

THE CHILDREN IN FAMILIES FIRST ACT: OVERLOOKING INTERNATIONAL LAW AND THE BEST INTERESTS OF THE CHILD

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When Tarikuwa Lemma was thirteen, she was sold.¹ She and her two sisters were adopted by an Arizona family who were told Tarikuwa's parents died of AIDS. The truth was that her mother had died during childbirth, but her father and her large extended family were alive and well—and capable of taking care of the children. Tarikuwa's birth family had been scammed by a man who told them that the girls were being sent on a study abroad program. It was only after the sisters arrived that they realized that their legal rights had been relinquished to a new family. Tarikuwa felt she had been kidnapped, and was placed in three different adoptive homes in the United States before finally becoming independent at age eighteen.

Sixteen-year-old Quita was adopted from Liberia by a couple in Wisconsin, Todd and Melissa Puchalla.² Soon the couple discovered that Quita had severe health and behavioral problems. Finding it impossible to take care of her, the Puchallas resorted to an online forum and advertised Quita for "re-homing," a term that has come to describe placing children from failed adoptions into new homes, without any government involvement. In Quita's case, Nicole and Calvin Eason, an Illinois couple in their 30s, saw the ad and stated that they

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1. Tarikuwa's story was originally reported by Kevin Voigt of CNN. Kevin Voigt, *International Adoption: Saving Orphans or Child Trafficking?*, CNN (Sept. 18, 2013, 2:41 PM EDT), <http://www.cnn.com/2013/09/16/world/international-adoption-saving-orphans-child-trafficking>. This description is adapted from that report.

2. Reuters exposed the re-homing phenomenon, including Quita's story, by studying internet message boards across a five-year period. Megan Twohey, *The Child Exchange: Inside America's Underground Market for Adopted Children*, REUTERS (Sept. 9, 2013), <http://www.reuters.com/investigates/adoption/#article>. This description is adapted from those reports.

would take Quita. Quita was quickly placed into her new family through a basic “power of attorney document,” which is a notarized statement allowing the child’s new guardians to act on the old guardians’ behalf, for instance, to enroll the child in school. Little did the Puchallas know that the Easons had been accused of sexually abusing children, and that Nicole Eason had her own biological children taken away from her by the state because of her severe psychiatric issues and violent tendencies. The Easons’ home was filthy and Quita did not attend school. She was asked to sleep in her guardians’ bed, while Nicole was naked. When the police found Quita, they took her to a homeless shelter, and then back to the Puchallas, who had given her up in the first place.³

The stories of Tarikuwa and Quita expose an adoption system that, too often, resembles a market without oversight, plagued by a lack of accountability. Tarikuwa’s story makes obvious the necessity for pre-adoption protections—including screening for child trafficking and corruption before validating intercountry adoptions. Quita’s story shows the necessity for domestic post-adoption services. The current applicable legislation—the Intercountry Adoption Act of 2000⁴ (IAA)—falls short of providing sufficient pre-adoption safeguards and completely neglects the necessity for post-adoption safeguards. Unfortunately, as will be discussed below, many government leaders are supporting the Children in Families First Act (CHIFF),⁵ new legislation that hopes to increase the number of international adoptions, without addressing the problems that currently exist. CHIFF puts children at risk by weakening the IAA and the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption⁶ (Hague Convention), which have at least provided for some pre-adoption protections. Additionally, like the IAA, CHIFF fails to provide for post-adoption assistance.

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The number of international adoptions has decreased, yet the risk of failed adoptions remains high. International adoptions have fallen from 15,719 children in 1999 to 8668 in 2012.⁷ The reasons for the decline are complex,⁸ but

3. *Id.*

4. 42 U.S.C. §§ 14901-14954 (2011).

5. S. 1530, 113th Cong. (2013).

6. Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, *opened for signature* May 29, 1993, S. TREATY DOC. NO. 105-51 (1998), 1870 U.N.T.S. 167 (entered into force May 1, 1995).

7. *See Statistics*, U.S. DEP’T STATE: INTERCOUNTRY ADOPTION, http://adoption.state.gov/about_us/statistics.php (last visited Apr. 14, 2014).

8. There are a number of proposed reasons why adoptions have been declining, from changing policies concerning the accreditation of adoption agencies to increasing use of assisted reproductive technologies. *See, e.g.*, Lynn D. Wardle & Travis Robertson, *Adoption: Upside Down and Sideways? Some Causes of and Remedies for Declining Domestic and International Adoptions*, 26 REGENT U. L. REV. 209, 224-26, 256 & n.328 (2014) (noting

many critics cite the Hague Convention rules, which require countries to set up a system of checks and balances to safeguard children from fraud and corruption. Countries that have been sources of scandal—for example, due to child trafficking—have shut down their international adoptions or been cut off by the United States until they become compliant with the Hague Convention. For example, the State Department decided in recent years to prohibit new adoptions from countries such as Guatemala, Vietnam, and Cambodia.⁹ All three countries have since become signatories to the Hague Convention.¹⁰

The IAA—which codifies the Hague Convention in the United States¹¹—implements the goal of preventing abusive practices towards children, for example, by instituting accreditation standards for adoption agencies and requiring background checks for adoptive parents.¹² One of the stated general purposes of the IAA is to ensure that such adoptions are in the children's best interests. Unfortunately, the consideration of the best interests of the child has not included post-adoption services. A number of organizations, including the American Academy of Pediatrics, brought a call for post-adoption assistance to the congressional hearings concerning the adoption of the IAA, testifying that "there are significant medical and behavioral problems unique or far more common in internationally adopted children than in those adopted domestically."¹³

However, Congress ultimately opted not to include funding for post-adoption services,¹⁴ and as a result, the IAA does little to protect children after the adoption has been finalized. Quita's story demonstrates that even parents who pass background and home checks, and seem to be good fits for adoption, may resort to re-homing when they find they are wholly unprepared to face the physical, behavioral, and emotional needs that many adopted children have.

some factors contributing to the decline, including the Hague Convention, the increase in the availability and effectiveness of assisted reproductive technologies, and the restrictions preventing LGBT parents from adopting internationally).

9. Rachel L. Swarns, *American Adoptions from Abroad at Their Lowest Level in Years*, N.Y. TIMES (Jan. 24, 2013), <http://www.nytimes.com/2013/01/25/world/us-adoptions-from-abroad-decline-sharply.html>.

10. *Convention Countries*, U.S. DEP'T STATE: INTERCOUNTRY ADOPTION, http://adoption.state.gov/hague_convention/countries.php (last updated Aug. 2013).

11. 42 U.S.C. § 14901 (2011).

12. *Id.* §§ 14921, 14932.

13. *Implementation of the Hague Convention on Intercountry Adoption: Hearing Before the H. Comm. on Int'l Relations*, 106th Cong. 141 (1999) (statement of Jerri Ann Jenista, Am. Academy of Pediatrics); *see also id.* at 137 ("We have serious concerns . . . about the numbers of children being adopted from overseas who have significant medical and behavioral problems that are poorly understood before arrival in this country.").

14. Congress explicitly excluded post-adoption services. In its own words, the House Committee on International Relations "amended the definition of 'adoption services' by deleting the subparagraphs relating to counseling and post-adoption services." H.R. REP. NO. 106-691, pt. 1, at 21 (2000); *see* Jaci L. Wilkening, *Intercountry Adoption Act Ten Years Later: The Need for Post-Adoption Requirements*, 72 OHIO ST. L.J. 1043, 1056 n.75 (2011).

One study reported seventy-seven percent of adoptive parents stated they needed post-adoption services, including counseling, mental health services, and “[s]omeone to help with crises.”¹⁵ These parents face these challenges without resources and support from adoption agencies and the state, since these services are not required or funded under the IAA. It is clear that even the best pre-adoption safeguards may be poor indicators in predicting post-adoption outcomes, because adoptive parents themselves may be unable to foresee their future child’s needs.

One of the few IAA provisions focusing on post-adoption outcomes requires states to report to the State Department cases in which they take custody of children from failed international adoptions.¹⁶ Even this reporting provision falls short because failed adoptions must come to the state’s attention (often via adoption agencies) for this provision to have any effect. When a power of attorney document, executed privately, is sufficient to place a child in another home, it becomes increasingly difficult for states to keep accurate statistics on disrupted adoptions.

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Still, scholars, legislators, and families are clamoring to relax international adoption procedures, without regard for ensuring there are safeguards to protect children. Introduced by Senator Mary L. Landrieu, CHIFF’s goal is to reinvigorate international adoption, given that “[f]or nine straight years, international adoptions to the U.S. have plummeted, by over 62%.”¹⁷ The bill was introduced in the Senate the week of September 16, 2013, and in the House on October 24, 2013. Senator Landrieu’s office reports that CHIFF will move forward in committee this spring and still anticipates passage in 2014.¹⁸ Advertised as a bill to make sure every child has a safe, loving family, CHIFF has gained strong academic and bipartisan support.¹⁹ CHIFF hopes to reappro-

15. N. AM. COUNCIL ON ADOPTABLE CHILDREN, POST-ADOPTION SERVICES: MEETING THE MENTAL HEALTH NEEDS OF CHILDREN ADOPTED FROM FOSTER CARE 3 (2007), available at <http://www.nacac.org/adoptalk/postadoptpaper.pdf>; TRUDY FESTINGER, *Adoption and After: Adoptive Parents’ Service Needs*, in THE POSTADOPTION EXPERIENCE: ADOPTIVE FAMILIES’ SERVICE NEEDS AND SERVICE OUTCOMES 17, 30 tbls.2-4, 33 (Martha Morrison Dore ed., 2006).

16. 42 U.S.C. § 622(b)(12); see also Megan Twohey, *Governments Call on U.S. to Track Foreign Adoptees* (Sept. 13, 2013), <http://www.reuters.com/article/2013/09/13/us-usa-childexchange-reaction-idUSBRE98C0XX20130913>.

17. CHILDREN IN FAMILIES FIRST, KEY MESSAGING POINTS (2013), available at <http://childreninfamiliesfirst.org/wp-content/uploads/2013/08/CHIFF-Messaging-Points.pdf>.

18. E-mail from Whitney Reitz, Senior Policy Advisor on Int’l Child Welfare, Office of Senator Mary Landrieu, to author (Feb. 18, 2014) (on file with author).

19. As of April 14, 2014, CHIFF had sixty-five representative sponsors, with thirty-eight Democrats, twenty-six Republicans, and one independent. *Children in Families First Act—CHIFF*, CHILD. FAMILIES FIRST: LEGIS., <http://childreninfamiliesfirst.org/legislation-chiff> (last visited Apr. 14, 2014). Academic supporters of the bill include

priate about sixty million dollars per year to establish the new Bureau of Vulnerable Children and Family Security in the State Department and to establish a USAID Center for Excellence for Children in Adversity.²⁰

If millions of dollars are pumped into incentivizing intercountry adoptions, it is reasonable to expect that fraud may increase as well. Unfortunately, the bill glosses over the very real concerns of child trafficking, fraud, and corruption. Instead, CHIFF weakens our commitment to the Hague Convention. Currently, adoptions from countries that have signed the Hague Convention are favored and have a number of benefits. For example, these adoptions guarantee accredited adoption service providers, an adoption services contract, a requirement of ten hours of parent education, and the preparation of medical records for the child by authorities in the country of origin.²¹ Furthermore, non-Hague Convention adoptions are only permitted if it can be verified that the child is an orphan.²²

One stated purpose of CHIFF is to ensure that the “same set of procedures and criteria govern suitability and eligibility determinations for prospective adoptive parents seeking to complete intercountry adoptions, whether or not the child is from a foreign state that is a party to the Hague Adoption Convention.”²³ This approach doesn’t make sense, since the current laws recognize

Elizabeth Bartholet, Faculty Director of the Child Advocacy Program at Harvard Law School. *Id.*

20. S. 1530, 113th Cong. §§ 101, 401(a)-(b) (2013).

21. *Hague vs Non-Hague Adoption Process*, U.S. DEP’T STATE: INTERCOUNTRY ADOPTION, http://adoption.state.gov/hague_convention/hague_vs_nonhague.php (last visited Apr. 14, 2014).

22. *See Non-Hague Visa Process*, U.S. DEP’T STATE: INTERCOUNTRY ADOPTION, http://adoption.state.gov/us_visa_for_your_child/nonhague.php (last visited Apr. 14, 2014) (“[C]hildren must qualify as orphans . . . before they can be considered for U.S. permanent residence or citizenship. . . . USCIS determines whether a child qualifies as an orphan according to U.S. law—not the law of a child’s country of residence.” (emphasis omitted)); *see also* 8 U.S.C. § 1101(b)(1)(F) (2012). In making the determination that the child qualifies as an orphan for immigration purposes, “USCIS looks for the death, disappearance, abandonment or other separation from both parents.” Ana M. Mencini, *The Intersection of Immigration and Adoption Law: Incoming Intercountry Adoption for Hague and Non-Hague Convention Countries*, DCBA BRIEF, Feb. 2012, at 18, 22; *see* 8 U.S.C. § 1101(b)(1)(F).

23. S. 1530 § 2(b)(7)(A). CHIFF expands its coverage of non-Hague Convention adoptions beyond orphans to “an adoption by United States parents of a child under the laws of the child’s country of origin (generally when the parents are living in the child’s country of origin and therefore able legally to complete a domestic adoption).” *Id.* § 3(11). However, living in the child’s country of origin is not always necessary. Many non-Hague Convention countries do not require residency to adopt (this does not include countries where adoptive parents can request a waiver from courts, or countries for which the State Department lacks statistics). *Factsheet: Intercountry Adoption from Hague Convention and Non-Hague Convention Countries*, U.S. DEP’T HEALTH HUM. SERVS.: CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/pubs/factsheets/hague.cfm> (last visited Apr. 14, 2014). Additionally, six out of the fourteen most common origin countries for international adoption by parents in the United States—the Democratic Republic of the Congo, Ethiopia, Haiti, Russia, South Korea, and Ukraine—do not have residency requirements (and have not

that non-Hague Convention countries do not have the same obligations for monitoring or reducing corruption, and therefore require stricter proof that children are legal orphans before moving forward on a non-Hague Convention adoption.²⁴

There is at least some evidence that compliance with the Hague Convention works—and has been correlated with less corrupt adoption practices.²⁵ The loopholes in CHIFF that encourage non-Hague Convention adoptions also undermine our commitment and ratification of international law. On a symbolic level, these loopholes make clear to the international community that compliance with the Hague Convention is optional when the United States wants it to be, and exposes the hypocrisy of our prior insistence on Hague Convention compliance for countries we adopt children from.

There is no doubt that there may be ways to better streamline the procedures of the Hague Convention, and make the process simpler and less bureaucratic,²⁶ especially given that many countries once targeted as hotbeds of child trafficking have improved their policies.²⁷ However, CHIFF does not seem to

signed onto the Hague Convention). Compare BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, FY 2013 ANNUAL REPORT ON INTERCOUNTRY ADOPTION (2014), available at http://adoption.state.gov/content/pdf/fy2013_annual_report.pdf, with Country Information, U.S. DEP'T STATE: INTERCOUNTRY ADOPTION, http://adoption.state.gov/country_information.php (select country name) (last visited Apr. 14, 2014).

Additionally, CHIFF allows the Secretary of Homeland Security to accept the filing of petitions on behalf of children living in non-Hague Convention countries in the absence of a final adoption decree. S. 1530 § 104(g). Typically, the adoption decree “ensure[s] that all former parents’ rights are terminated and the adoptive parents receive those legal rights of the adoptee.” *Adoption Decree*, ADOPTION.ORG, <http://www.adoption.org/adopt/adoption-decree.php> (last visited Apr. 14, 2014). In non-Hague Convention countries, the final adoption decree may be particularly significant in preventing corruption.

24. See *Non-Hague Visa Process*, *supra* note 22.

25. I recognize that asking whether the Hague Convention “works” is a “chicken and egg” situation of sorts—it may be unclear in some cases whether international pressure first led a country to reduce corruption, and therefore become compliant with the Hague Convention indirectly, or whether signing the Hague Convention came first and thereafter compelled compliance. Either way, the State Department has suggested that Hague Convention-compliant countries are less prone to corruption and fraud in intercountry adoptions. See Erik Eckholm, *Eager to Adopt, Evangelicals Find Perils Abroad*, N.Y. TIMES (May 31, 2013), <http://www.nytimes.com/2013/06/01/us/moved-to-adopt-evangelicals-find-children-and-pitfalls-abroad.html>.

26. The bureaucracy involved in international adoptions is one of the main complaints with the Hague Convention. See Wardle & Robertson, *supra* note 8, at 224-26.

27. See Notice: Update on Inter-Country Adoptions in Cambodia, U.S. DEP'T STATE: INTERCOUNTRY ADOPTIONS (Nov. 30, 2012), http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=cambodia_4; Vietnam's Department of Adoptions Issues Further Guidance for U.S. Convention-Accredited Adoption Service Providers, U.S. DEP'T STATE: INTERCOUNTRY ADOPTION (Sept. 2013), http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=vietnam_7.

recognize the middle ground of improving the bureaucratic process while boosting the protections mandated by international law.

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The CHIFF legislation also does little to fix the IAA's disregard of post-adoption challenges. Still, other state and federal legislation has emerged in response to the public outrage over the Reuters report on re-homing that featured Quita. There are at least two ways a solution to re-homing would need to be framed: (1) post-adoption services and support to prevent re-homing from happening in the first place—a long-term solution; and (2) oversight from child welfare authorities in those cases in which international adoptees *are* moved to a new family—a safety net when it is impossible to prevent disruption.

One federal bill recognizes the first factor, and shapes a long-term, real solution. The Supporting Adoptive Families Act (1) helps to fund specialized treatment for adopted children; (2) creates access to a twenty-four-hour emergency hotline, mentoring, and support groups in order to allow new families to learn from experienced adoptive parents; and (3) calls for a Government Accountability Office study of re-homing practices, including how children are advertised on the Internet.²⁸ This Act is perhaps less sexy than CHIFF—it has far fewer cosponsors²⁹ and has received far less publicity than CHIFF—but is incredibly valuable and provides many components that are necessary before expanding international adoptions.

Related to oversight, Wisconsin has been a leader and introduced Assembly Bill 581, which prohibits advertisements related to adoption, delegation of parental power for more than one year without juvenile court approval, and unauthorized interstate placements of children.³⁰ The bill also requests a study of adoption disruption and dissolution. The bill enjoyed strong support and was approved by the Wisconsin State Assembly on February 13, 2014, and has

28. S. 1527 §§ 1-3, 113th Cong. (2013); H.R. 3423 §§ 1-2, 5, 113th Cong. (2013).

29. The Senate version of the Supporting Adoptive Families Act (SAFA) has two cosponsors compared to CHIFF's sixteen cosponsors. *Compare S. 1527: Supporting Adoptive Families Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s1527> (last visited Apr. 14, 2014), with *S. 1530: Children in Families First Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s1530> (last visited Apr. 14, 2014). The House SAFA bill, H.R. 3423, has six cosponsors compared to the House version of CHIFF's thirty-one cosponsors. *Compare H.R.3423: To Ensure the Safety and Well-Being of Adopted Children*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr3423> (last visited Apr. 14, 2014), with *H.R. 3323: Children in Families First Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr3323> (last visited Apr. 14, 2014). An updated version of the House CHIFF Bill, H.R. 4143, 113th Cong. (2014), now features forty-one cosponsors. *H.R. 4143: Children in Families First Act of 2014*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr4143> (last visited Apr. 14, 2014).

30. Assemb. B. 581, 2013-2014 Leg., Reg. Sess. (Wis. 2013).

moved to the state's Committee on Senate Organization.³¹ A state-led solution for monitoring is admirable, but given that children are often moved illegally and re-homed across state lines,³² there is a need for federal commitment to policing and preventing re-homing.

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The Hague Convention and the IAA were early attempts at regulating intercountry adoptions. As a result, they can understandably be described as bureaucratic and overly demanding at times. But while CHIFF has noble goals, it too readily puts aside our international law obligations. By attempting to erase the distinctions between a Hague Convention adoption and a non-Hague Convention adoption, CHIFF is in danger of eliminating important adoption protections that the Hague Convention has been instrumental in encouraging. Additionally, CHIFF adopts a “full steam ahead” approach to intercountry adoption, when instead, reasonable caution should be exercised to prevent the tragic adoption failures we have seen before. CHIFF’s goal of providing every child a home is a worthy one, and with appropriate safeguards, it is a goal that can truly be achieved.

31. *Assembly Bill 581*, WIS. LEGIS. DOCUMENTS, <http://docs.legis.wisconsin.gov/2013/proposals/ab581> (last visited Apr. 14, 2014).

32. See Twohey, *supra* note 2 (“The Interstate Compact on Placement of Children requires notice if a child is re-homed from one state to another. But it is rarely followed—if authorities are not notified, they have no reason to think a child may be being transferred.”); see also Anneliese Mahoney, *You Don’t Hear About This Side of Adoption*, LAWSTREET (Nov. 15, 2013), <http://lawstreetmedia.com/news/headlines/you-dont-hear-about-this-side-of-adoption>.