorities may designate other public authorities, accredited bodies and qualified persons to perform Central Authority functions under its supervision.

Chapter V - Recognition and Effects of the Adoption

Art. 23  “An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States.”

Art. 24  Recognition may be refused “only if the adoption is manifestly contrary to [such State’s] public policy, taking into account the best interests of the child.”
Art. 25  If the adoption is in derogation of certain Articles of the Convention by bilateral treaty, States may choose to deny recognition to such adoptions.

Art. 26  Recognition includes recognition of the child-adoptive parent relationship, parental authority, and termination of prior parent-child relationship if according to the law of the State of adoption.

Art. 27  By conversion under the law of the receiving State, parental rights of an adopted child may be terminated.

Chapter VI - General Provisions

Art. 28  Convention allows but does not require the State of origin to be the place of adoption.

Art. 29  Contact between adoptive and biological parents or guardians before proper consents have been taken is forbidden generally.

Art. 30  Preservation of information required and optional access to child and parental identity information authorized.

Art. 31  Information to be used only for authorized purposes.

Art. 32  Payment of actual costs, expenses and reasonable professional fees allowed but “improper financial or other gain” from intercountry adoption prohibited.

Art. 33  Central Authorities obliged to remedy violations of the Convention.

Art. 34  Translation of documents for authorities in the receiving State required upon request.

Art. 35  Central Authorities obliged to act expeditiously in adoptions.

Art. 36  In states with federal or plural legal systems, the laws and authorities of the applicable local unit of habitual residence incorporated.

Art. 37  Law of State determines which legal system applies.

Art. 38  Plural legal systems treated same as unitary legal systems.

Art. 39  Preserves existing obligations under other international instruments regarding international adoption, and permits party States to enter into other agreements with party States to improve implementation of the Convention in derogation of most of the Central Authority Articles.

Art. 40  Other reservations to the Convention forbidden.
Art. 41 Convention applicable to all applications received after the Convention is in force in both the receiving State and State of origin.

Art. 42 Secretary General of the Hague Conference must periodically convene a Special Commission to review operation of the Convention.

Chapter VII - Final Clauses

Art. 43 Ministry of Foreign Affairs of the Netherlands is the depositary of the Convention, and receives instruments of ratification, acceptance or approval by Hague Conference member States and other States who participated in the HCIA Session.

Art. 44 Depository to receive instruments of accession by other States, also.

Art. 45 States with federal or plural legal systems may make the Convention applicable to all those units or only certain units.

Art. 46 The Convention enters into force in a State three months after it deposits its ratification, acceptance, approval or accession. The Convention obligations do not apply between that State and any Party State who timely objects to the newly acceding State.

Art. 47 A State may withdraw from the Convention by depositing notice of denunciation, effective twelve months later.

Art. 48 The depository is obliged to notify the Hague Conference States and other party States of signatures, ratifications, acceptances, approvals, accessions, and denunciations.

### Appendix 2

**Immigrant Visas Issued to Orphans Coming to the U.S.**

<table>
<thead>
<tr>
<th>Year</th>
<th># Visas</th>
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Appendix 3

Intercountry Adoption Act of 2000

TITLE I-UNITED STATES CENTRAL AUTHORITY
Sec. 101. Designation of central authority.
Sec. 102. Responsibilities of the Secretary of State.
Sec. 103. Responsibilities of the Attorney General.
Sec. 104. Annual report on intercountry adoptions.

TITLE II-PROVISIONS RELATING TO ACCREDITATION AND APPROVAL
Sec. 201. Accreditation or approval required in order to provide adoption services in cases subject to the Convention.
Sec. 202. Process for accreditation and approval; role of accrediting entities.
Sec. 203. Standards and procedures for providing accreditation or approval.
Sec. 204. Secretarial oversight of accreditation and approval.
Sec. 205. State plan requirement.

TITLE III-RECOGNITION OF CONVENTION ADOPTIONS IN THE UNITED STATES
Sec. 301. Adoptions of children immigrating to the United States.
Sec. 302. Immigration and Nationality Act amendments relating to children adopted from Convention countries.
Sec. 303. Adoptions of children emigrating from the United States.

TITLE IV-ADMINISTRATION AND ENFORCEMENT
Sec. 401. Access to Convention records.
Sec. 402. Documents of other Convention countries.
Sec. 403. Authorization of appropriations; collection of fees.
Sec. 404. Enforcement.

TITLE V-GENERAL PROVISIONS
Sec. 501. Recognition of Convention adoptions.
Sec. 502. Special rules for certain cases.
Sec. 503. Relationship to other laws.
Sec. 504. No private right of action.
Sec. 505. Effective dates; transition rule.
