

UNREGULATED CUSTODY TRANSFERS: WHY THE PRACTICE OF REHOMING SHOULD BE CONSIDERED A FORM OF ILLEGAL ADOPTION AND HUMAN TRAFFICKING

Michael D. Aune*

TABLE OF CONTENTS

I.	INTRODUCTION	187
II.	THE PROBLEM OF UNREGULATED CUSTODY TRANSFERS	189
	A. <i>Background</i>	191
	B. <i>Unregulated Custody Transfers as a “Solution”</i>	193
	C. <i>Relevant Legislation at the Level of the Constituent States of the United States</i>	193
III.	STATEMENT OF INTERNATIONAL LAW PERTAINING TO THE INTERNATIONAL ADOPTION, HUMAN TRAFFICKING, AND THE BEST INTERESTS OF THE CHILD	196
	A. <i>The United Nations Convention on the Rights of the Child</i>	196
	B. <i>The Hague Adoption Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption</i>	200
	C. <i>The United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children</i>	203
	D. <i>Customary International Law</i>	204
	E. <i>The Best Interests of the Child in International Law</i>	206

* J.D. Candidate, University of Georgia School of Law, 2018; B.S. in Philosophy, Florida State University, 2008. I would like to thank everyone who had to deal with my unhappy discussions on a troubling and disheartening subject throughout my 2L year. In particular, I want to give my love and thanks to Katherine Ekstrand, who supported me throughout the process of producing this Note (and law school in general); Rachel Davidson, without whom I would not have had the opportunity to explore this important topic, and whose guidance helped me to understand in some small way the myriad issues faced by adopted children; and Professor Diane Marie Amann, who provided me with invaluable assistance and insight as I tried to navigate the maze of international law.

IV.	ANALYSIS.....	209
	A. <i>The United States is not Necessarily Obligated to Combat Unregulated Custody Transfers Under the Best Interests Standard</i>	210
	B. <i>Unregulated Custody Transfers do not Constitute Illegal Adoption Under International Law</i>	213
	C. <i>The United States is not Bound by the Child Rights Convention as a Matter of Customary International Law</i>	216
	D. <i>Unregulated Custody Transfers do not Qualify as Human Trafficking Under International Law</i>	217
	E. <i>Recommendations</i>	219
V.	CONCLUSION.....	223

I. INTRODUCTION

One of the most prominent instances of an unregulated custody transfer within the United States involved Arkansas state representative Justin Harris. Harris and his wife began the adoption process of three young girls in 2012, finalizing the adoption of two of them in March 2013.¹ The Harrises soon decided that the girls were violent and that this violence jeopardized the safety of the couple's biological sons.² Despite this, the couple said they were fearful of involving the Arkansas Department of Human Services because doing so might lead to charges of abandonment that could affect the custody of their biological children.³ In October 2013, the girls were given to an employee who had worked at a daycare run by the Harrises, and by March of 2014 it was discovered that one of the girls had been sexually assaulted by the man into whose custody they had been placed.⁴ That man, Eric Francis, is now serving a forty-year sentence for the sexual assault, as well as for two additional incidents of sexual assault involving other children.⁵ There was no government oversight or involvement at any point in the transfer of the girls from the Harrises to Francis.⁶

On April 6, 2015, Arkansas responded by enacting legislation⁷ that was designed to combat the practice of unregulated custody transfers within the state.⁸ Despite this legislation, the Harrises have not faced criminal or civil liability for their part in the unregulated custody transfer of their two adopted daughters, as their actions were legal prior to the passing of the rehoming legislation.⁹ The outrage generated when the unregulated custody transfer first came to light was also insufficient to oust Justin Harris from public office.¹⁰

¹ Benjamin Hardy, *Months After the Rehoming of Their Adopted Daughters Was Made Public, Justin and Marsha Harris Have Yet to Face Consequences*, ARK. TIMES (May 28, 2015), <http://www.arktimes.com/arkansas/months-after-the-rehoming-of-their-adopted-daughters-was-made-public-justin-and-marsha-harris-have-yet-to-face-consequences/Content?oid=3871740>. One of the girls was returned to the Arkansas Department of Human Services prior to the finalization of the adoption due to difficulties stemming from the girl's behavioral issues.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ H.B. 1676, 90th Gen. Assemb., Reg. Sess. (Ark. 2015), <http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/BillInformation.aspx?measureno=HB1676> (last visited Sept. 20, 2017).

⁸ ARK. CODE ANN. § 5-27-211(b) (West 2016).

⁹ See Hardy, *supra* note 1.

¹⁰ See *Legislator List*, ARKANSAS STATE LEGISLATURE, <http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/LegislatorSearchResults.aspx?member=&committee=All&chamber=> (last visited Sept. 28, 2016) (listing Justin Harris as the representative of the eighty-first district).

The sexual assault and unregulated custody transfer went undetected until an anonymous phone call to Arkansas' child maltreatment hotline led to the discovery of the unregulated transfer and subsequent abuse.¹¹ Because no oversight was mandated, there was no requirement that Francis receive the type of background checks and home studies¹² that are standard in adoption proceedings.¹³ Those precautions are designed to ensure that the best interests of children are protected. Absent government intervention or management of custody transfers, the girls in the Harris case were exposed to risks that might otherwise have been avoided.

“Unregulated custody transfers” involve the permanent transfer of custody of an adopted child to a third party, often using a legal device like a power of attorney in order to give the third-party legal control of the child. The third-parties in these transfers can be anyone, regardless of their qualification or previous history with children, and because there is no government oversight or notice of such transfers the children are potentially exposed to substantial harm.¹⁴ Information regarding the frequency of these transfers is scarce, but evidence suggests that the problem affects children adopted internationally more regularly than children adopted domestically.

This Note argues that the United States is not currently committed to actively combating the practice of unregulated custody transfers based on its existing international obligations. This Note arrives at that conclusion by exploring the international instruments that might currently bind the United States to take proactive steps to prevent the practice, thereby safeguarding the best interests of children adopted internationally.

Part I will explore the problem of unregulated custody transfers, including instances where such transfers have exposed the involved children to harm. This Note will then briefly examine the current legal framework within the

¹¹ Benjamin Hardy, *A Child Left Unprotected*, ARK. TIMES (Mar. 5, 2015), <http://www.arktimes.com/arkansas/a-child-left-unprotected/Content?oid=3691164>.

¹² Home studies are investigations into the home of prospective adoptive parents that are designed “to ensure that each child is placed in a suitable home and that good matches are made between children and families.” *Home Studies*, CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/topics/adoption/adoptive/home-study/> (last visited Dec. 19, 2016); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-733, CHILD WELFARE: STEPS HAVE BEEN TAKEN TO ADDRESS UNREGULATED CUSTODY TRANSFERS OF ADOPTED CHILDREN (2015) [hereinafter GAO REPORT] (“[A] home study [is] performed by a licensed professional to assess the suitability of the prospective parents, such as their health, finances, and criminal history.”).

¹³ See GAO REPORT, *supra* note 12, at 6–7 (discussing many of the checks adoptive parents must go through when seeking to adopt a child).

¹⁴ This practice is commonly referred to as “rehoming,” after the analogous practice of finding a new home for a problematic pet. However, equating children with animals makes the “unregulated custody transfer” terminology preferable.

United States. Part II will examine the current standing of international law that is most directly relevant to the problem, focusing on instruments concerning children's rights, illegal adoption, and human trafficking to which the United States is, at least arguably, bound, and will end with a discussion of the child's "best interests standard" within international law. Part III begins by analyzing whether the child's best interests standard as understood by the international community is applicable to the United States and will conclude that the United States arguably has committed itself to safeguarding the best interests of children. Despite the foregoing, this Note will argue that the open-ended nature of the best interests standard makes it difficult to say that the United States must take any particular course of action to combat the practice of unregulated custody transfers. Further, even if the United States is obligated to act, it is unclear what such action would look like, and whether it would be any different than the current approach which leaves the regulation of family matters up to each constituent U.S. state. Part III then compares unregulated custody transfers to illegal adoptions and human trafficking and argues that the substantive elements of both practices, as currently understood within international law, are manifested through such transfers. Despite the similarities, however, the present understanding of what constitutes illegal adoption and human trafficking in the international community makes it unlikely that such transfers are covered under international law. This Note argues that the definitions of both illegal adoption and human trafficking should be explicitly expanded to include unregulated custody transfers, insofar as the practice effectively satisfies the elements of both illegal activities. Finally, this Note will briefly examine potential strategies for dealing with unregulated custody transfers, focusing on ways to decrease the number of transfers that occur and to increase the likelihood of intervention when they do.

II. THE PROBLEM OF UNREGULATED CUSTODY TRANSFERS

The practice of "unregulated custody transfers," popularly known as "rehoming," came to the public's attention in the United States in late 2013, following the publication of an exposé examining the practice.¹⁵

¹⁵ See Megan Twohey, *The Child Exchange: The Network*, REUTERS (Sept. 9, 2013), <http://www.reuters.com/investigates/adoption/#article/part1>. This seminal piece on unregulated custody transfers—a 2014 finalist for the Pulitzer Prize for Investigative Reporting—focused on internet messaging boards that were being used as virtual meeting places/exchanges. *2014 Pulitzer Prize Winners & Finalists*, THE PULITZER PRIZES, <http://www.pulitzer.org/prize-winners-by-year/2014> (last visited Sept. 20, 2017). The article found that one Yahoo message board (now closed) had 261 children offered for unregulated custody transfers over a five-year period, yielding an average of about one child per week. Of these 261 children, at least 70% were born overseas.

Unregulated custody transfers involve the transfer of custody of an adopted child to a third party by an adoptive parent, often via the use of a power of attorney.¹⁶ There is no government oversight or notification of the custody transfer, which means there are no official means by which the best interests of the child or children¹⁷ are protected.¹⁸ Until very recently, these transfers were technically legal in every constituent state of the United States, and they remain so in the vast majority of those constituent states.¹⁹

As indicated above, significant obstacles make combating this practice difficult. First, U.S. states are generally left to combat the practice individually, and what interstate coordination exists that might be brought to bear on the problem of unregulated custody transfers is inadequate.²⁰ Second, despite some federal interest on the topic,²¹ no new legislation has been proposed to address the issue at a national level. This inconsistent attention leaves adopted children—and particularly internationally adopted children—vulnerable to the potential harms inherent in the practice.²² These harms are not merely theoretical: there are documented instances where children were left with people who were later convicted for possession of child pornography or were accused of sleeping naked in the same bed as a child acquired through one of these transfers.²³

¹⁶ Twohey, *supra* note 15.

¹⁷ The “best interests of the child” is a legal term of art used to describe the standard by which decisions concerning a child are to be judged in both the public and private spheres. This standard is enshrined within the international community in Article 3 of the United Nations Convention on the Rights of the Child. *See* G.A. Res. 44/25, art. 4, ¶ 1, Convention on the Rights of the Child (Nov. 20, 1989) [hereinafter Child Rights Convention]. The official comments on Article 3 describe the best interests of the child as a substantive right, an interpretive legal principle, and a rule of procedure. *See* Comm. on the Rights of the Children, U.N. Doc. CRC/C/GC/14, at 3–4 (May 29, 2013). The comments to Article 3 include a non-exhaustive list of factors, relevant to a best interests of the child analysis, centered around protecting and advancing the overall well-being of the child. *See generally id.*

¹⁸ *See* Twohey, *supra* note 15.

¹⁹ *See infra* Part II.A for a more detailed discussion of the status of unregulated custody transfer legislation within the United States. The United States has a federal system of government wherein each of the constituent states is a sovereign power with legislative authority. Although the federal government is empowered to legislate in some areas, the individual constituent states are primarily responsible for the creation and enforcement of criminal legislation within their respective jurisdictions. *See* U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

²⁰ *See infra* note 61, for a discussion of the Interstate Compact on the Placement of Children.

²¹ *See* GAO REPORT, *supra* note 12 (discussing the scope of the practice at a national level and displaying a variety of approaches to tackling the problem).

²² *See* Twohey, *supra* note 15.

²³ *Id.*

The legislative responses to the issue of unregulated transfers within the United States have not demonstrated movement towards a unified, nationwide solution to the problem. Relatively few U.S. states have existing legislation aimed at combating the practice, and few of those states laws do more than impose limits on the time during which custody can be transferred to a non-relative third party through use of a power of attorney.²⁴ What momentum there was at the federal level appears to have faltered, and there has been no official congressional action since the Government Accountability Office published a report in 2015, at Congress's request, on the topic of unregulated custody transfers.²⁵

The focus on the United States is not misplaced, given its prominence in international adoption. By sheer numbers, the United States is the world's leading "receiving" country (a country that is the recipient of adopted children),²⁶ taking in nearly half of all children adopted internationally from 2004 to 2015.²⁷ Because the United States receives such a large proportion of internationally adopted children, the status of unregulated custody transfers within the current understanding of the international law—particularly the international legal framework around illegal adoption and human trafficking—is relevant worldwide.

A. Background

Evidence suggests that older children adopted internationally are more likely to be the subject of an unregulated custody transfer, though little data on the actual shape and scope of the problem exist due to the underground nature of the practice.²⁸ Even though any given child is a potential victim of

²⁴ See *infra* Part III.C for a detailed discussion of U.S. law on a state-by-state basis.

²⁵ See GAO REPORT, *supra* note 12. Despite the initial interest at the federal level, a survey of current federal legislation did not uncover any statutes that target the practice of unregulated custody transfers.

²⁶ In international adoption, the "receiving country" is the country which will receive the adopted child. In contrast, the "sending country" is the country from which a child will be adopted. Developed nations tend to be receiving countries, while poorer developing countries tend to be sending countries. See Elizabeth Bartholet, *International Adoption*, in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE 63, 66 (Lori Askeland ed., 2006).

²⁷ From 2004 to 2015, the United States adopted 165,504 children internationally, while the remaining twenty-three responding countries adopted 178,364 children internationally. See Peter Selman, *Global Statistics for Intercountry Adoption: Receiving States and States of Origin 2004–2015*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (2017), <https://assets.hcch.net/docs/a8fe9f19-23e6-40c2-855e-388e112bf1f5.pdf>.

²⁸ See Twohey, *supra* note 15 (observing that the majority of children advertised on internet messaging boards for the purpose of transferring custody ranged in age from six to fourteen years old); see also GAO REPORT, *supra* note 12, at 4 ("[R]eports of unregulated transfers have primarily pertained to children adopted internationally or from foster care); *id.* at 13–14

the practice, many children adopted overseas are more prone to victimization because they come from institutionalized settings which have been linked to behavioral, emotional, or developmental problems.²⁹ This presents unique challenges with which adoptive parents may struggle to cope, thereby threatening to disrupt or dissolve the adoption.³⁰ It can also be more difficult to get accurate child histories, and adoptive parents may not be prepared to handle any undisclosed or undiagnosed behavioral, mental, or emotional problems with which a child may be struggling.³¹

According to the U.S. Department of State, no federal requirements mandate post-adoption reviews or reports, though a country of origin—i.e., the country where the child is from—may require periodic reports within a specified timeframe following an international adoption of a child.³² Further, the post-adoption help available to struggling adoptive parents from the government or the adoption agency with whom they worked is often limited or non-existent.³³ It is also practically impossible to break the legally-created parent-child relationship or accomplish involuntary termination of parental rights without judicial intervention.³⁴ In fact, there are no state-sanctioned or formal means by which an adoptive parent in the United States can end his or her parental relationship with a child following the finalization of an adoption decree.³⁵ Without adequate resources and a state-sanctioned way to dissolve a fatally troubled adoption, parents are left in limbo. Parents are not

(noting that under 8% of children adopted internationally in 2013 were younger than one year old, and that a 2013 study found that almost half of adoptive parents surveyed said that their internationally adopted children had diagnosed special needs).

²⁹ See Dana E. Johnson, *Know the Risks: Adopting an Institutionalized Child*, ADOPTIVE FAMILIES ASSOCIATION OF BC, <https://www.bcadoption.com/resources/articles/know-risks-adopting-institutionalized-child> (last visited Dec. 21, 2016) (discussing the types of mental and physical issues associated with the adoption of post-institutionalized children); see also RUTH LYN MEESE, *CHILDREN OF INTERCOUNTRY ADOPTIONS IN SCHOOL: A PRIMER FOR PARENTS AND PROFESSIONALS* 4–17 (2002) (discussing pre-adoption care of adopted children from several prominent sending countries, and the connection between institutionalization and the health and developmental difficulties it causes children).

³⁰ GAO REPORT, *supra* note 12, at 5 (“[A]n adoption may be terminated as a result of disruption, which occurs before the adoption is finalized, or a dissolution, which occurs after the adoption is finalized.”); MEESE, *supra* note 29, at 4–17.

³¹ Twohey, *supra* note 15; see also GAO REPORT, *supra* note 12, at 5.

³² GAO REPORT, *supra* note 12, at 8.

³³ *Id.* at 20–24.

³⁴ Andrea B. Carroll, *Breaking Forever Families*, 76 OHIO ST. L.J. 259, 260 n.7 (2015) (citing Tiffany Woo, Comment, *When the Forever Family Isn't: Why State Laws Allowing Adoptive Parents to Voluntarily Rescind an Adoption Violate the Adopted Child's Equal Protection Rights*, 39 SW. L. REV. 569, 571–72 (2010)) (highlighting how rare it has historically been for courts to set aside finalized adoption decrees).

³⁵ *Id.* at 260–61.

only unable to maintain their custodial relationship with the child, but they also lack a legally-sanctioned way of permanently relinquishing that custody.

B. Unregulated Custody Transfers as a “Solution”

Unregulated custody transfers offer a way out of an adoption—a way that avoids the potential legal consequences of a finding of abuse or neglect, and one of the only possible means by which adoptive parents in the United States can relinquish custody of a child. A common mechanism for effectuating these transfers is the use of a power of attorney, “a notarized statement declaring the child to be in the care of another adult.”³⁶ A power of attorney acts as a legal loop-hole of sorts. Although parents cannot legally divest themselves of their parental rights and obligations through use of a power of attorney, they can practically achieve the same effect by enabling a caretaker to make major decisions regarding a child.³⁷ Normally, the ability to use a power of attorney to transfer temporary custody of a child can be advantageous. For example, parents deployed overseas can confer on a friend or relative the power of attorney to temporarily transfer custody of a child, thereby protecting the best interests and welfare of the child without requiring government intervention.³⁸ However, this same tool can be and has been used as a way of establishing a permanent custodial relationship without going through state-sanctioned processes designed to safeguard the best interests of the child.³⁹ When joined with the ability to find new homes for children via the internet with virtual anonymity and privacy, the use of a power of attorney offers parents a way out of an adoption unavailable through traditional legal channels.

C. Relevant Legislation at the Level of the Constituent States of the United States

There is no law directly concerning the unregulated custody transfer of adopted children at the federal level of the United States, despite interest in the subject as evidenced by the report issued by the Government

³⁶ Twohey, *supra* note 15.

³⁷ See O.C.G.A. § 19-9-123 (Westlaw current through the 2017 Session of the Georgia General Assembly) for an example of the broad authority that can be granted via a power of attorney.

³⁸ *Id.* (laying out the authority of an agent authorized to care for a child using a power of attorney).

³⁹ See generally Twohey, *supra* note 15 (describing how a power of attorney can be used to create a *de facto* custodial relationship between an agent and a child).

Accountability Office in 2015.⁴⁰ However, legislatures of the constituent states of the United States began to respond to the problem of unregulated custody transfers in 2014.⁴¹ To date, twelve of those states have legislation that targets some aspect of unregulated custody transfers. Eight states—Arkansas,⁴² Colorado,⁴³ Florida,⁴⁴ Kentucky,⁴⁵ Louisiana,⁴⁶ Maine,⁴⁷ Missouri,⁴⁸ and Nevada⁴⁹—have passed laws making it a felony to engage in unregulated custody transfers. New Hampshire,⁵⁰ North Dakota,⁵¹ Rhode Island,⁵² and Wisconsin⁵³ also have laws targeting these custody transfers, but the penalties proscribed are misdemeanors.⁵⁴

Of the twelve U.S. states that have passed legislation that targets some aspect of unregulated custody transfers, few have targeted the various ways such transfers are effectuated. For example, Florida's relevant statute prohibits the use of any public media to advertise either that a child is

⁴⁰ See GAO REPORT, *supra* note 12.

⁴¹ Wisconsin was the first U.S. state to target the practice with the passing of legislation in 2014. Barnini Chakraborty, *Wisconsin Becomes First State to Restrict Parents from Giving Up Adopted Kids*, FOX NEWS (Apr. 18, 2014), <http://www.foxnews.com/politics/2014/04/18/wisconsin-becomes-first-state-to-ban-advertising-adopted-kids-online.html>.

⁴² ARK. CODE ANN. § 5-27-211(b) (Westlaw through the 2017 legislative sessions) (effective July 22, 2015).

⁴³ COLO. REV. STAT. § 19-5-213.5 (Westlaw through August 8, 2017) (effective July 1, 2014).

⁴⁴ FLA. STAT. § 63.212(1)(g) (Westlaw through the 2017 First Regular Session and Special "A" Session) (effective July 1, 2014).

⁴⁵ KY. REV. STAT. ANN. § 403.352 (Westlaw through the end of the 2017 Regular Session) (effective July 15, 2016).

⁴⁶ LA. STAT. ANN. § 14:46.4 (Westlaw through the 2017 Second Extraordinary Session) (effective Aug. 1, 2016).

⁴⁷ ME. REV. STAT. ANN. tit. 18-a, § 5-104 (Westlaw through the 2017 First Regular Session) (amended 2017) (effective Jan. 1, 2017).

⁴⁸ MO. ANN. STAT. § 453.110 (Westlaw through the 2017 First Regular Session and First and Second Extraordinary Sessions).

⁴⁹ NEV. REV. STAT. ANN. § 127.240 (Westlaw current through the 79th Regular Session (2017)).

⁵⁰ N.H. REV. STAT. ANN. § 170-B:33 (Westlaw through the 2017 Regular Session).

⁵¹ N.D. CENT. CODE ANN. § 14-10-05 (Westlaw through 2017 Regular Session).

⁵² R.I. GEN. LAWS § 42-72.1-4(d) (Westlaw through Chapter 302 of the January 2017 Session).

⁵³ WIS. STAT. ANN. § 48.979 (Westlaw through 2017 Act 57) (effective Apr. 27, 2016).

⁵⁴ Going further, the average period of incarceration across those twelve states is thirty-four months, and the range is anywhere from six months (Rhode Island) to sixty months (Louisiana). Similarly, the average fine for those states is \$14,966.67, and the range extends from \$500 (Rhode Island) to \$100,000 (Colorado). The applicability of the laws also varies, with some states (e.g., Arkansas) only focusing on unregulated custody transfers involving adopted children, while other states (e.g., Louisiana) do not specify that a child must have been adopted for the legislation to be applicable.

available for adoption or that a child is sought for adoption.⁵⁵ Missouri, on the other hand, prohibits the transfer of custody of a child without first obtaining a court order approving or ordering the transfer.⁵⁶ And North Dakota prevents anyone other than a child's parents from assuming the permanent care and custody of a child—with the exception of placements with a grandparent, uncle, or aunt—for the purposes of establishing a permanent custodial relationship.⁵⁷ Finally, Kentucky,⁵⁸ Maine,⁵⁹ and Wisconsin⁶⁰ only go so far as to prevent the use of a power of attorney to transfer parental rights and responsibilities for more than one year.

Several obstacles make combating the practice at the level of the constituent states of the United States difficult. First, U.S. states are generally left to combat the practice individually, and what interstate coordination exists that might be relevant to stopping unregulated custody transfers is inadequate.⁶¹ Second, despite some federal interest in the topic,⁶² no new legislation has been proposed to address the issue of unregulated custody transfers at the national level.

⁵⁵ FLA. STAT. § 63.212(1)(g) (Westlaw current through the 2017 First Regular Session and Special "A" Session of the 25th Legislature).

⁵⁶ MO. ANN. STAT. § 453.110 (Westlaw through the 2017 First Regular Session and First and Second Extraordinary Sessions).

⁵⁷ N.D. CENT. CODE ANN. § 14-10-05 (Westlaw through 2017 Regular Session).

⁵⁸ KY. REV. STAT. ANN. § 403.352 (Westlaw through the end of the 2017 Regular Session).

⁵⁹ ME. REV. STAT. ANN. tit. 18-a, § 5-104 (Westlaw through the 2017 First Regular Session) (amended 2017).

⁶⁰ WIS. STAT. ANN. § 48.979 (Westlaw through 2017 Act 57).

⁶¹ Every constituent state within the United States is a member of the Interstate Compact on the Placement of Children (ICPC), a binding contract between those states designed to facilitate custody transfers of children across state borders through the establishment of uniform procedures and policies. Those states have each enacted the text of the Compact; therefore, it is not federal legislation, despite its national scope. *See* ASS'N OF ADMINS. OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILD., <http://www.aphsa.org/content/AAICPC/en/home.html> (last visited Aug. 1, 2017). This Compact is not necessarily responsive to the issue of unregulated custody transfers, however, because it only applies to custody transfers of children between U.S. states when the child is in the custody of one of those states or when the child is being moved pursuant to a formal adoption or foster placement. As such, the ICPC is powerless to stop the use of a power of attorney to effectuate a permanent custody transfer, nor can it mandate oversight by the designated state agency responsible for overseeing such transfers. Since neither of the triggering conditions are satisfied, the Compact cannot be brought to bear on one of the common ways custody of children is given to new caretakers in an unregulated custody transfer. *See, e.g.*, O.C.G.A. § 39-4-4, art. III (Westlaw current through the 2017 Session of the Georgia General Assembly) (incorporating the ICPC into the Georgia state legislative code). Further, the Compact is dependent on state laws when an illegal placement has occurred, so it has no independent ability to enforce its provisions. *See, e.g., id.* art. IV.

⁶² *See* GAO REPORT, *supra* note 12 (discussing the scope of the practice of unregulated custody transfers at a national level and recommending possible solutions to this problem).

III. STATEMENT OF INTERNATIONAL LAW PERTAINING TO THE INTERNATIONAL ADOPTION, HUMAN TRAFFICKING, AND THE BEST INTERESTS OF THE CHILD

Intercountry adoption entails the change in an “adopted child’s habitual country of residence but not necessarily of the child’s citizenship.”⁶³ The United Nations estimated in 2005 that around 40,000 international adoptions took place each year, accounting for 15% of all adoptions (both intra- and intercountry) worldwide.⁶⁴ The United States is the world’s leading receiving country, but the United States adopts internationally at a lower rate than many other receiving countries as a percentage of its overall number of adoptions (both international and domestic).⁶⁵

Because of their focus on adoption, human trafficking, or the concept of the best interests of the child, several international instruments discussed in this section can be roughly categorized as applicable to unregulated custody transfers. This Note will focus primarily on widely applicable international law, rather than bilateral or small multilateral instruments. It does so for two reasons: first, international adoption involves many countries, and as such the widest possible applications will be the most useful to combating practices that harm those adoptive children; second, the United States is the largest receiving country with respect to international adoptions.⁶⁶ Since the problem of unregulated custody transfers involves the “giving away” of children who were received by the adopted parents, focusing narrowly on the United States is an efficient way to combat the practice with respect to the largest population of children adopted internationally.

A. *The United Nations Convention on the Rights of the Child*

The United Nations Convention on the Rights of the Child (Child Rights Convention) was adopted by the General Assembly in 1989 and entered into

⁶³ See *Child Adoption: Trends and Policies*, DEP’T OF ECON. & SOC. AFFAIRS, U.N. Doc. ST/ESA/SER.A/292, U.N. Sales No. E.10.XIII.4, at 74 (2009), http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf.

⁶⁴ *Id.*

⁶⁵ *Id.* at 75. Table V.3 cites the percentage of international adoptions in the United States at 15%, while other receiving countries adopt internationally at a considerably higher rate. See, e.g., France at 90%, Spain at 82%, Italy at 68%, Sweden at 65%, Norway at 76%, and Belgium at 95%. Of the twenty-seven countries listed, only the United Kingdom (5%) and Portugal (1%) adopted internationally at a rate lower than that of the United States. The median rate for international adoption is 64% of all adoptions.

⁶⁶ Selman, *supra* note 27.

force in 1990.⁶⁷ The Child Rights Convention was created because the international community determined that the existing human rights conventions and treaties did not adequately address the unique needs of children,⁶⁸ and that proactive measures should be taken to protect the rights of children given children's comparatively vulnerable status relative to adults.⁶⁹ The Child Rights Convention is binding on states parties rather than individual persons, per the language of that Convention, meaning that states parties are the entities responsible for protecting the rights set forth in that instrument.⁷⁰

As of 2016, the United States is the only member of the United Nations that has not ratified the Child Rights Convention, though it is a signatory.⁷¹ The United States was also an active participant over the ten-year process during which the Child Rights Convention was drafted.⁷² Despite this, the Child Rights Convention has never been submitted to the Senate for ratification, as required by the U.S. Constitution.⁷³ This may reflect a general wariness of international treaties—which might undermine the sovereignty of the United States—as well as political opposition within the United States.⁷⁴ This opposition asserts that committing to that Convention

⁶⁷ Child Rights Convention, *supra* note 17.

⁶⁸ See Iara de Witte, *Illegal Adoption as Child Trafficking: The Potential of the EU Anti-trafficking Directive in Protecting Children and Their Original Family from Abusive Intercountry Adoption* 8 (May 2012) (unpublished master's thesis, University of Amsterdam) (discussing the reasons motivating the creation of the Convention on the Rights of the Child).

⁶⁹ *Id.*; see also Child Rights Convention, *supra* note 17, at Preamble.

⁷⁰ See, e.g., Child Rights Convention, *supra* note 17, art. 6 (“1. *States Parties* recognize that every child has the inherent right to life. 2. *States Parties* shall ensure to the maximum extent possible the survival and development of the child.” (emphasis added)); see also *id.* art. 7(2) (“*States Parties* shall ensure” (emphasis added)); *id.* art. 9(1) (“*States Parties* shall ensure” (emphasis added)).

⁷¹ See United Nations Human Rights Office of the Commissioner, *Status of Ratification Interactive Dashboard*, <http://indicators.ohchr.org> (select “Convention on the Rights of the Child” from the “Select a treaty” dropdown box at the top of the page).

⁷² Susan Kilbourne, *Opposition to U.S. Ratification of the United Nations Convention on the Rights of the Child: Responses to Parental Rights Arguments*, 4 LOY. POVERTY L.J. 55, 55–56 (1998).

⁷³ *Id.* at 56; see also U.S. CONST. art. II, § 2, cl. 2.

⁷⁴ Kilbourne, *supra* note 72, at 57; see also Martha Middleton, *The Last Holdout: The ABA Adds its Voice to Calls for the United States to Ratify the Convention on the Rights of the Child*, 102-MAR A.B.A. J. 64, 66 (2016) (discussing several reasons why the Child Rights Convention has not been ratified by the United States); Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard — Explanation, Example, and Avenues for Change*, 4 N.Y.C. L. REV. 59, 68 (2001) (“Opponents of human-rights treaty ratification have justified their position with a wide array of arguments that such instruments would: diminish fundamental American rights; violate states' rights; promote world government; subject citizens to trial abroad; enhance Communist/Socialist

will threaten parental rights within the United States, insofar as the United States will be committed to advancing and protecting the rights of children in ways that might run counter to some parents' preferences regarding things like education and discipline.⁷⁵ Additionally, the regulation of family matters in the United States has traditionally been handled at the level of the individual U.S. states.⁷⁶ However, these worries run counter to both the spirit and the drafting history of the Child Rights Convention.⁷⁷ Perhaps most importantly for the purposes of this Note, none of the objections relate to Articles 21 and 35, discussed below, which are concerned with adoption and the human trafficking of children, respectively.⁷⁸

There are several key articles in the Child Rights Convention. First, Article 3 declares: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."⁷⁹ Under Article 3, States parties assume the obligation to "ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents . . . and, to this end, shall take all appropriate legislative and administrative measures."⁸⁰ States parties also assume the obligation to "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention" within the means of those states.⁸¹ Article 9 is perhaps the most relevant to the issue of unregulated custody transfers, as it declares that states parties shall ensure that children will not be separated from their parents against their will except in circumstances where competent authorities that are subject to judicial review determine that the separation is necessary to protect the best interests of the child.⁸²

Article 18 shifts focus to a child's parents and obligates States parties to make efforts to recognize the principle that parents "have common

influence; infringe upon domestic jurisdiction; increase international entanglements; and create self-executing obligations.").

⁷⁵ Kilbourne, *supra* note 72, at 58; *id.* at 97.

⁷⁶ *Id.* at 57–58.

⁷⁷ *Id.* at 61.

⁷⁸ *See generally id.*

⁷⁹ Child Rights Convention, *supra* note 17, art. 3. It is important to note that the language references States and State actors, not private individuals.

⁸⁰ *Id.* The importance of the "best interests of the child" standard will be explored more fully in Part II.E.

⁸¹ *Id.* art. 4.

⁸² *Id.* art. 9.

responsibilities for the upbringing and development of the child.”⁸³ This idea of parental obligation to the child is extended in Article 19, which requires States to take proactive measures to protect children from physical and mental abuse, from either violence or neglect.⁸⁴

Article 21 declares that adoption systems must protect the best interests of the children, and that those interests will be “paramount” in adoption proceedings.⁸⁵ Article 27 states that children have a right to “a standard of living adequate for the child’s physical, mental, spiritual, moral and social development” and that parents are responsible for providing that living standard to the child, within the parents’ abilities and financial capacities.⁸⁶ Further, Article 27 commits states parties to assist parents in the implementation of that right so far as the state is capable.⁸⁷ States parties also assume the obligation to prevent trafficking of children in “any purpose or in any form” under Article 35,⁸⁸ though the exact nature of what constitutes trafficking is not specified within the Child Rights Convention. This lack of clarity was somewhat clarified with the enactment of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which will be discussed below.⁸⁹

The United Nations Children’s Fund—commonly known as UNICEF—produced an Implementation Handbook for the Convention on the Rights of the Child (Handbook) in 2007 which further elaborates on the rights and obligations contained within the Convention.⁹⁰ The Handbook suggests that

⁸³ *Id.* art. 18.

⁸⁴ *Id.* art. 19.

⁸⁵ *Id.* art. 21.

⁸⁶ *Id.* art. 27.

⁸⁷ *Id.*

⁸⁸ *Id.* art. 35.

⁸⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter U.N. Anti-trafficking Protocol]. Although there is an optional protocol to the Child Rights Convention that also mentions human trafficking, it only does so with respect to the trafficking for the purposes of the sale of children, child prostitution, and child pornography. *See* Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Preamble, May 25, 2000, 2171 U.N.T.S. 227 [hereinafter Optional Protocol]. This contains a narrower definition than is found in the U.N. Anti-trafficking Protocol, and the language within the Optional Protocol suggests that the Optional Protocol is intended to focus on human trafficking within the context of sexual exploitation, rather than to define the outer boundaries of what constitutes human trafficking. *See id.* The Optional Protocol highlighting the international community’s growing concern with sexual tourism, sexual exploitation of children, and the growing availability of child pornography.

⁹⁰ RACHEL HODGKIN & PETER NEWELL, UNITED NATIONS CHILDREN’S FUND, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 37 (3d ed. 2007). The original version of the Handbook was published in 1998. *Id.* at XI.

states parties interpret what constitutes a child's best interests in ways that are not overly culturally relative so as to deny to a child any of the rights contained within the Child Rights Convention.⁹¹ The Handbook also recommended that children be given independent representation of the child's best interests whenever a legal decision related to the child is made.⁹² With respect to Article 9 of the Child Rights Convention, the Handbook states that: "The words 'against their will' refer either to the parents' will or to the parents' and child's will together; the grammar makes clear that it does not mean the child's will alone."⁹³ However, in instances in which the will of the child and the parents differs, the Handbook says that states should be willing to accept the role of arbiter between the parties.⁹⁴ The Handbook goes on to say that, at a minimum, the state should establish judicial machinery by which the child can make a case for arbitration, particularly where the state is willing to step in to settle disputes between parents.⁹⁵ Finally, the Handbook notes that a child may experience neglect when a child's parents are either unable to care for the child's needs, or intentionally do not care for the child's needs, when discussing the demands of Article 19.⁹⁶

B. The Hague Adoption Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

The Child Rights Convention establishes many child rights that states should work to protect, but it generally sticks to open-textured language. For example, with respect to adoption, the Child Rights Convention does not state with specificity how states should safeguard children; it lists the goals, but not the means.⁹⁷ However, other instruments exist that create legal frameworks that can protect the best interests of children in specific areas. For adoption, the Hague Adoption Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption⁹⁸ was adopted in 1993 with the aim of establishing an international framework that would ensure that children are protected during international adoptions.⁹⁹ The Hague

⁹¹ *Id.* at 38.

⁹² *Id.* at 242.

⁹³ *Id.* at 122.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 257.

⁹⁷ *See, e.g.*, Child Rights Convention, *supra* note 17, art. 21.

⁹⁸ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption art. I, May 29, 1993, 1870 U.N.T.S. 167 [hereinafter Hague Adoption Convention].

⁹⁹ *Id.* at Preamble.

Adoption Convention has ninety-eight contracting states, including the United States.¹⁰⁰

Trevor Buck has said that two goals of the Hague Adoption Convention are to help combat child trafficking and to reorient the international adoption system by placing primary emphasis on the best interests of the child, rather than on profit for those who were engaged in the international adoption process.¹⁰¹ Unlike the Child Rights Convention, the Hague Adoption Convention is not a human rights treaty, but rather a private law treaty.¹⁰² It does not establish human rights; instead, the Hague Adoption Convention builds upon the human rights framework established in the Child Rights Convention, as evidenced by the Hague Adoption Convention's preamble.¹⁰³ The Hague Adoption Convention's preamble states that the contracting states want "to establish common provisions" so as to protect the rights and best interests of a child who is the subject of intercountry adoption, "taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child"¹⁰⁴

The objectives of the Hague Adoption Convention are enshrined in Article 1, which highlights two of the purposes of the Convention. One purpose is "to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law."¹⁰⁵ Another purpose is "to establish 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."¹⁰⁶

¹⁰⁰ See *Status Table 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69> (last visited June 12, 2017) (listing the current member states to the Hague Adoption Convention).

¹⁰¹ TREVOR BUCK, *INTERNATIONAL CHILD LAW* 247 (2d ed. 2011).

¹⁰² Private law concerns the relationships between individuals and institutions, while public law concerns the relationship between individuals and the State. *Id.* at 67; *Public law*, BLACK'S LAW DICTIONARY (10th ed. 2014). Thus, the Hague Adoption Convention establishes how private individuals will interact via a designated State entity throughout the international adoption process, whereas the Child Rights Convention and the Anti-trafficking Protocol establish how States will interact with individuals in light of substantive rights granted by those (and related) documents.

¹⁰³ Hague Adoption Convention, *supra* note 98, at Preamble (stating that the Hague Adoption Convention "tak[es] into account the principles set forth in international instruments, in particular the [Child Rights Convention] . . .").

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* art. 1.

¹⁰⁶ *Id.* (emphasis added).

The Hague Adoption Convention requires that each member state designate a “Central Authority.”¹⁰⁷ That authority is responsible for ensuring that, among other things:

- i) the child is adoptable;
- ii) after considering domestic options, international adoption will be in the child’s best interests;
- iii) those whose consent is required have been informed about the legal consequences of consent to adoption and have freely given consent;
- iv) the child has been informed of the consequences of adoption and has consented (where required), and the child’s wishes have been considered;
- v) and that consent has not been induced via payment or any other form of compensation; and
- vi) the would-be adoptive parents are fit and eligible to adopt the child and have been counseled as is necessary.¹⁰⁸

The designation of a central authority is crucial, because it allows member states to trust one another throughout the intercountry adoption process, and J.H.A. van Loon, the former Secretary General of the Hague Conference on Private International Law, has commented that the mandated oversight by state authorities is the keystone of that trust.¹⁰⁹ Finally, Article 29 of the Hague Adoption Convention limits the type of contact that prospective adoptive parents can have with birth parents,¹¹⁰ and Article 32 prohibits anyone from receiving “improper financial or other gain” from activities related to international adoption.¹¹¹

¹⁰⁷ *Id.* art. 6.

¹⁰⁸ *Id.* art. 4.

¹⁰⁹ See David M. Smolin, *Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption*, Information Document No. 1, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 1, 8 (June, 2010), <https://assets.hcch.net/upload/wop/adop2010id01e.pdf> (quoting Secretary J.H.A. van Loon, who spoke in 2007 when the United States deposited its ratification of the Hague Adoption Convention: “The Convention has created a global framework that provides stability by giving countries the control they need to trust their partners.”).

¹¹⁰ Hague Adoption Convention, *supra* note 98, art. 29.

¹¹¹ *Id.* art. 32.

C. The United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children¹¹² entered into force in 2003 and has been ratified by 172 states, including the United States.¹¹³ It acts as a supplement to the United Nations Convention against Transnational Organized Crime.¹¹⁴ The Preamble states that the Anti-trafficking Protocol was necessary given the lack of a comprehensive international framework with which to combat human trafficking, and because trafficking victims would not otherwise be adequately protected without such a protocol.¹¹⁵

It is important to note that the definition of human trafficking¹¹⁶ under the Anti-trafficking Protocol is composed of three elements: activity, means, and purpose.¹¹⁷ “Activity” is comprised of the “recruitment, transportation, transfer, harbouring or receipt of person.”¹¹⁸ “Means” includes the “threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.”¹¹⁹ Finally, “purpose” involves “exploitation,” which includes prostitution, sexual exploitation, forced labour or services, slavery and similar practices, servitude, or the removal of organs.¹²⁰ Understanding how each of these elements is interpreted is important when determining the applicability of the Anti-trafficking Protocol to the practice of unregulated custody transfers. Notably, Article 3(c) spells out an exception when children are involved. To be precise, acts of “recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation” are considered trafficking even when the “means” listed in Article 3(a) are not present.¹²¹

¹¹² U.N. Anti-trafficking Protocol, *supra* note 89.

¹¹³ UNITED NATIONS TREATY COLLECTION, DEPOSITORY, STATUS OF TREATIES (Sept. 21, 2017, 5:28 PM), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&clang=_en.

¹¹⁴ U.N. Anti-trafficking Protocol, *supra* note 89, art. 1, ¶ 1.

¹¹⁵ *Id.* at Preamble.

¹¹⁶ The U.N. Anti-trafficking Protocol uses the phrase “trafficking in persons,” but this Note will proceed with the less unwieldy phrase “human trafficking.”

¹¹⁷ de Witte, *supra* note 68, at 50.

¹¹⁸ U.N. Anti-trafficking Protocol, *supra* note 89, art. 3(a).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* art. 3(c).

D. Customary International Law

Outside of the instruments discussed above, there is an additional source of international obligations recognized by the United States—customary international law. *Black's Law Dictionary* defines “customary international law” as “[i]nternational law that derives from the practice of states and is accepted by them as legally binding.”¹²² The definition contains two elements: an identifiable practice of states and the acceptance by those states of the practice as legally binding. This is a subjective stance towards the practice, meaning that the practice must be viewed by the state as binding on its actions in the international community. Customary international law stems from “a general and consistent practice of states followed by them from a sense of legal obligation”¹²³ as well as derivations from “general principles common to the major legal systems of the world.”¹²⁴ Customary law originally required adherence over a substantial amount of time, but this requirement has diminished in importance since World War II, perhaps because improved communication made the practice of states widely and quickly known where there is broad acceptance and no or little objection.¹²⁵ Anthea Roberts has argued that the modern conception of customary international law is “deductive” in nature, insofar as it is derived from “general statements of rules rather than particular instances of practice.”¹²⁶ Such custom “can develop quickly because it is deducted from multilateral treaties and declarations by international fora such as the [U.N.] General Assembly, which can declare existing customs, crystallize emerging customs, and generate new customs.”¹²⁷

The U.S. Constitution declares that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every [constituent] State shall be bound thereby, any Thing in the Constitution or Laws of any [constituent] State to the Contrary notwithstanding.”¹²⁸ U.S. federal courts have also acknowledged that customary international law is binding, provided that the United States has not

¹²² *Customary international law*, BLACK'S LAW DICTIONARY (8th ed. 2004).

¹²³ RESTATEMENT (THIRD) OF FOREIGN REL. § 102(2) (AM. LAW. INST. 1987).

¹²⁴ *Id.* § 101(2)(c).

¹²⁵ *Id.* at Reporter's Notes (2).

¹²⁶ Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001).

¹²⁷ *Id.*

¹²⁸ U.S. CONST. art. VI, cl. 2; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (AM. LAW. INST. 1987) (echoing the U.S. Constitution by stating that international law and agreements to which the United States is a party are the laws of that nation and “supreme over the law of the several [constituent] States”).

exempted itself from the relevant customary international law and there is no contradictory federal statute.¹²⁹ Further, it has been argued that customary international law could be considered federal common law, based on U.S. Supreme Court decisions that have treated customary international law as binding on the United States, though this debate has not been settled.¹³⁰

The Child Rights Convention can be considered customary international law with respect to the United States based on apparent subjective acceptance of that Convention by the U.S. government. For example, the U.S. Supreme Court referenced that Convention in a 2010 decision regarding the imposition of sentences involving life without parole on minors and highlighted that, although the Child Rights Convention was not binding on the Court, the “overwhelming weight of international opinion against life without parole for nonhomicide offenses committed by juveniles provides respected and significant confirmation for our own conclusions”¹³¹ Further, the

[U.S. Supreme] Court has treated the laws and practices of other nations and international agreements as relevant to the

¹²⁹ See *Oliva v. U.S. Dep’t of Justice*, 433 F.3d 229, 233–34 (2d Cir. 2005); see also *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003) (reiterating that “[i]t has long been established that customary international law is part of the law of the United States to the limited extent that where there is *no treaty*, and *no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations” and that “public international law is controlling only in the absence of controlling positive law or judicial precedent.” (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900) and citing *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986)) (internal quotation marks omitted)); see also *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, *where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects with which they treat.*” (emphasis added)). This judicial practice is not uncontroversial, however. For a discussion on the controversy surrounding declarations by U.S. federal courts holding customary international law to be binding on the United States, see CURTIS BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 147–56 (2d ed. 2015).

¹³⁰ See BRADLEY, *supra* note 129, at 147–56, which traces the history of customary international law within American jurisprudence and highlights that, although conventional wisdom in the 1980s was that customary international law had the status of federal common law, this proposition has become more contentious in the intervening years. This debate is important in large part because declaring customary international law to be federal common law could give it preemptory status when such federal common law conflicts with the laws of one of the constituent states of the United States. *Id.* at 149.

¹³¹ *Graham v. Florida*, 560 U.S. 48, 81 (2010) (internal quotation marks omitted).

Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.¹³²

Instances where federal courts have declined to find enforceable obligations arising under the Child Rights Convention have generally involved contradictory federal law which, as described above, cannot be preempted by customary international law.¹³³

E. The Best Interests of the Child in International Law

One thread that runs through international law is the best interests of the child legal standard, which has been an important concept for decades.¹³⁴ This standard is understood to be a constantly evolving “dynamic concept” that “encompasses various issues” by the Committee on the Rights of the Children (Child Rights Committee).¹³⁵ That body administers the Child Rights Convention, and it has issued a General Comment that explores the concept of the best interests standard within the context of Article 3 of the Child Rights Convention.¹³⁶

The Child Rights Committee has stated that the best interests standard involves examining and balancing the various factors and potential consequences of any decision pertaining to the welfare of a child in order to

¹³² *Id.* at 82.

¹³³ *See, e.g., Oliva*, 433 F.3d at 234 (noting that “Congress has enacted legislation defining the circumstances under which hardship to a child may appropriately be considered as a ground for granting relief This statute, and not the [Child Rights Convention], necessarily determines the outcome. . . .”); *Mejia v. Holder*, 492 Fed. Appx. 780, 781 (9th Cir. 2012) (“[E]ven if the Convention on the Rights of the Child were customary international law, Congress may legislate beyond the limits imposed by international law.”); *see also Martinez-Lopez v. Gonzales*, 454 F.3d 500, 503 (5th Cir. 2006) (memorandum decision) (“Given that Martinez-Lopez is directly challenging a statute, he cannot appeal to customary international law.”).

¹³⁴ *See* United Nations High Commissioner for Refugees, UNHCR Guidelines on Determining the Best Interests of the Child (May 2008), <http://www.unhcr.org/4566b16b2.pdf> (listing seven instruments that incorporate the best interests standard, including, e.g., the Hague Adoption Convention, Child Rights Convention, and the African Charter on the Rights and Welfare of the Child); *see also* Comm. on the Rights of the Children, *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, ¶ 1)*, U.N. Doc. CRC/C/GC/14 (2013), at I(A)(2) [hereinafter *General Comment on Art. 3*].

¹³⁵ *General Comment on Art. 3*, *supra* note 134, at II(11).

¹³⁶ *Id.*

ensure the child's interests are effectively advanced.¹³⁷ Explaining the nature of the best interests standard, the Child Rights Committee has stated that

[i]t should be emphasized that the basic best interests assessment is a general assessment of all relevant elements of the child's best interests, the weight of each element depending on the others In weighing the various elements, one needs to bear in mind that the purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the Convention and its Optional Protocols, and the holistic development of the child.¹³⁸

This standard is at the heart of the Child Rights Convention, which, as noted above, is binding on all U.N. member states except for the United States.

The Child Rights Committee has noted that there is no "hierarchy of rights," and that "no right could be compromised by a negative interpretation of the child's best interests."¹³⁹ The child's best interests should not only be considered on a case-by-case basis, or only when state decisions overtly affect the welfare of a single child; but even state actions, such as passing budget legislation, should incorporate the best interests of the child.¹⁴⁰ Further, the best interests of the child is to be understood as applying to both individual children, as well as children as a group,¹⁴¹ and it is applicable to decisions made in both the public and private spheres.¹⁴²

Despite the fact that the United States is not a state party to the Child Rights Convention, the best interests standard runs through the two Optional Protocols to the Child Rights Convention to which the United States is a state party.¹⁴³ The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts states that its goal of raising the age of recruitment of children into armed forces "will contribute effectively to the implementation of the principle that the best interests of the

¹³⁷ See *id.* at V(A)(2).

¹³⁸ *Id.*

¹³⁹ *Id.* at I(A).

¹⁴⁰ *Id.* at IV(A)(2)(d).

¹⁴¹ *Id.* at IV(A)(1)(c).

¹⁴² *Id.* at I(A).

¹⁴³ See United Nations Human Rights Office of the Commissioner, *supra* note 71 (select "Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict" from the "Select a treaty" dropdown box at the top of the page); see also *id.* (select "Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography" from the "Select a treaty" dropdown box at the top of the page).

child are to be a primary consideration in all actions concerning children.”¹⁴⁴ Similarly, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography specifies that the best interests of children “shall be a primary consideration” whenever victims of the specified illegal practices interact with a state party’s criminal justice system.¹⁴⁵ Interpretations of these Protocols must reflect their complementary relationship to the Child Rights Convention and “must always be guided by the principles of non-discrimination, best interests of the child and child participation.”¹⁴⁶ Given their complementary nature, the interpretation of the best interests standard within the Child Rights Convention can be read as informing and shaping the interpretation of the Optional Protocols to which the United States is a party. The Hague Adoption Convention is also shaped by the understanding of the principles set forth in Child Rights Convention, as the Hague Adoption Convention explicitly states that it takes “into account the principles set forth in international instruments, in particular the *United Nations Convention on the Rights of the Child*. . . .”¹⁴⁷

To reiterate, Article 3 states that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”¹⁴⁸ Additionally, Article 3 says that “States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being.”¹⁴⁹ The Child Rights Committee has interpreted the concept of the best interests standard laid out in Article 3 as a threefold concept: a substantive right, an interpretive principle, and a rule of procedure.¹⁵⁰ As a substantive right, the child has a right to have his or her interests taken as a primary consideration.¹⁵¹ As an interpretive principle, in the event that a legal provision is susceptible to multiple interpretations, the interpretation that best serves the child’s interests should be chosen.¹⁵² Finally, as a rule of procedure, decision-making processes established by a

¹⁴⁴ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, Preamble, May 25, 2000, 2173 U.N.T.S. 236.

¹⁴⁵ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, art. 8(3), May 25, 2000, 2171 U.N.T.S. 247.

¹⁴⁶ United Nations Children’s Fund, *Advancing the CRC*, https://www.unicef.org/crc/index_protocols.html (last visited June 13, 2017).

¹⁴⁷ Hague Adoption Convention, *supra* note 98, at Preamble.

¹⁴⁸ Child Rights Convention, *supra* note 17, art. 3(1).

¹⁴⁹ *Id.* art. 3(2).

¹⁵⁰ *General Comment on Art. 3*, *supra* note 134, at I(A)(6).

¹⁵¹ *Id.* at I(A)(6)(a).

¹⁵² *Id.* at I(A)(6)(b).

state party must include procedural guarantees any time evaluations of the child's best interests are made.¹⁵³ Looked at as a whole, the Child Rights Committee's comment on Article 3 displays an understanding of the best interests standard that is broad, pervasive, and holistic in its approach to advancing the best interests of children whenever decisions impacting the welfare of children must be made.

IV. ANALYSIS

This Part will explore whether the United States is currently obligated to take proactive measures to combat the practice of unregulated custody transfers. The analysis will begin with the more general best interests standard, then move on to instruments pertaining to illegal adoption and human trafficking. The reason behind starting with the more general best interests standard is simple: it is a cornerstone of international human rights law, as indicated by its place therein for the last half-century, as well as its prominence within the Child Rights Convention.¹⁵⁴ However, the best interests standard's broad scope and less-than-concrete nature, coupled with the United States' tenuous relationship with the Child Rights Convention, makes that standard an ineffective means of motivating the United States to proactively combat unregulated custody transfers. In light of this, this Part will examine those transfers in relation to the analogous practices of illegal adoption and human trafficking. Part IV will assert that expanding the understanding of either of those unlawful practices, such that they encompass unregulated custody transfers, is the most effective way of instigating change within the United States at the national level in light of that country's existing international obligations.

¹⁵³ *Id.* at I(A)(6)(c). To elaborate,

States must put into place formal processes, with strict procedural safeguards, designed to assess and determine the child's best interests for decisions affecting the child, including mechanisms for evaluating the results. States must develop transparent and objective processes for all decisions made by legislators, judges or administrative authorities, especially in areas which directly affect the child or children.

Id. at V(B).

¹⁵⁴ The best interests standard has been a part of the development of international human rights for decades; it was included in the 1959 Declaration of the Rights of the Child. *Id.* at I(A).

A. The United States is not Necessarily Obligated to Combat Unregulated Custody Transfers Under the Best Interests Standard

The United States is likely bound to the best interests standard contained within the Child Rights Convention by its numerous international commitments. Such commitments include self-imposed commitments as a state party to two Optional Protocols to the Child Rights Convention, the interpretation of which are influenced by the principles laid out in that Convention.¹⁵⁵ Similarly, the United States is a state party to the Hague Adoption Convention, which explicitly ties itself to the principles contained within the Child Rights Convention.¹⁵⁶ Going further, the near universal adoption of the Child Rights Convention, as well as the long-standing place of the best interests standard within international law, strongly suggests that the standard has achieved the status of customary international law, as discussed *supra* in Part III.D. That the United States has voluntarily committed itself to instruments that themselves incorporate the best interests standard is evidence that the United States has adopted the subjective stance required for a practice to obtain the status of customary international law.¹⁵⁷ This means that the United States is arguably bound to adhere to the requirements under the Child Rights Convention.

Unfortunately, even if one were to assume that the United States is bound to consider the child's best interests based on its existing treaty obligations and/or customary international law, it is unclear what such a commitment would actually entail. Although the Child Rights Committee's comments on Article 3 of the Child Rights Convention indicates that the best interests standard is to be understood as a robust right that should be a foundational consideration in all decisions affecting the well-being of children, the language of Article 3 hints at limitations on that best interests standard. John Quigley has pointed out that "the exercise by a child of a right is subject to the guidance of the child's parents. In this respect, the Convention would seem to protect a child's right less fully than human rights treaties of general application, like the International Covenant on Civil and Political Rights."¹⁵⁸

¹⁵⁵ See UNICEF, *Convention on the Rights of the Child: Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (Nov. 30, 2005), https://www.unicef.org/crc/index_30204.html (explaining that because the "Optional Protocol on the sale of children, child prostitution and child pornography" is "a complement to the Convention on the Rights of the Child, interpretation of the Optional Protocol's text must always be guided by the principles of non-discrimination, best interests of the child and child participation.").

¹⁵⁶ Hague Adoption Convention, *supra* note 98, at Preamble.

¹⁵⁷ See Part II.D, *supra*.

¹⁵⁸ John Quigley, *U.S. Ratification of the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 401, 404-05 (2003). Professor Quigley is the President's Club

Similarly, Quigley highlights that “Article 3 requires ratifying states to make a child’s best interests ‘a primary consideration’ The word ‘a’ here was substituted for ‘the’ from earlier drafts to make clear that a child’s best interest is not the overriding and only consideration.”¹⁵⁹ The United States itself objected to earlier drafts of Article 3 of the Child Rights Convention that used “the paramount consideration,” rather than “a primary consideration,” and the latter formulation was adopted as a compromise.¹⁶⁰

The United States’ objection to the language contained within earlier drafts of Article 3 indicates an unwillingness to elevate the best interests of the child above all other considerations. This unwillingness is not unfounded, as a member of the Child Rights Convention Working Group noted at a 1981 meeting that “other parties might have equal or even superior legal interests in some cases (e.g., medical emergencies during childbirth).¹⁶¹ Unfortunately, by forcing the child’s best interests to be weighed against the rights and interests of others, it becomes more difficult to determine when a child’s interests should prevail over another person’s competing interests. Per the interpretation of the best interests standard by the Child Rights Committee, so long as the interests of the child are properly weighed, nothing requires that the child’s interests ultimately win out over opposing considerations. In the setting of an unregulated custody transfer, the interests of family privacy and parental privilege with respect to the custody and control of their children must be weighed against the child’s best interests, and it is not clear how the tension arising from these competing interests is best addressed.

The incidents described in Part I highlight the potential dangers to which children involved in an unregulated custody transfer may be exposed, dangers that plainly are not in any child’s best interests. As noted above, the best interests standard must be applied on a case-by-case basis, and there is no definitive list of factors that must be considered. Indeed, the Child Rights Committee stated, “[it] considers it useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best interests assessment by any decision-maker having to determine a child’s best interests.”¹⁶² Such a list would provide guidance but would not necessarily

Professor of Law at Ohio State University and an expert in international law. See *Faculty Directory*, THE OHIO STATE UNIV. MORITZ COL. OF L., <http://moritzlaw.osu.edu/faculty/professor/john-b-quigley/> (last visited June 13, 2017).

¹⁵⁹ Quigley, *supra* note 158, at 405.

¹⁶⁰ Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 175 (1998).

¹⁶¹ *Id.* at 175.

¹⁶² *General Comment on Art. 3*, *supra* note 134, at V(A).

dictate a specific course of action in a particular situation wherein a child's best interests must be determined. Although unregulated custody transfers are not in the best interests of adopted children, it is unclear what must be done to combat the practice by the United States at the national level. Since the United States has traditionally left regulation of family matters to its constituent states, it could simply opt to leave the regulation of those custody transfers to those states. Regrettably, that approach has led to the untenable situation described in Part II with relatively few U.S. states addressing unregulated custody transfers via legislation, and widely varying legislation in those U.S. states that have legislated against the practice in some way.

Since Article 21 of the Child Rights Convention states that the best interests of the child becomes "the paramount consideration" when making decisions regarding adoption, it could be argued that unregulated custody transfers of adopted children are substantively different from transfers involving non-adopted children.¹⁶³ However, it is uncertain whether Article 21's language would apply after an adoption has been completed, since adoption decisions would have already been made and (in theory) completed prior to any unregulated custody transfer. Even if one assumed that Article 21 would extend to decisions concerning an adopted child after the finalization of an adoption, the United States is not bound by the terms of the Child Rights Convention. Even if the Child Rights Committee's interpretation of the best interests standard within the context of Article 3 is taken as indicative of the current scope of that standard as a matter of customary international law, that interpretation does not elevate the best interests of the child to the level of "the paramount consideration." Since the Optional Protocols to which the United States is a party do not cite the "paramount consideration" standard, and the evidence suggests that customary international law encompasses only "a primary consideration" standard, it would be difficult to argue that the United States is explicitly obligated to take special action when adopted children are involved. Bolstering that conclusion is the fact that the instrument pertaining to adoption to which the United States is a party—the Hague Adoption Convention—does not use the phrase "paramount consideration," but rather states that one of its objectives is "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child. . . ."¹⁶⁴ It would be difficult to argue—given this language and the United States' failure to ratify the Child Rights Convention—that the United States considers itself bound to make the child's best interests anything more than a primary consideration when decisions impacting the child's welfare are made.

¹⁶³ Child Rights Convention, *supra* note 17, art. 21.

¹⁶⁴ Hague Adoption Convention, *supra* note 98, art. 1(a).

Although it seems clear that the United States is bound to make the best interests of children a primary consideration when decisions affecting the well-being of children are made, what that fact entails is undetermined. The nature of the best interests standard makes it difficult to say it requires any particular course of action in a given case; so long as the child's best interests are a primary consideration, a state may determine that other considerations are more important. In the case of the United States, the traditional role its constituent states have played in regulating family life, as well as the competing rights and interests of a child's parents, may make it unattractive to attack the problem of unregulated custody transfers at the national level.

However, even if the United States is not necessarily bound by the best interests standard to take proactive measures against unregulated custody transfers, either due to its treaty obligations or as a matter of customary international law, it may be possible to demonstrate that the United States is bound by other instruments to combat the practice. To that end, the next two sections will explore whether unregulated custody transfers constitute a form of either illegal adoption, human trafficking, or both, and whether the United States is thereby obligated to combat those custody transfers.

B. Unregulated Custody Transfers do not Constitute Illegal Adoption Under International Law

There are three ways that an adoption can be illegal, thereby undermining or destroying the legal legitimacy of that adoption. The first is where parents have bypassed the official system and directly procured a child in a foreign country, then subsequently pretend that the child is theirs.¹⁶⁵ Another similar situation arises where the would-be parents who have bypassed the official adoption system attempt to legitimize the adoption at a later date.¹⁶⁶ Finally, there are cases where "parents" go through the official adoption process in good faith, but where there are fraudulent elements within the adoption process, such as falsified documents, abduction of the child prior to adoption, or coercion of the birth family to give up the child for adoption.¹⁶⁷

Of the three scenarios listed above, the first most closely resembles an unregulated custody transfer because of the intentional circumvention of existing procedures for obtaining permanent custody of a child.¹⁶⁸

¹⁶⁵ de Witte, *supra* note 68, at 22–23.

¹⁶⁶ *Id.* at 23.

¹⁶⁷ *Id.*

¹⁶⁸ It is important to distinguish short-term transfers of custody via a legal mechanism such as power of attorney from long-term transfers using the same mechanism. Power of attorney

By bypassing the official safeguards spelled out at the national level and under the terms of the Hague Adoption Convention, would-be adoptive parents prevent states from ensuring that adoption proceedings “are made in the best interests of the child and with respect for his or her fundamental rights,”¹⁶⁹ while simultaneously ensuring that birth parents are not being exploited or coerced.¹⁷⁰ Unregulated custody transfers bypass these same safeguards with respect to the interests of the child, though it seems less likely that parents are going to be exploited or coerced in these situations. This failure to ensure that the best interests of the child are protected is in contravention of Article 1 of the Hague Adoption Convention¹⁷¹ and Article 3 of the Child Rights Convention.¹⁷² Although Article 3 is binding on states and state actors, not private individuals, the Convention does establish that states have a responsibility for protecting the rights of children and taking measures to ensure those rights are not infringed upon. It is difficult to see why a state’s interest in protecting the rights of children within its jurisdiction extends only to official acts; presumably, a state has an ongoing interest in the continued protection and promotion of the rights of children under its administrative purview. As such, it seems appropriate to consider the best interests of a child within an unregulated custody transfer insofar as the private actors involved in such a transfer are undermining the state’s ability to live up to its commitments under the Child Rights Convention.

An argument can also be made that adoptive parents involved in an unregulated custody transfer are similar to the birth parents in scenario three, wherein coercion may have played a part in a birth parent’s decision to give up their child for adoption. Many of the stories that first brought the practice into the public consciousness involved parents who were desperate for assistance and without sufficient support or options to properly deal with the various behavioral, emotional, or psychological needs of adopted children.¹⁷³ The availability of an unregulated custody transfer may have a coercive effect on adoptive parents that would run counter to the intentions of the Hague Adoption Convention. That Convention explicitly takes into account

is useful for temporary transfers so that the temporary custodian can make important legal decisions regarding a child given into their custody. If, for example, a parent wishes to give a family friend the authority to make medical decisions while the child is left in the friend’s care while the parent is out of the country, then power of attorney is an appropriate and useful tool.

¹⁶⁹ Hague Adoption Convention, *supra* note 98, at Preamble.

¹⁷⁰ *Id.* art. 4.

¹⁷¹ *Id.* art. 1.

¹⁷² Child Rights Convention, *supra* note 17, art. 3.

¹⁷³ See, e.g., Meghan Twohey, *The Child Exchange: Inside America’s Underground Market for Adopted Children*, REUTERS (Sept. 10, 2013), <http://www.reuters.com/investigates/adoption/#article/part3>.

the desire to avoid exploitation or coercion of birth parents, just as poverty may be a coercive force in some of the poorer countries that traditionally supply the children involved in intercountry adoptions.

Unregulated custody transfers are also comparable to illegal adoption, because both involve active marketplaces wherein the children are obtained by would-be parents. These markets have a very high demand relative to the available supply of adoptable children; UNICEF has estimated that the ratio of prospective parents to adoptable children was as high as fifty to one.¹⁷⁴ This imbalance increases the likelihood that people will resort to means outside of the official systems to obtain a child.¹⁷⁵

It is important to note that illegal adoption usually involves the payment of fees and other associated expenses, thereby bringing into the picture those who would exploit this imbalance for their own financial gain.¹⁷⁶ No such profit-focused motivation appears to be driving the phenomenon of unregulated custody transfers. However, that does not mean that there cannot be an exchange of non-monetary consideration in such transfers, since one person is getting a child through the exchange, thereby avoiding—intentionally or not—the inherent costs associated with official adoption processes. On the other side of the exchange, the biological parents are unburdening themselves of a child they are either unwilling or unable to care for. Thus, while profit might not be motivating the exchanges, unregulated custody transfers still involve the same kind of supply and demand factors that can drive a market in the unregulated transfer of custody of children.

If unregulated custody transfers are considered a form of illegal adoption, there is still the question of how states are obligated to act. As discussed *supra* in Part III.B, the Hague Adoption Convention was designed to avoid illegal adoptions by establishing state oversight and regulation of the adoption process so as to protect the parties involved. It does not, however, have civil or criminal penalties built into it. The Child Rights Convention is also not a criminal law instrument, but rather a binding treaty in which states have assumed certain obligations to recognize and protect specified rights. Illegal adoption is not specifically mentioned within that Convention, and Article 21 obliges states parties to make efforts to ensure the propriety of the adoption process via separate bilateral or multilateral agreements, but the Convention does not provide for or require states to enact civil or criminal penalties with respect to illegal adoption.¹⁷⁷

¹⁷⁴ de Witte, *supra* note 68, at 25–26.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 28.

¹⁷⁷ Child Rights Convention, *supra* note 17, art. 21.

C. The United States is not Bound by the Child Rights Convention as a Matter of Customary International Law

Even if the Child Rights Convention could obligate states parties to enact measures to protect adopted children from unregulated custody transfers, the United States would not be bound because it has only signed, but not ratified, the Child Rights Conventions. As noted in Part III.D, there is an argument to be made that, although not bound as a state party, the United States is nonetheless bound by the Child Rights Convention as a matter of customary international law. Recall that the U.S. Supreme Court has stated that customary international law can be determinative so long as there are not positive laws, executive actions, or court decisions that contradict the alleged customary international law.¹⁷⁸ With respect to unregulated custody transfers, the U.S. Congress has not passed legislation on the topic, nor has there been executive action or a federal court decision regarding the practice. Currently, the cited provisions of the Child Rights Convention do not conflict with standing U.S. law. The U.S. Supreme Court and several of the U.S. federal circuit courts have favorably cited the Convention, which could indicate that the United States subjectively considers itself bound to the Child Rights Convention, at least in part. Unfortunately, given the small number of federal cases that favorably cite the Child Rights Convention, as well as the United States' failure to even submit that Convention to its Senate for ratification, it seems unlikely that the United States has adopted the subjective stance required for customary international law to be binding on a state, particularly when coupled with the United States' general wariness of international treaties.¹⁷⁹

Ultimately, unregulated custody transfers could be reasonably construed as a form of illegal adoption, thereby triggering provisions of the Child Rights Convention and the Hague Adoption Convention. Unfortunately, even if such transfers amount to illegal adoption, neither convention offers much in the way of guidance as to what should be done to combat the practice. As such, it may be better to consider whether unregulated custody transfers and illegal adoption can be considered a form of human trafficking.

¹⁷⁸ United States v. Yousef, 327 F.3d 56, 92 (2d Cir. 2003).

¹⁷⁹ Middleton, *supra* note 74, at 66.

D. Unregulated Custody Transfers do not Qualify as Human Trafficking Under International Law

The Child Rights Convention, U.N. Anti-trafficking Protocol, and the Hague Adoption Convention do not speak to or define illegal adoption. Given the loose connection between illegal adoption and human trafficking within the international instruments discussed *supra*, the following analysis will proceed solely on the merits of unregulated custody transfers, without reference to illegal adoption.

As discussed in Part III, the three elements in the U.N. Anti-trafficking Protocol are “activity,” “means,” and “purpose,” but only “activity” and “purpose” need be discussed here, because the Protocol drops the requirement to satisfy the “means” element when children are involved.¹⁸⁰ Therefore, a child will be considered to have been a victim of human trafficking provided that they are recruited, transported, transferred, harbored, or received for the purposes of exploitation.¹⁸¹ Given that the transfer and receipt of children are an inherent part of the practice of unregulated custody challenges, whether or not such transfers constitute human trafficking will turn on whether the children involved are being exploited within the meaning of the instruments.

Discussing exploitation, the Anti-trafficking Protocol states that “exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹⁸² None of the listed activities bear directly on the practice of unregulated custody transfers, but the list was not intended to be exhaustive, as indicated by the phrase “exploitation shall include, at a minimum” found within the definition. The question then becomes whether unregulated custody transfers are so closely analogous to the prohibited purposes as to justify its inclusion under the “at a minimum” phrase.

Each of the prohibited purposes shares something in common with unregulated custody transfers: they all commodify a child, insofar as the child is effectively turned into a good that is introduced into a market to fulfill a particular need. These activities place no emphasis on the best interests of the child, but are instead oriented to satisfy the parties who are in control of the child. Seen in this light, analogizing unregulated custody transfers (and, for that matter, illegal adoptions) as a form of human

¹⁸⁰ U.N. Anti-trafficking Protocol, *supra* note 89, art. 3(c).

¹⁸¹ *Id.* art. 3.

¹⁸² *Id.* art. 3(a).

trafficking is not particularly difficult. Adoptive parents need a way by which they can divest themselves of custody of their adopted child and find their way into a forum, such as an online messaging board, where they can advertise their child to potentially interested parties. Other people, seeking to avoid the formal adoption process—perhaps because they would fail to qualify for adoption through official channels, or because they wish to avoid the costs associated with the official process—arrange to take the child from the adoptive parents and, with a simply drafted power of attorney, the permanent transfer of custody of the child is effectuated. The child is handed off, without oversight by a neutral third-party, regardless of the trauma and distress caused by the entire process. This scenario is driven by the needs and desires of the adults, not the child, and as such the transfer of that child is much like the transfer of any good during a business transaction. The only real difference is the lack of a monetary exchange, but, given the benefits obtained by the adult parties through the custody transfer, the child has been nonetheless commodified.¹⁸³

It might be argued that this exchange is like that which takes place through the formal adoption process—a process that is allowed and promoted throughout the world—and therefore the description of unregulated custody transfers as a form of exploitation must be fatally flawed. There are two problems with this argument, however. First, both illegal adoption and unregulated custody transfers can be seen as a response to the huge demand by prospective parents and the much smaller supply of adoptable children, and the potential monetary gains for those who facilitate such adoptions. So long as there are would-be parents who desire children, the adoption process may be corrupted to fulfill those desires at the expense of the children (and the birth parents of those children).¹⁸⁴ These improper incentives set those illegal practices apart from legitimate adoptions, because profit is not a consideration and a conflict of interests between those facilitating the adoption and the best interests of the child (and the child's birth family) is avoided.

Second, there is a key difference between unregulated custody transfers and adoptions. In any adoption governed by the Hague Adoption Convention, the state intervenes as a third-party whose stated primary goal is to promote the best interests of the child, thereby helping to mitigate concerns that intercountry adoption can promote exploitative practices. While adoptions performed in accordance with the Hague Adoption Convention and in line with the mandates of the Child Rights Convention are

¹⁸³ de Witte, *supra* note 68, at 59.

¹⁸⁴ *Id.* at 24.

by no means incorruptible, the presence of the sending and receiving states acts as a potentially powerful way of protecting children from being commodified and exploited for the sake of prospective parents and self-interested adoption facilitators.

As has been shown, it can be argued that unregulated custody transfers constitute human trafficking under the “at a minimum” phrase within the U.N. Anti-trafficking Protocol. Since the United States has ratified the U.N. Anti-trafficking Protocol, it could be argued that the United States is bound to take proactive measures to combat the practice of unregulated custody transfers per the terms of those instruments. The U.N. Anti-trafficking Protocol is of particular importance as a supplement to the United Nations Convention against Transnational Organized Crime, because that Protocol it is an international instrument that requires states to criminalize human trafficking (as defined within the Anti-trafficking Protocol). Most importantly, the U.N. Anti-trafficking Protocol commits states parties to a proactive approach to combating human trafficking.¹⁸⁵

Despite the foregoing arguments, it remains unclear whether unregulated custody transfers would be considered a form of human trafficking. The issue has not yet entered into international discourse, and it is uncertain if it will ever do so, given the inherently underground nature of the practice. Further, since illegal adoption—a related but more well-known and visible phenomenon—has not been explicitly acknowledged as a form of human trafficking absent subsequent exploitation, it seems unlikely that unregulated custody transfers would be considered to have satisfied the constitutive elements of human trafficking.

E. Recommendations

As has been demonstrated, the current state of both U.S. domestic law and international law are ill-equipped to combat the problem of unregulated custody transfers. The United States suffers from a lack of a cohesive national strategy, and any measures taken to combat the practice have been done at the level of the constituent states of the United States. Additionally, the international community’s current understandings of both “illegal adoption” and “human trafficking” do not seem broad enough to encompass unregulated custody transfers. The difficulties inherent in tackling the problem through a constituent state-by-state approach, as evidenced by the sporadic, uneven, and often inadequate legislative responses at the level of

¹⁸⁵ U.N. Anti-trafficking Protocol, *supra* note 89, art. 5.

the constituent states of the United States, suggests that a top-down approach would be more effective.

Since the United States is the largest receiving country for intercountry adoptions, focusing on the United States is an effective way to target the practice of unregulated custody transfers, thereby protecting the single largest population of internationally adopted children. As argued above, this could be achieved most immediately by defining unregulated custody transfers as either illegal adoption, human trafficking, or both, within the context of the Child Rights Convention. The Child Rights Convention would be an effective mechanism for achieving a widespread impact for several reasons:

1. The Child Rights Convention informs the definitions of human trafficking and/or illegal adoption within the U.N. Anti-trafficking Protocol¹⁸⁶ and the Hague Adoption Convention;¹⁸⁷
2. The Child Rights Convention can be viewed as customary international law that is binding on the United States with respect to unregulated custody transfers, given the country's current commitments to combating human trafficking and illegal adoption as evidenced by the fact that it is a member of both the U.N. Anti-trafficking Protocol and the Hague Adoption Convention; and
3. The Child Rights Convention acknowledges that children are particularly vulnerable¹⁸⁸ and countries should proactively work to secure the fundamental rights of children.¹⁸⁹

If the trend towards a broader understanding of what constitutes illegal adoption and/or human trafficking continues, it is not a stretch to say that unregulated custody transfers should and will be considered a practice that states should take proactive measures to combat. That being said, there is still the question as to the best way to address the problem.

It is important to acknowledge that parents experiencing problems with adopted children may honestly be looking for a way out that can preserve both the best interests of the child and the parents, even if one must simultaneously recognize that some adoptive parents may opt for an

¹⁸⁶ *Id.* at Preamble.

¹⁸⁷ *See* Hague Adoption Convention, *supra* note 98, at Preamble.

¹⁸⁸ Child Rights Convention, *supra* note 17, at Preamble.

¹⁸⁹ *Id.* art. 2.

unregulated custody transfer for less altruistic reasons. Adopted children have often suffered some form of trauma during their formative years and this is especially true as the age of a child increases.¹⁹⁰ This increases the likelihood that they will experience developmental, physical, mental, emotional, or behavioral issues,¹⁹¹ Unfortunately, it is common for adoptive parents to have the child's entire history of trauma hidden from them during the adoption process.¹⁹² Similarly, parents in the United States often have few options once the adoption is finalized, and they cannot simply divest themselves of their parental responsibilities, without risking charges of child abandonment or child endangerment, depending on the jurisdiction.¹⁹³ Only twenty U.S. states allow internationally adopted children to participate in their post-adoption programs, per the U.S. Department of Health and Human Services, leaving many parents without the resources they need to help their child and themselves.¹⁹⁴ Parents are left unsupported by the system that facilitated the adoption in the first place, and without a legitimate means of divesting themselves of parental responsibility when faced with the needs their child has but which they are unable or unwilling to accommodate.

Considering these realities, there are three ways of approaching the problem: prevention, intervention, and punishment. Of the three, prevention and intervention would offer the greatest chance for success, since the underground nature of unregulated custody transfers makes enforcement of available penalties difficult. It is unclear whether relatively weak punishments would deter desperate parents. Further, enforcement steps would be implemented too late in the child's life, as they have already been abandoned by their parents and exposed to potential abuse by the child's new custodians, in addition to the trauma inherent to the custody transfer.

Some U.S. jurisdictions have focused on intervention, rather than punishment. For example, the state of Ohio has proposed legislation that is unique within the United States.¹⁹⁵ In situations where a non-parent has presented a power of attorney to a mandatory reporter to make custodial

¹⁹⁰ EVAN B. DONALDSON ADOPTION INSTITUTE, *Keeping the Promise: The Critical Need for Post-Adoption Services to Enable Children and Families to Succeed* 5 (2010).

¹⁹¹ *Id.* at 17.

¹⁹² Sean McIntyre, Note, *A Proposal to Eliminate a Black Market for Children*, 66 CASE W. RES. L. REV. 1117, 1128 (2016) (“[A]doptive parents are often provided with inconsistent and, sometimes, wildly inaccurate information regarding the physical, psychological, and mental ailments of the adoptive child.”).

¹⁹³ *Id.* at 1131.

¹⁹⁴ *Id.* at 1129.

¹⁹⁵ See S.B. 311, 130th Gen. Assemb., Reg. Sess. (Ohio 2014).

decisions for a child, that mandatory reporter¹⁹⁶ must inform the public services agency within the county wherein that child resides.¹⁹⁷ This could dramatically increase the likelihood that an unregulated custody transfer would come to the attention of the relevant child welfare agencies, giving those agencies the opportunity to intervene and protect the best interests of the child. Given that “best interests” guide child welfare law both in the United States and around the world, the Ohio model should be considered elsewhere as a potentially effective way to bring unregulated custody transfers out of the darkness.

Although laws have been passed in some U.S. states focusing on prohibiting the practice of unregulated custody transfers and creating criminal penalties for those who engage in the practice, those laws fail to include preventative strategies centered around post-adoption services. However, increasing the availability of these services should be explored as a way to prevent unregulated custody transfers from occurring in the first place. Looking for a specific model on which to base a post-adoptive services program is difficult, however, since the current situation within the United States has been described by Evan Donaldson as “[a] checkered landscape of programs, intervention models, therapies developed by adoption experts who provide training across the nation and have authored books, and innovative new approaches that seem promising but are much less well-known or empirically tested.”¹⁹⁸ Of those jurisdictions within the United States that do offer services, none are comprehensive enough to encompass the plethora of needs adoptive families have.¹⁹⁹ A focused effort to examine the needs of adoptive families is necessary to best serve them, thereby alleviating the pressures that lead to unregulated custody transfers. While the exact services that should be provided are beyond the scope of this Note, it is imperative that commitments are made to provide those essential services.²⁰⁰

Before concluding, it should be noted that non-adoptive families are often faced with similar pressures and challenges. Nothing about unregulated custody transfers is specific to children adopted internationally or domestically, even if it happens to be true that children who are adopted internationally might be more likely to experience the types of trauma that

¹⁹⁶ “Mandatory reporters” are individuals who are required by law to report suspected abuse of minors to authorities. *See, e.g.*, O.C.G.A. § 19-7-5(c)(1) (Westlaw current with legislation passed during the 2017 Session of the of the Georgia General Assembly) (specifying those individuals who must report child abuse to the designated authorities).

¹⁹⁷ *See* Ohio S.B. 311.

¹⁹⁸ EVAN B. DONALDSON ADOPTION INSTITUTE, *supra* note 190, at 10.

¹⁹⁹ *Id.* at 63.

²⁰⁰ *Id.* at 24–25.

would lead to behavioral problems that may disrupt family life.²⁰¹ While some U.S. states have targeted unregulated custody transfers only with respect to adopted children,²⁰² others have not made the distinction.²⁰³ This inclusive approach should be followed, as the best interests of *all* children are at the heart of child welfare systems throughout the world, as dictated within the Child Rights Convention, the Hague Adoption Convention, and numerous other human rights instruments. A struggling family can need support regardless of how that family was formed.

V. CONCLUSION

Unregulated custody transfers expose internationally adopted children to potentially significant harm, but the existing legal tools within the international community are currently insufficient to help combat the practice. The definitions of the two most closely-related practices—illegal adoption and human trafficking—do not appear to encompass these transfers, and the best interests standard is too indefinite to require states to take proactive measures against unregulated custody transfers. Similarly, the legal landscape within the United States demonstrates the difficulties associated with addressing the issue using a state-by-state approach. Expanding the current definitions of human trafficking and illegal adoption under international legal instruments like the Child Rights Convention and the U.N. Anti-trafficking Protocol such that they encompass these custody transfers could be an effective to motivate countries around the world to proactively address the issue. States parties would be bound to take measures to combat the practice, and even states that are not currently a party to those instruments could arguably be bound as a matter of customary international law. The world has recognized that children are especially vulnerable to exploitation and abuse. Battling unregulated custody transfers by mandating state intervention ensures that the best interests of adopted children can be more readily guaranteed and that unnecessary harms to those children can be avoided.

²⁰¹ *Id.* at 16.

²⁰² *See, e.g.*, ARK. CODE ANN. § 5-27-211(b) (Westlaw through the 2016 legislative sessions).

²⁰³ *See, e.g.*, N.D. CENT. CODE. ANN. § 14-10-05 (Westlaw through chapter 484 (end) of the 2015 Regular Session).