

**THE HAGUE INTERCOUNTRY ADOPTION ACT  
AND ITS INTERACTION WITH ISLAMIC LAW:  
CAN AN IMPERFECT ENFORCEMENT  
MECHANISM CREATE CAUSE FOR CONCERN?**

*Alexander D. Gonzalez\**

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\* J.D. Candidate, Rutgers University School of Law—Camden, May 2007; B.A. Political Science, Rutgers University, 2004.

## I. INTRODUCTION

In 2004, more than 40,000 children were adopted worldwide.<sup>1</sup> Of these, many were the victims of corruptive adoption practices throughout the world.<sup>2</sup> In response to these deceptive practices, the Hague Intercountry Adoption Convention sought to remedy these atrocities through international treaty with the *Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*.<sup>3</sup> The treaty has received overwhelming international support<sup>4</sup> and provides a uniform system for intercountry adoption.<sup>5</sup>

Although the Convention provides a novel framework for adoptive practices, the interaction between the mandates of the Convention and those of Shari'a Law have not been addressed. In particular, *Al-Ahزاب* 33:37 "abolished the pre-Islamic custom of adoption whereby an adopted child could be assimilated by law into another family."<sup>6</sup> Therefore, "tabnia," the

1. Hague Conference on Private International Law, *China joins the Hague Intercountry Adoption Convention* (Sept. 16, 2005) available at [http://www.hcch.net/index\\_en.php?act=events.details&year=2005&varevent=110](http://www.hcch.net/index_en.php?act=events.details&year=2005&varevent=110). In the U.S., intercountry adoptions have been estimated to be over 20,000 per year. U.S. Citizenship and Immigration Services, Intercountry Adoptions, at <http://www.uscis.gov/portal/site/uscis/menuitem> (follow "Services and Benefits" hyperlink then follow "Adoptions" hyperlink) (last visited Feb. 17, 2007) [hereinafter *Inter-Country Adoptions*].

2. See generally, Hague Conference on Private International Law, *Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, May 29, 1993, available at [http://hcch.e-vision.nl/index\\_en.php?act=conventions.text&cid=69](http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=69) [hereinafter *The Convention*]. See also Parts II A and B *infra* discussing corruptive adoptive practices both internationally and as rationalization by the United States congresses for ratification of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. *Id.*

3. *Id.*; see Part III C *infra* discussing the Convention and its interaction with Shari'a Law.

4. See Hague Conference on Private International Law, *Status Table*, available at [http://hcch.e-vision.nl/index\\_en.php?act=conventions.status&cid=69](http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=69) (listing Contracting and Non-Contracting States to the Convention) (last visited March 2, 2007) [hereinafter *Status Table*]. A "Contracting State" is one that has signed the Convention and ratified it under their legal system. *Id.* at [http://hcch.e-vision.nl/index\\_en.php?act=conventions.text&cid=69](http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=69).

5. See U.S. Department of State, *Hague Convention: Advantages and Provisions*, at [http://travel.state.gov/family/adoption/convention/convention\\_2300.html](http://travel.state.gov/family/adoption/convention/convention_2300.html) (last visited Feb. 17, 2007). For the purposes of this article, the term "intercountry adoption" refers to adoption of children from one country by citizens of a different country.

6. K.M. Sharma, *What's in a Name?: Law, Religion, and Islamic Names*, 26 DENV. J. INT'L L. & POL'Y 151, 175 (1998). For the story as set forth in the Qur'an, see *id.* at 175, n. 75, which provides in pertinent part:

For, Allah has not  
Made your adopted sons  
Your sons.  
Such is (only)  
Your (manner of) speech  
By your mouths.

concept of adoption, is no longer recognized in most Muslim communities.<sup>7</sup> Thus, for those who strictly follow Shari'a law, there is cause for concern if they live in a Convention Contracting nation that subjects them to mandatory adoptive practices, especially where violations are punishable by fines or imprisonment.<sup>8</sup>

While ratification of the Convention is laudable in theory, uncertainty clouds its effectiveness particularly in Contracting States with large or powerful Muslim communities and political strongholds. In following with the aforementioned theme, this article will raise questions as to how the Articles of the Convention could interact with Shari'a Law. Specifically, this article will address potential issues that should be handled with care. Section II of this article will provide the history of the Intercountry Adoption Convention and the United States' reasons for joining the effort as reflected in the congressional record. Section III will focus on the interaction between Shari'a Law and the Articles of the Convention. Section IV analyzes a case study of an intercountry adoption in the Philippines through the experiences of a practicing immigration attorney. Finally, this article will discuss how ratification could adversely impact those who strictly adhere to Shari'a Law, and how law-making bodies should respond to those concerns.

## II. HISTORY OF THE INTERCOUNTRY ADOPTION ACT

The Intercountry Adoption Convention emerged as an international effort to protect the rights of the child.<sup>9</sup> In particular, the primary purpose of the Convention is to end human rights violations, namely, abduction, sale, and trafficking of children.<sup>10</sup> In order to achieve a unified international

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Sura Al-Ahzab 33:4.

Otherwise, taken too literally, a man's calling another's offspring "his son" may create needless complications, by erecting false relationships to the detriment of or loss of true blood relations. Thus, only those who have been "wives of your sons proceeding from your loins" (sura An-Nisaa 4:23) are within the prohibited degrees of marriage, and this does not include "adopted sons." *Id.*

7. *Id.* at 175.

8. The law of one's respective nation governs punishment for violation of the Convention. For example, in the U.S. violations are subject to monetary penalties or imprisonment. 2 AM. JUR. 2D *Adoption* § 46 (2004); *see also* 42 U.S.C.A. § 14944 (2005).

9. *See generally* Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4059 (Nov. 20, 1959).

10. *See generally* The Convention, *supra* note 2; *but cf.* Linda J. Olsen, *Live or Let Die: Could Intercountry Adoption Make a Difference?*, 22 PENN ST. INT'L L. REV. 483, 489 (2004) (citing CYNTHIA PRICE COHEN, INTRODUCTION TO THE RIGHTS OF THE CHILD, 88-89 (Maria Rita Saulle & Flaminia Kojanec eds., 1995)). The author suggests "the primary motivation for intercountry adoption is . . . a more self-centered parental motivation of every family's right to a child." *Id.* The basis for the theory was a 1993 U.S. Government Accounting Office report finding an overwhelming majority of prospective adoptive parents chose intercountry

system of adoption, the Convention created general preconditions including: (1) the requirement that Contracting States appoint a “Central Authority”<sup>11</sup> to enforce the mandates of the Convention; (2) procedural requirements;<sup>12</sup> and (3) recognition “by operation of law.”<sup>13</sup> As of April 2005, sixty-seven countries had ratified the articles of the Convention in whole or in part and 52 countries were signatories. Recently, the United States Congress enacted federal law recognizing the Convention through the promulgation of the Intercountry Adoption Act (IAA).<sup>14</sup> The IAA specifically endorses the Convention as “essential”<sup>15</sup> to protecting the rights of the child.<sup>16</sup>

#### A. *Impetus Behind International Recognition of Intercountry Adoptions*

Unfortunately, human trafficking of children for the purpose of adoption has become a lucrative international business. International legal experts recognize that changes in traditional societies such as social and economic pressures, in addition to the HIV/AIDS epidemic, increases the number of orphaned children.<sup>17</sup> This is problematic because the demand for children has increased dramatically each year.<sup>18</sup>

Even more problematic, biological parents are resorting to selling their infants for \$5,000 to \$25,000 or trading them for “appliances or commodities considered as luxury items.”<sup>19</sup> As a result, children have been kidnapped or abducted to be sold by dealers to adoptive families and orphanages.<sup>20</sup> In response, the international community has sought a

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adoption because it could be “completed in less time and would be easier than domestic adoption.” *Id.*

11. See The Convention, *supra* note 2, art. 6.

12. *Id.* arts. 14-22.

13. *Id.* art. 23.

14. See 42 U.S.C.S. § 14901 (2005). See discussion *infra* Part IV B (providing reasons why the United States has not joined the international community in the inter-country adoption effort).

15. See 42 U.S.C.S. § 14901(a)(2).

16. See 42 U.S.C.S. § 14901(b)(2) (stating “to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children’s best interests). *Id.*

17. See Florida Ruth P. Romero, *Legal Challenges of Globalization*, 15 IND. INT’L & COMP. L. REV. 501, 534 (2004-05).

18. U.S. Department of State, Immigrant Visas Issued to Orphans Coming to the U.S. at [http://travel.state.gov/family/adoption/stats/stats\\_451.html](http://travel.state.gov/family/adoption/stats/stats_451.html) (last visited Feb. 17, 2007) (providing statistics for visas issued including selected countries of origin). For example, the United States Citizenship Immigration Service issued 7,093 visas to orphans coming to the U.S. in 1990 and 22,728 in 2005. *Id.* See also 145 CONG. REC. E 1930, 124 (daily ed. Sept. 22, 1999) (statement of Rep. Gilman) (recognizing the magnitude of adoption statistics as justification for uniform system as developed by the Convention).

19. Romero, *supra* note 17, at 534.

20. *Id.* In addition, a necessary consequence of illegal human trafficking is the falsification of documents. *Id.*

remedy through the United Nations in the *Convention on the Rights of the Child*<sup>21</sup> (CRC) and the Convention.

*B. Intercountry Adoption Convention as Adopted by the United States*

In the words of Colin Powell, “it is incomprehensible that trafficking in human beings is taking place in the 21st Century—incomprehensible but true. Trafficking leaves no land untouched, including our own.”<sup>22</sup> While the U.S. has previously addressed the severity of human trafficking through legislation<sup>23</sup> and granted children born abroad citizenship,<sup>24</sup> it has recently recognized the importance of an international system of adoption with the IAA,<sup>25</sup> which is based on the articles of the Convention.<sup>26</sup> The United States’ recognition of the Convention has drawn praise. In particular, the congressional record leading up to the enactment reflects the pressing need to address the dual purpose of facilitating international adoptions to accommodate prospective families and curb corruption.<sup>27</sup>

Even before the advent of the Convention, congressional representatives expressed the importance of addressing problems associated with adoption. Some of the pressing concerns included bureaucracy,

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21. Office of the High Commissioner for Human Rights, Convention of the Rights of the Child, Nov. 20, 1989, available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm>. The CRC, of which 191 states are a party, ordered the implementation of uniform multi-national adoptive practices through legislation. *Id.*

22. Romero, *supra* note 17, at 531 (citing Bureau of Public Affairs, Third Annual Trafficking in Persons Report (June 10, 2003)).

23. *Id.* Romero recognizes that the U.S. has taken measures to combat human trafficking at home and abroad through the Trafficking Victim Protection Act of 2000, 22 U.S.C. § 7107 (2006), and the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat 2875 (2003). *Id.*

24. Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat 1631 (2000). As a result of the Child Citizenship Act, seventy to seventy-five thousand foreign-born adopted children automatically became U.S. citizens. See Victor C. Romero, *The Child Citizenship and the Family Reunification Act: Valuing the Citizen Child As Well As the Citizen Parent*, 55 FLA L. REV. 489, 493-96 (2003) (providing a summary of the Child Citizenship Act of 2000).

25. 42 U.S.C. §14901 (2007). The Convention itself was adopted in 1993 and the U.S. was a signatory to the Convention in 1994. See Status Table, *supra* note 4; see also 146 CONG. REC. H6389, H6396 (daily ed. July 18, 2000) (statement of Rep. Gilman). For a detailed report summarizing the findings in respect to the provisions of the Intercountry Adoption Act see 151 CONG. REC. S3319, S3332-36 (daily ed. Apr. 6, 2005) (statement of Sen. Santorum).

26. *Id.* Seemingly, the U.S. “joined the international community in, for the first time, recognizing that the ‘child for the full, harmonious development of his or her personality, should grow up in a family.’” 146 CONG. REC. S8938 (daily ed. Sept. 21, 2000) (statement of Sen. Landrieu). For a discussion pointing out that the U.S. has not formally adopted the Convention see *infra* Part IV B.

27. 146 CONG. REC. at H6395. Documented abuses include “charging exorbitant fees by so called ‘facilitators’ in some countries for child kidnapping, baby smuggling, and coerced consent from birth mothers . . .” *Id.*

discrimination, and the black market.<sup>28</sup> Among one of the most deplorable atrocities associated with intercountry adoptions occur when orphanage directors knowingly fail to identify children eligible for adoption in order to obtain more state money.<sup>29</sup> Under the IAA, such a violation would be subject to penalty.<sup>30</sup>

The congressional record<sup>31</sup> further emphasized that “standards of competence, financial soundness, and ethical behavior”<sup>32</sup> must be met. Moreover, the Record commends the structure established at the Convention in that it strengthens international cooperation and alleviates the arduous process of adoption.<sup>33</sup> The penalties under the IAA<sup>34</sup> assure that violations “go far beyond the cost of merely doing business.”<sup>35</sup>

28. 139 CONG. REC. E1110 (daily ed. Apr. 29, 1993) (statement of Rep. Smith). The Speaker, Rep. Smith of N.J., stressed that adoption was the “forgotten option . . . relegated to the bottom of the list of priorities.” *Id.* Smith further professed that “years of neglect for this loving practice have allowed bureaucracy and discrimination to smother the purpose of adoption -- to meet the best interests of the children.” *Id.*; *but cf.* Olsen, *supra* note 10, at 489. Specifically, Smith referred to orphans in Romania living under a “heartless dictatorship . . . devoid of proper health care and sanitation . . .” *Id.* Smith goes on to remark that 40,000 Romanian children continue to live in such conditions despite being “the No. 1 nation for American families seeking adoption overseas.” *Id.* It is also noted that millions of children are living in appalling institutions with “unspeakable conditions” or on the streets. 145 CONG. REC. S11784, S11785 (daily ed. Oct. 1, 1999) (speakers Sen. Landrieu and Sen. Graham).

29. 139 CONG. REC. at E1110.

30. 2 AM. JUR. 2D *Adoption* §46. Penalties include “civil money penalty, fine, or imprisonment.” *Id.*

31. Hereinafter referred to as “the Record.”

32. 145 CONG. REC. E1931 (daily ed. Sept. 22, 1999) (speaker Rep. Delahunt). It can, however, be debated as to what constitutes “ethical behavior” because what is viewed as “unethical” by one culture may not be in another. Nevertheless, it is apparent that Rep. Delahunt is referring to protecting fundamental human rights. *See also* 145 CONG. REC. E1930 (daily ed. Sept. 22, 1999) (speaker Rep. Camp) (emphasizing that international standards of adoption are needed so that “only competent and law-abiding agencies and individuals are involved in intercountry adoptions”).

33. According to Rep. Delahunt of Massachusetts, the “burdens” of adoption are “expensive, time-consuming and stressful . . .” 145 CONG. REC. at E1931. According to Senate findings, Americans adopted 7,093 and 19,237 children internationally in 1990 and 2001 respectively. 150 CONG. REC. S11898, S11901 (daily ed. Dec. 7, 2004) (speakers Sen. Smith, Sen. Conrad, Sen. Nelson, and Sen. Nickles). Overall, American citizens adopt four out of five children placed through intercountry adoption. 146 CONG. REC. H6389, H6396 (daily ed. July 18, 2000) (speakers Rep. Gilman, Rep. Delahunt, Rep. Smith, Rep. Gejdenson, Rep. Johnson, Rep. Pomeroy, Rep. Camp, Rep. Bliley, and Rep. Burr); *see also id.* at H6398 (finding 100,000 children in the last 10 years; and 15,000 in 1998).

Furthermore, the Senate recognized that orphaned children adopted by Americans required “extensive paperwork” and the involvement of three federal agencies. *Id.* Under the Convention and the IAA, intercountry adoption will not require needless paperwork and federal functions will be consolidated into one central office. *Id.*

34. The penalties are either: (1) criminal punishment; or (2) fines up to \$25,000 and \$50,000 depending upon the severity of the violation. *Id.*

35. 145 CONG. REC. E1931 (daily ed. Sept. 22, 1999) (speaker Rep. Bliley). Rep. Bliley of Virginia recognized that “[i]t takes a great deal of *faith* for one country to allow their children to be adopted by people from another country.” *Id.* (emphasis added). Although

The purpose for recognizing the Convention, of course, is to create uniformity in an otherwise decentralized international system by promoting cross-governmental cooperation.<sup>36</sup> When interacting under an international system, differences among laws and practices within nations are inevitable and likely to cause “confusion, expense, and delay . . . .”<sup>37</sup> One way to facilitate cooperation among nations is the internet, which, due to differences in time zones and time constraints, has become the principal form of communication between agencies.<sup>38</sup>

The recognition of the Convention creates hope for thousands of unfortunate children around the world. Specifically, countries ratifying the Convention anticipate that each intercountry adoption will be carried out following the established standards.<sup>39</sup> A concern, however, which is particularly poignant to the issue at bar, is “bureaucracy and red tape.”<sup>40</sup> This proposition stems from the notion that countries are not free from the influences of politics, bureaucracy, and religion. As a result, delay, manipulation, and malfeasance are implicated regardless of the governmental structure.

### III. ISLAMIC PERSPECTIVE AND THE POTENTIAL IMPACT OF THE HAGUE INTERCOUNTRY ADOPTION CONVENTION

The practical concept of adoption as known in the western world is foreign to most Muslim societies. Historically, the Qur’an abolished the custom of adoption yet it, along with the Traditions of the Prophet, provides exceptional protection for children’s rights irrespective of adoption formalities.<sup>41</sup> Despite preexisting safeguards with respect to the protection of children, critics of Shari’a Law nonetheless propose reform as a way to coexist with the modern world.<sup>42</sup> In the context of the Convention, the

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Rep. Bliley did not intend to use the word “faith” to be construed to include the reaction of followers of Shari’a Law, it is nevertheless apropos to the discussion at hand.

36. 146 CONG. REC. at H6397. Specifically, the Convention established the rules to “first, allow recognition of adoption among the party countries; two, protect the interests of all members of the adoption triad; and, three, prevent illegal child trafficking.” *Id.*

37. *Id.* at H6397.

38. For example, the case study in *infra* Part IV provides analysis of an intercountry adoption of a Philippino girl living in the Philippines. The time difference is significant because at 9 a.m. eastern-standard-time it is 10 p.m. in Manila, Philippines. So in order to speak with an official in the Philippines in live-talk, given the 13-hour time delay and assuming an 8-hour-work-day from 9 a.m to 5 p.m., the phone call must be made between 8 p.m. and 4 a.m. eastern-standard-time. This is highly inconvenient hence the importance of e-mail communications.

39. 146 CONG. REC. S8938 (daily ed. Sept. 1, 2000) (speaker Sen. Landrieu).

40. 146 CONG. REC. S7751, S7752 (daily ed. July 27, 2000) (speakers Sen. Campbell, Sen. Helms, and Sen. Brownback).

41. See discussion *infra* Part III A.

42. See discussion *infra* Part III B.

drafters have taken into account possible conflicts of law, but the effect on those adhering to the constructs of Shari'a Law is nebulous.<sup>43</sup>

#### A. Islamic Law Overview of Adoption

In this context, the right to inheritance is important in Muslim societies.<sup>44</sup> Particularly, illegitimate children do not have a right to an inheritance from their guardian.<sup>45</sup> Moreover, adoption<sup>46</sup> is a foreign notion to most Muslim societies.<sup>47</sup> This is not to say that Islam does not recognize a process similar to legal adoption. In fact, when a guardian acknowledges paternity to an orphaned child it is seen as a form of adoption.<sup>48</sup> Moreover, other commentary suggests that adoption is not prohibited, but it is an "act towards which religion is indifferent."<sup>49</sup> As may be expected, there is little law addressing adoption in most Muslim countries.<sup>50</sup>

Nevertheless, Islamic law provides extraordinary protection for the rights of children including the prohibition of abortion,<sup>51</sup> government

43. See discussion *infra* Part III C.

44. For a detailed discussion of the history and constructs of Islamic Laws of Inheritance see JAMILA HUSSEIN, ISLAM: ITS LAW AND SOCIETY 116-27 (2d ed. 2004); JOHN L. ESPOSITO & NATANA J. DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW (2d ed. 2001); Martha Mundy, *The Family, Inheritance, and Islam: A Re-Examination of the Sociology of Fara'Id Law*, in ISLAMIC LAW: SOCIAL AND HISTORICAL CONTEXTS 1 (Aziz Al-Azmeh ed., 1988).

45. Sharma, *supra* note 6, at 174. Under Shari'a Law, as discussed *infra*, adoption is not recognized whereas guardianship is. *Id.* In addition, Sharma recognizes that "legitimacy assumes a criminal dimension in Islamic law" since a mother of an illegitimately born child may be punished for "sexual liaisons (zina)." *Id.* For a discussion on the implementation of legislative amendments with respect to inheritance in India and Pakistan see David Pearl, *Executive and Legislative Amendments to Islamic Family Law in India and Pakistan*, in ISLAMIC LAW AND JURISPRUDENCE 199 (Nicholas Heer ed., 1990). Relevant to this proposition is a discussion on the issue of inheritance "for [an] orphaned grandchild out of the estate of his grandfather if he is in competition with a close survivor . . ." *Id.* at 205, 215-16 (finding the Supreme Court of Pakistan questioned but did not answer "whether it was the intention of the lawmaker to provide the opportunity for the orphaned grandchild simply to obtain the 'Islamic share,' and not to provide a system of strict representation" in *Iqbal Mai v. Falak Sher*, 1986 PLD SC 228).

46. The concept of adoption is known as "Tabnia." Sharma, *supra* note 6, at 175.

47. *Id.* This is because *Al-Ahzab* 33:37 "abolished the pre-Islamic custom of adoption whereby an adopted child could be assimilated by law into another family." *Id.*; see also text accompanying note 6.

48. Sharma, *supra* note 6, at 175-76. This type of acknowledgement is referred to as "lakit." *Id.*

49. *Id.* at 176. This concept is known as "mubah." *Id.*

50. *Id.* For examples of Muslim countries permitting adoption see Sharma, *supra* note 6, at 176-77.

51. IBRAHIM ABDULLAH AL-MARZOUQI, HUMAN RIGHTS IN ISLAMIC LAW 249-50 (2000). Not only is adoption protected, but violations are punishable. *Id.* at 250. It is not surprising that if a pregnant woman commits a grievance meriting corporal punishment (i.e., flogging) the punishment is not carried out until the baby is delivered and in normal health. *Id.*

assistance regardless of legitimacy,<sup>52</sup> and increased protection for orphans.<sup>53</sup> Specifically, orphaned children are afforded what is known as the guardianship system.<sup>54</sup> The rationale is to give orphans “humane sympathy and compassion, compensating them for the misfortune of missing their parents.”<sup>55</sup> Dr. Ibrahim Abdulla Al-Marzouqi cites the Prophet as saying: “I and who looks after an orphan will be . . . (together) . . . in Paradise.”<sup>56</sup> As a result, rules and regulations are established to provide parentage, care, and education.<sup>57</sup> More important than state rules and regulations, however, is that great care to orphans “brings God’s rewards.”<sup>58</sup>

In reference to international human rights, most Muslim States have ratified the *UN Convention on the Rights of the Child* (CRC).<sup>59</sup> Relative to the conflict of laws at hand, many of the Muslim States ratifying the CRC expressed reservations that the CRC was in conflict with Islamic Law.<sup>60</sup> A number of Muslim States, including Egypt, Jordan, Kuwait, Maldives, Oman, Syrian Arab Republic, and United Arab Emirates have pointed particularly to the provisions of the CRC relating to adoption as the reason behind their reservations.<sup>61</sup>

It is apparent that Shari’a Law acknowledges the importance of providing children special protection due to their inherent vulnerability.<sup>62</sup>

52. *Id.* at 252. Child assistance includes monetary support through adulthood and supplemental sustenance (i.e., food and clothing). *Id.* at 252-53.

53. AL-MARZOUQI, *supra* note 51, at 253.

54. MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 155* (Oxford University Press 2003). This is known as “kafalah” and its purpose is “to provide alternative family-care for children deprived of natural parental care.” *Id.*

55. *Id.*

56. AL-MARZOUQI, *supra* note 51, at 253 (citing *The Holy Quran*).

57. *Id.*

58. *Id.* at 254.

59. BADERIN, *supra* note 54, at 155. Baderin notes two exceptions: Somalia and Palestine. *Id.* Somalia, Baderin explains, has been unstable since 1991 and Palestine is not recognized as a State under international law. *Id.*

60. See United Nations Treaty Collection, Declarations and Reservations, available at [http://www.unhchr.ch/html/menu3/b/treaty15\\_asp.htm](http://www.unhchr.ch/html/menu3/b/treaty15_asp.htm) (last visited Feb. 2, 2007) [hereinafter Declarations and Reservations].

61. *Id.*

62. BADERIN, *supra* note 54, at 154, 155 (citing A.R. OMRAN, *FAMILY PLANNING IN THE LEGACY OF ISLAM* 32 (1992) (identifying that children have at least “ten cardinal rights” under Islamic law)). These rights are listed as:

The right [of the child] to genetic purity.

The right [of the child] to life.

The right [of the child] to legitimacy and good name.

The right [of the child] to breast-feeding, shelter, maintenance and support, including health care and nutrition.

The right [of the child] to separate sleeping arrangements for children.

The right [of the child] to future security.

The right [of the child] to religious training and good upbringing.

The right [of the child] to education, and training in sports and self-defense [sic].

The Qur'an and Traditions of the Prophet emphasize a child's innocence and the need to distance them from sophisticated matters of society.<sup>63</sup> These extraordinary efforts to protect the children of Islam are nonetheless susceptible to the pressures of critics calling for reform as well as conformity to westernization.

### B. Islamic Reform or Conformity to Westernization?

In *Toward an Islamic Reformation*, Abdullahi Ahmed An-Na'im emphasized that Shari'a Law requires reform in order to "adapt and adjust to the circumstances and needs of contemporary life . . . ."<sup>64</sup> An-Na'im's premise is based on the application of what he calls "historical Shari'a," which, in the modern world, "would create severe problems and hardships."<sup>65</sup> This is a response to the negative constitutional and human rights connotations associated with "historical Shari'a." Of course issues regarding adoption are private and personal, but family law and inheritance matters could have constitutional and public law implications.<sup>66</sup>

A deviation from strict adherence to Shari'a Law is justified under the doctrine of necessity.<sup>67</sup> However, to "deny or question the divine revelation" is "a far more heinous sin."<sup>68</sup> This is problematic according to An-Na'im because "current international law, including the human rights standards established thereunder, cannot coexist with corresponding principles of Shari'a."<sup>69</sup> On the other hand, basing the need to reform

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The right [of the child] to equitable treatment regardless of gender or other factors.  
The right [of the child] that all funds used in their support come only from legitimate sources.

*Id.* at 155.

63. *Id.* at 154.

64. ABDULLAHI AHMED AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION* 7 (Syracuse University Press 1990). An-Na'im stressed the importance of reform "even if this should involve discarding or modifying certain aspects of historical Shari'a." *Id.* Since it is undisputed that the Qur'an is accepted as accurate by all Muslims, An-Na'im only seeks to reexamine the use of the Qur'an as the basis of positive law. *Id.* at 19. For background in the arena of historical and contemporary Shari'a practice see *id.* at 142-60.

65. *Id.* at 2.

66. See discussion regarding possible conflicts between Shari'a Law and the Convention *infra* Part III C.

67. AN-NA'IM, *supra* note 64, at 6. The doctrine of necessity, which in other words pardons certain Shari'a Law requirements if "necessary," is otherwise known as "darura." *Id.* It should also be noted that the level of observance varies from time period to time period and from one sect of Shari'a to another. *Id.* at 31-33.

68. *Id.* at 6.

69. *Id.* at 8. Particularly, An-Na'im is concerned with losing the most significant benefits of secularization if "historical Shari'a" was applied today. AN-NA'IM, *supra* note 64, at 8. "At the international level, Shari'a authorizes the aggressive use of force to propagate Islam and does not recognize the equal sovereignty of non-Muslim states." *Id.* at 9. In addition, An-Na'im addresses human right violations such as slavery, which is "lawful under

Shari'a Law upon possible human rights violations is precarious because such practices are already unwelcome by the majority of Muslims and are per se violations of established international law.<sup>70</sup>

Despite a decrease of Shari'a influence in former Muslim territories,<sup>71</sup> in most parts of the Muslim world family law and inheritance was governed by Shari'a.<sup>72</sup> Therefore, in order to balance the "benefits of modern notions of constitutionalism and human rights" with adherence to Shari'a Law, An-Na'im suggests reform in order to coexist in the modern world.<sup>73</sup>

Even more pressing is that there are substantial challenges faced by Muslims living in western societies. In *Muslims on the Americanization Path*, John L. Esposito referred to the French declaration: "if Muslims were to become good French citizens, they must integrate not just assimilate"<sup>74</sup> as an extreme representation of the predicament confronting modern day Muslims. Esposito continues, although on a more subtle note, that observant Muslims living under westernized legal rule must: (1) choose to deny that they are "permanent residents or citizens of the West"; (2) "choose to jettison their tradition and totally assimilate into local society"; or (3) "redefin[e] faith and identity within contemporary contexts and realities . . . ."<sup>75</sup> According to Esposito, the challenges posed by westernization are those of "identity, pluralism, and participation . . . ." <sup>76</sup> which will continue so long as Islamic Law is a minority in the West.

### *C. Articles of the Convention: Conflicts with Shari'a Law*

The Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption does cause concern for "Muslims observing Shari'a law"<sup>77</sup> in western legal systems. The Convention provides for civil and criminal punishment in the event of a violation.<sup>78</sup> Moreover, Contracting States are bound to recognize adoption as a matter of law. In an effort to address the potential ramifications the Convention may cause for

Shari'a and can be reestablished if the conditions set by Shar'ia for this institution are satisfied." *Id.*

70. *Id.* at 9.

71. *Id.* at 33. An-Na'im lists examples such as the Ottoman Empire, Persia, and India. AN-NA'IM, *supra* note 64, at 33. All of which have "collapsed and were co-opted into accepting the European models of the nation-state and international order and abandoning all pretense of conforming to the public law of Shari'a." *Id.* at 33.

72. *Id.* at 33, 44. An-Na'im finds this is "partly due to the greater degree of detailed regulation of these fields in the Qur'an and Sunna." *Id.* at 31.

73. *Id.* at 33.

74. MUSLIMS ON THE AMERICANIZATION PATH? 8-9 (Yvonne Yazbeck Haddad & John L. Esposito eds., Scholars Press 1998).

75. *Id.* at 15.

76. *Id.*

77. Hereinafter referred to as Shari'a Muslims.

78. See text accompanying *supra* notes 8, 30, 34, and *infra* 174.

Shari'a Muslims in Contracting States, the Articles of the Convention will be viewed in light of possible conflict.<sup>79</sup>

#### D. Purpose, Scope, and Requirements of the Convention

The introduction and Chapters I-III of the Convention address the purpose of the international cooperation, the scope of the Convention, the procedural intercountry adoption requirements, and the precondition that the intercountry adoption is performed by an accredited Central Authority. The major premise of the Convention is to provide a family environment for orphaned and unfortunate children while combating the realities of international human rights violations.<sup>80</sup> It is clear that the Convention's goal is to create a "permanent parent-child relationship" free from outside influences and manipulation.<sup>81</sup> Accomplishing this objective relies upon the manner in which the designated Central Authorities perform their duties. It is questionable whether Shari'a Law will have a substantial effect, however each of the Articles of the Convention will be considered in conjunction with any potential issues.<sup>82</sup>

The purpose of the Convention is to have children raised in a "family environment."<sup>83</sup> The definition of a "family environment" is clear under the Convention; however a child who is not "formally" adopted living in a Shari'a Muslim family would in reality meet those criteria.<sup>84</sup> Many families living around the world raise orphans as their own children irrespective of adoption formalities, which by no means is the determinative factor for what constitutes a family environment.<sup>85</sup>

Article 1 of the Convention stresses the importance of protecting children's fundamental rights<sup>86</sup> and providing safeguards to prevent

79. The Convention builds upon previously established principles set forth in the "United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986)." The Convention, *supra* note 2, intro.

80. The Convention, *supra* note 2, art 1.

81. *Id.* art 2. *See also* text accompanying note 88.

82. Chapter IV of the Convention (Procedural Requirements in Intercountry Adoption) will be evaluated in Part IV of this note. There the process of an intercountry adoption as set forth in the Convention will be discussed alongside a case study on an intercountry adoption of a child from the Philippines by a U.S. citizen.

83. The Convention, *supra* note 2, intro.

84. *See id.* *See generally infra* Part III A discussing standard in which children not formally adopted live under Shari'a law.

85. On the other hand, the formalities of a formal adoption do facilitate the provision of services such as health insurance and the right to inheritance. In particular, the right to inheritance causes concern for practicing Muslims because inheritance is reserved for "true blood relations." *See generally* Sharma, *supra* note 6; *see also* discussion *supra* Parts III and III A (analyzing the abolition of the custom of adoption and the right to inheritance).

86. The Convention, *supra* note 2, art 1.

abduction, sale, and trafficking of children.<sup>87</sup> According to Article 2, unless a “permanent parent-child relationship”<sup>88</sup> is established, the Convention does not apply. Hence, a Muslim who wishes to provide for an orphan as a guardian will not enjoy the privileges of the Convention because it only recognizes formal adoption.<sup>89</sup>

The requirements for intercountry adoption under Chapter II, Article 4 of the Convention deserve attention with respect to establishing whether or not a child is adoptable,<sup>90</sup> whether “an intercountry adoption is in the child’s best interest,”<sup>91</sup> and whether there has been consent free from interference.<sup>92</sup> Article 4 makes clear that the appointed Central Authority<sup>93</sup> is responsible for ensuring that the aforementioned requirements have been met.<sup>94</sup> This is not to say that the Central Authority is not influenced by Shari’a law in States consisting of large and influential Muslim communities. Irrespective of the presence or lack thereof of Shari’a Law, it cannot be assured that eligible orphans or prospective adoptable children will be adjudged adoptable or that adoption would be in the best interest of the child.

In addition, the Convention ensures that those placing children up for adoption have been counseled as to the effects of their consent as evidenced in writing.<sup>95</sup> This requirement, however, does not take into account the likelihood that extrinsic factors play a role in whether a parent or guardian places a child up for adoption in the first place.<sup>96</sup> Moreover, it is difficult to

87. *See supra* Part III A.

88. The Convention, *supra* note 2, art. 2(2). Since a “permanent parent-child relationship” refers to a formal adoption, the protections afforded under the Convention do not apply to those who seek to serve as a guardian of an orphaned child.

89. *See Olsen, supra* note 10, at 502 (indicating that the United States Bureau of Citizenship and Immigration Services and the Board of Immigration Appeals have held “guardianship insufficient for the purposes of immigration under the Immigration and Nationality Act”).

90. The Convention, *supra* note 2, art. 4(a) (providing “[a]n adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin – (a) have established that the child is adoptable”).

91. *Id.* art. 4(b) (providing “[a]n adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin – (b) have determined . . . that an intercountry adoption is in the child’s best interests”).

92. *Id.* art. 4(c)-(d).

93. This refers to the designated institution required under the Convention. *Id.* at art. 6(1). This Article provides in pertinent part: “A Contracting State shall designate a Central Authority to discharge duties which are imposed by the Convention upon such authorities.” *Id.*

94. *Id.* art. 4. This refers to the designated institution required under the Convention. *Id.* art. 6(1). This Article provides in pertinent part: “A Contracting State shall designate a Central Authority to discharge duties which are imposed by the Convention upon such authorities.” The Convention, *supra* note 2, art. 6(1).

95. *Id.* art. 4(c)(1)-(2).

96. Under the Convention, the failure to place an eligible child up for adoption is considered interference. *See discussion infra* Part VI. However, so long as a child’s fundamental rights are not violated and there is not a violation of human rights, if a Shari’a Muslim does “interfere” as a result of adherence to their beliefs they should not be liable for

determine whether a counselor is interfering if he informs the child or his parents of the religious implications of their decision.<sup>97</sup> In such a situation, whether or not consent was freely given is just as suspect to skepticism as is a failure to fully inform one of the legal effects of their decision.<sup>98</sup>

Under similar reasoning, if a child is of appropriate age and maturity level,<sup>99</sup> the Convention requires that the child is counseled as to the effects of the adoption and that consent is freely given as evidenced in writing.<sup>100</sup> Just as Muslim adults are influenced by Islamic law so too are Muslim children. In fact, children are more susceptible to indoctrination and persuasion. As a necessary consequence, Contracting States may be faced with a need to differentiate between whether consent was freely given and whether failure to consent was improperly influenced. One final consideration under the Convention's requirements is that the Central Authority of the receiving State must determine "that the prospective adoptive parents are eligible and suited to adopt<sup>101</sup> . . . [and] have been counseled [sic] as may be necessary . . ."<sup>102</sup> This raises similar concerns as discussed above, and will be subject to the same extrinsic influence that may be prevalent in States with a substantial Shari'a Law presence.

Under Chapter III of the Convention, the Central Authorities of each contracting State are required to co-operate with one another, including the free exchange of information in regards to the adoption laws of their respective States and "other general information."<sup>103</sup> Moreover, Central Authorities are obligated under Article 7(2)(b) to keep the other Central Authority informed and to avoid delay.<sup>104</sup> Article 7 further requires Central Authorities to partake in a joint effort to take "all appropriate measures"<sup>105</sup> against any interference with the effective implementation of the

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the civil and criminal remedies provided under the Convention as implemented within his respective contracting State. *Id.*

97. A relevant scenario would involve a counselor, either a Shari'a Muslim or one knowledgeable of Shari'a law, and a Muslim individual who seeks to place a child up for adoption.

98. The Convention, *supra* note 2, art. 4(c). It specifically addresses the need to inform a person, "whose consent is necessary for adoption . . . of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin . . ." *Id.*

99. The Convention does not apply unless "Central Authorities of both States have agreed that the adoption may proceed" before the child reaches 18 years of age. *Id.* art. 17(c), 3.

100. *Id.* art. 4(d)(1)-(3). The Convention does not apply unless "Central Authorities of both States have agreed that the adoption may proceed," before the child reaches 18 years of age. *Id.* art. 17(c), 3.

101. *Id.* art. 5(a).

102. *Id.* art. 5(a)-(b).

103. The Convention, *supra* note 2, art. 7(2)(a). According to the text of the Convention, the other general information referred to are "statistics and standard forms." *Id.*

104. *Id.* art. 7(2)(b).

105. *Id.* art. 7(2).

Convention.<sup>106</sup> As for whether such information includes local sentiment towards adoptive practices is yet to be seen.

Under Article 9, Central Authorities must also take “all appropriate measures” to “facilitate, follow and expedite proceedings with a view to obtaining the adoption[,] . . . provide each other with general evaluation reports about experience with intercountry adoptions [and] reply . . . to justified requests... for information about a particular adoption situation.”<sup>107</sup> “The Convention accomplishes its goal of facilitating intercountry adoptions by way of zealous advocacy in the free exchange of information in obtaining the adoption.”<sup>108</sup> However, it cannot be certain whether the influences of Shari’a law in Contracting States will lead to set backs in the adoption process.<sup>109</sup> Nevertheless, the “general evaluation reports about the experience with intercountry adoption”<sup>110</sup> should not discredit or fail to consider the impact Shari’a law could have in a Contracting State with a significant Muslim presence.<sup>111</sup>

One safeguard protecting the integrity of the procedure established by the Convention is accreditation.<sup>112</sup> This requires, under Articles 10 and 11, that Central Authorities demonstrate “competence,”<sup>113</sup> and be “directed and staffed by persons qualified by their ethical standards . . . .”<sup>114</sup> Central Authorities are thus subject to preliminary and continuing criterion once appointed.<sup>115</sup> The Convention also requires that the designation of the Central Authorities be registered with the Permanent Bureau of the Hague Conference on Private International Law.<sup>116</sup>

The accreditation process itself is admirable; however the ability to enforce it is credulous. In practice, Contracting States are responsible for self-regulation. Ratification of the Convention is also subject to each State’s laws and processes.<sup>117</sup> As a result, the determination of a Central Authority as “competent . . . qualified by their ethical standards” is contingent upon

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106. *Id.* Whether information on the effect Shari’a Law has on a particular Muslim society constitutes “other general information, [or an] obstacle to [the Convention’s] application,” is unclear, but will nonetheless have some effect. The Convention, *supra* note 2, art 7(2)(a)-(b).

107. The Convention, *supra* note 2, art. 9(b),(d),(e).

108. *Id.* art. 9(b).

109. *See* discussion *infra* Parts V and VI.

110. The Convention, *supra* note 2, art. 9(d).

111. *See* discussion *infra* Parts V and VI.

112. The Convention, *supra* note 2, arts. 10-13.

113. *Id.* art. 10-11.

114. *Id.* art. 11(b).

115. *Id.* art. 10. The relevant language in pertinent part provides: “[a]ccreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.” *Id.*

116. The Convention, *supra* note 2, art. 13.

117. For a list of States that have ratified the Convention *see* Status Table, *supra* note 4.

the extrinsic and intrinsic influences present within each Contracting State.<sup>118</sup>

*E. Recognition and Effects of General Provisions and Final Clauses of Adoption*

Chapter V of the Convention addresses the force of law commanded by an intercountry adoption by Contracting States. Chapter VI discusses issues otherwise not expressly provided, in particular those dealing with the interaction between different bodies of law. Finally, chapter VII provides administrative guidelines.

An intercountry adoption under Chapter V of the Convention must be recognized by force of law within Contracting States.<sup>119</sup> There is an exception, however, which allows a State to decline recognition of an adoption “only if the adoption is manifestly contrary to its public policy . . . .”<sup>120</sup> This exception also affords a Contracting State the opportunity to provide constructive notice “that it will not be bound under [the] Convention to recognize adoptions.”<sup>121</sup>

Under Chapter VI, the Convention sets forth the general provisions, a number of which are relevant to the discussion at hand. The most consequential provision under this chapter is the Article 33 duty to report violations.<sup>122</sup> This duty even requires a “competent authority”<sup>123</sup> to report a “serious risk”<sup>124</sup> that a violation might occur. Whether or not the influence of Shari’a Law poses a “serious risk” under the Convention is uncertain, but it is worthy of consideration.<sup>125</sup> A more pressing matter, however, is the

118. See discussion *infra* Parts V and VI.

119. The Convention, *supra* note 2, art 23(1). As for what constitutes “recognition,” Article 26 provides in relevant part that it includes “recognition of . . . legal parent-child relationship.” *Id.* art 26.

120. *Id.* art. 24. This exception is relevant to the discussion because it indirectly contemplates the impact Shari’a Law has on Contracting States. For a discussion on this topic see *infra* Part V.

121. The Convention, *supra* note 2, art. 25. This article refers to “an agreement concluded by application of Article 39(2).” *Id.* However this is just another way of saying “the procedural requirements of an intercountry adoption.” See *id.*, art. 39(2); see also *infra* Part V for a discussion on merits of this exception. See also *supra* Part III A and text accompanying *supra* note 62 for States that utilized a similar practice under the CRC to provide “constructive notice” of their reservations to the provisions concerning adoption.

122. The Convention, *supra* note 2, art. 33. This provision requires “[a] competent authority which finds any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State.” *Id.*

123. *Id.* Competent authorities are the equivalent of spokes for a central organization (or hub) but are normally located in different counties or cities for the purpose of convenience. The competent authorities have a duty to report and take orders from the central hub (i.e., the Central Authority).

124. *Id.*

125. See discussion *infra* Parts V and VI.

extent adherence to which Shari'a Law will factor in the determination as to whether a violation or a serious risk of violation will be punishable under the Convention and the laws of Contracting States.<sup>126</sup>

The Convention does demonstrate a willingness to recognize conflicting bodies of law under Articles 36, 37, 38, and 45. In fact, these provisions may prove to be the basis for a valid argument to followers of Shari'a Law attempting to exempt themselves from the Convention requirements.<sup>127</sup> Each provision and its practical effects will be discussed in turn with the exception of Article 37 because it is fundamentally similar to Article 36.<sup>128</sup>

Article 36 acknowledges States that have "two or more systems of law with regard to adoption applicable in different territorial units."<sup>129</sup> Under this provision references to the law of a particular State "shall be construed as referring to the law in force in the relevant territorial unit."<sup>130</sup> In regards to territories under the dictates of Shari'a Law, this provision has the practical effect of giving credence to "the law in force."<sup>131</sup> What the provision does not provide is protection for individuals living in territories where Shari'a Law is not "the law in force."<sup>132</sup>

Article 38 holds that territories abiding by their own rules of law in regards to adoption are not bound by the Convention.<sup>133</sup> If a Contracting State has two or more territories with differing systems of law, it is permitted to make a declaration.<sup>134</sup> This requires notification to the depositary<sup>135</sup> expressly indicating which territories within the Contracting State are bound by the laws of the Convention and which are exempt.<sup>136</sup> If, however, a Contracting State does not make such a declaration, the

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126. See discussion *infra* Parts V and VI.

127. As we will see, Article 45(3) holds an "undeclared" State bound by the laws set forth in the Convention. The Convention, *supra* note 2, art. 45(3). The term "undeclared" derives from the Article 45 requirement that States with two or more territories under differing legal systems must "declare" which territories are bound by the Convention and which territories are not. *Id.* art. 45(2). Absent such a declaration, the Convention will apply to all territories within that particular Contracting State. See *id.* art. 45(3). For a discussion on the effect the constructive notice requirement may have on Shari'a Muslims see *infra* Parts V and VI.

128. The Convention, *supra* note 2, arts. 36-37.

129. *Id.*

130. *Id.*

131. Also known as *de jure* law.

132. See discussion *infra* Parts V and VI.

133. The Convention, *supra* note 2, art. 38.

134. See *id.* art. 45(1).

135. *Id.* art. 46(2)(a). The depositary is an official record-keeping agency of the Hague called the Ministry of Foreign Affairs of the Kingdom of the Netherlands. See Hague Conference on Private International Law, Frequently Asked Questions, at [http://www.hcch.net/index\\_en.php?act=faq.details&fid=39](http://www.hcch.net/index_en.php?act=faq.details&fid=39) (last visited on Feb. 20, 2007).

136. The Convention, *supra* note 2, art. 45(2).

Convention is held applicable to all the territories within that State.<sup>137</sup> As a result, a territory and its citizens within a Contracting State that are influenced by Shari'a Law but otherwise undeclared will be bound by the Convention and subject to civil penalty or imprisonment for a violation.<sup>138</sup>

#### IV. CASE STUDY: U.S. YET TO RATIFY THE CONVENTION

This section of the note explores the status of intercountry adoption law between two States, the United States and the Philippines, by analyzing an on-going intercountry adoption.<sup>139</sup> Under U.S. law and the Convention there are different procedures for different types of adoption.<sup>140</sup> This case is

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137. *Id.* art. 45(3).

138. *See* discussion *infra* Parts V and VI.

139. The U.S. is a signatory to the Convention while the Philippines is a Contracting State. *See* discussion *supra* Part II B; *see also* Status Table, *supra* note 4.

140. *See generally* U.S. Citizenship and Immigration Services, <http://www.uscis.gov/> (last visited Feb. 20, 2007). The site provides in depth detail of not only the rationale behind facilitating intercountry adoptions, but also the manner in which to proceed. In regards to intercountry adoptions, there are two legal ways to adopt a child from a foreign country into the United States. First, there is adoption of a child based on 2-years residence of the petitioner by submitting a Form I-130. *See* I-130, Petition for Alien Relative, <http://www.uscis.gov/graphics/formsfee/forms/files/i-130.pdf> (last visited Feb. 20, 2007). There are age requirements, referred to "Aging Out," that must be met prior to confirming the ability to adopt. *Id.* These require that the child is adopted before the age of 16, with two exceptions: (1) biological brothers or sisters of a child adopted by the same parents before they reach the age of 18; and (2) Orphans over the age of sixteen so long as a Form I-600 was filed on their behalf before they reached the age of 16—or if they are a biological brother or sister of a child adopted by the same parents so long as a Form I-600 was filed on their behalf before they reached the age of 18. *Id.* The second legal way to adopt a foreign born child is by adopting an orphan through submitting a Form I-600. *Id.*; *see also* I-600, Petition to Classify Orphan as an Immediate Relative, <http://www.uscis.gov/graphics/formsfee/forms/file/s/i-600.pdf> (last visited Feb. 20, 2007).

In addition to the laws of the United States, there are country specific adoption procedures that must be followed in order to adopt a child from that particular foreign country. *See generally* U.S. Department of State, International Adoption, [http://travel.state.gov/family/adoption/country/country\\_369.html](http://travel.state.gov/family/adoption/country/country_369.html) (last visited Feb. 20, 2007). [hereinafter International Adoption]. The requirements for the Philippines can be found at [http://travel.state.gov/family/adoption/country/country\\_437.html](http://travel.state.gov/family/adoption/country/country_437.html) (last visited Feb. 20, 2007). The competent authorities and the Central Authority within the Philippines with respect to intercountry adoptions are the Department of Social Welfare and Development (DSWD) and the Inter-Country Adoption Board (ICAB), respectively. *Id.*

This procedure required by the Philippines is as follows: (1) Any U.S. citizen permanently residing abroad can file an application for intercountry adoption; (2) the application must be filed with the ICAB where it is subsequently filed with an adoption agency accredited by the ICAB; (3) the DSWD then issues a certification recommending intercountry adoption as being in the best interests of the child; (4) the Inter-Country Adoption Placement Committee matches an adoptable child with prospective parents and refers its proposal to the ICAB for approval—under the Inter-Country Adoption Act of 1995, the child is prohibited from contacting the prospective parents before such ICAB approval; (5) the ICAB notifies the U.S. adoption agency of the match wherein the adoptive parents are given time to respond. If agreeable the ICAB issues a Placement Authority, which permits the adopting parents to take custody of the child; (6) the child is interviewed at the U.S. Embassy—all the documents,

an inter-family adoption, which is quite common. Although issues regarding conflicting Islamic law or influence did not arise in this case, the USCIS has not fully recognized the mandates of the Convention despite its' signature and codification of the Intercountry Adoption Act.<sup>141</sup>

#### A. *Adoption One: In the Philippines*

We begin this case study with Jennifer who was born on September 23, 1993 in the Philippines to biological parents, Nicolas and Jane.<sup>142</sup> Jane's great-aunt, Natalia,<sup>143</sup> sought to adopt Jennifer because Nicolas and Jane were unable to provide the necessary care and support for the child. Natalia was born in the Philippines in 1947, naturalized a United States citizen in 1991, and has been married to Rolando<sup>144</sup> since 1991.

Jennifer was first formally adopted by Natalia and Rolando in 1998 in the Philippines.<sup>145</sup> Since this was a domestic adoption it was not subject to the mandates of the Convention.<sup>146</sup> The Petition for adoption was filed with the court<sup>147</sup> in November of 1996.<sup>148</sup> An Order was granted in December of

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fees, passport, and medical exam are prepared by the ICAB; (7) the child then must be escorted from the Philippines to the United States; (8) at that time a six-month trial custody period commences where an accredited U.S. adoption agency monitors the child's welfare; (9) after the trial custody period is completed, an adoption petition must be filed with a U.S. court within six months; and (10) the final adoption decree must be filed with the ICAB within one month after it is issued. *Id.*

Intercountry adoptions in the Philippines require that the petitioner, a.k.a. the adopting parents, are at least 27 years of age and 16 years older than the adopted child; however, this requirement can be waived if the petitioner or their spouse is the biological parent of the adoptee (the parent placing their child for adoption). *Id.* Single parents are eligible to adopt and married couples must file jointly with their spouse. *Id.*

141. See discussion *supra* in Part II B and discussion *infra* Part IV B.

142. The facts of this case are taken from a case I was personally involved with, and thus the names were altered due to a desire for anonymity and respect for the parties involved.

143. Natalia's brother is Jane's father. Therefore, Jane is Natalia's niece and Jennifer is her grandniece.

144. Rolando was also born in the Philippines and is currently a United States citizen.

145. The law of the Philippines allows married couples to petition jointly and therefore both Natalia and Rolando's names appear as "Petitioner." This is not a requirement for intercountry adoptions as will be seen in the subsequent petition to formally adopt Jennifer in the United States.

146. The Philippines were signatories to the Convention in 1995 and ratified it in 1996. See Status Table, *supra* note 4. If, however, this adoption was not domestic it would have been governed by the Convention after ratification in 1996 because the Petition to adopt Jennifer was in 1996 and the Order and Decision were not entered until 1997.

147. The official name of the court is Republic of the Philippines Regional Trial Court Sixth Judicial Region, which is in Iloilo City.

148. The primary information provided in the Petition included (1) that the petitioners were spouses of legal age; (2) the name of representation with whom to serve orders, notices, and processes; (3) that Jennifer is Natalia's grandniece and that she has been taking care of her since birth, including all medical, food, clothing, and other sustenance on a monthly basis; (4) petitioners consider Jennifer as their own child; (5) the petitioners satisfied all qualifications to adopt under the law and that neither have been indicted or convicted of an offense involving

1996, thereby setting a hearing date for February of 1997.<sup>149</sup> The subsequent hearings were held to provide the court with sufficient evidence that the petitioners were qualified to adopt, that all procedural requirements were met and necessary documents<sup>150</sup> had been submitted, and that the adoption was in the best interests of the child. During each of the hearings the court heard testimony substantiating the validity of the adoption. Natalia testified during the first of such hearings,<sup>151</sup> while a social worker and Jane, Jennifer's biological mother, both testified during the final hearing.<sup>152</sup> The Decision was rendered in October of 1997 wherein the court entered a decree of adoption declaring Jennifer the legitimate adopted daughter of Natalia and Rolando, effective as of the date of filing the Petition in November of 1996.<sup>153</sup> Entry of Judgment was ordered making the adoption final and executory as of January of 1998. For the most part, the adoption in the Philippines was uncontested and merely a matter of procedure. However, this was not the case when Natalia sought to bring Jennifer to the United States.

*B. Adoption Two: Intercountry Adoption Process in the U.S.*

Natalia<sup>154</sup> petitioned for her adopted daughter, Jennifer, to obtain U.S. citizenship in September of 1999. The case was then forwarded to the U.S.

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moral turpitude nor afflicted with an incurable disease; and (6) the natural parents have given unconditional conformity and written consent through affidavit.

149. The Order then required that a copy of such be published for three consecutive weeks in a local newspaper and also that it be posted in the municipality wherein Jennifer and her parents reside and at the court house so that if anyone has an objection they can challenge with cause. In addition, the DSWD was directed to conduct and submit a Child Study Report of Jennifer and a Home Study of Jennifer's parents as well as Natalia and Rolando together with its recommendation. Finally, a copy of the Order was to be furnished to the head of DSWD for the Province of Iloilo, the Solicitor General, and the Local Civil Registrar.

150. In the Philippines, the necessary documents include: (1) Home Study Report conducted by the DSWD or other accredited adoption agency; (2) birth certificate of adoptive parent(s); (3) marriage certificate or its equivalent—i.e. divorce, nullification, or separation decree; (4) written consent by the child if over the age of ten who are living with the petitioner; (5) medical evaluation; (6) police clearance; (7) income tax returns or equivalent; (8) character references; (9) photos of the petitioner and immediate family; and (10) certificate of attendance of pre-adoption seminars, etc. International Adoption, *supra* note 140. Additionally, the documents must be authenticated. *Id.*

151. The first two hearings were in April of 1997 where Natalia testified during both.

152. The final hearing was in August of 1997.

153. The Decision indicated that all the requirements had been met and the adoption was in the best interests of the child. Also, the trial custody period was waived because Natalia and Jennifer are related and the child had already developed an emotional bond with the adoptive parents. Upon the final determination Jennifer was four years of age.

154. Since the U.S. does not require that married couples file jointly, Natalia is the petitioner for Jennifer, the beneficiary, in this Immigrant Petition for Relative (I-130). *See* Inter-Country Adoptions, *supra* note 1.

Embassy in Manila, Philippines.<sup>155</sup> Jennifer's interview was scheduled for April of 2000. Following the interview, the Embassy sent notice indicating that an immigration visa could not be issued because Jennifer was ineligible since "the 2 years' [sic] physical custody and legal control requirement were not met."<sup>156</sup> The two-year physical custody and legal control requirement was and still is imposed by the U.S. despite the President's signing the IAA on October 6, 2000.<sup>157</sup> This provision requires that Natalia live in the Philippines with Jennifer for two years.<sup>158</sup>

Following the intent to revoke in September of 2001, the petition was revoked in February of 2002 because Natalia did not submit evidence that she could meet the two-year residency requirement.<sup>159</sup> At that time, Natalia sought legal representation in the U.S., wherein another Petition for Alien Relative was filed and given a priority date of October 2002. After a series of inquiries and submission of the required documentation, an interview was set for July of 2004 at the U.S. Embassy in Manila. Once again, following the interview in July of 2004, the petition was denied because of a failure to meet the required two-year residency requirement during which time the petitioner must have parental custody. A timely appeal was filed indicating that the U.S. is a signatory to the Convention and that the IAA was signed by the President on October 6, 2000. Nevertheless, U.S. Citizenship and Immigration Services (USCIS) has failed to approve the petition.

Under current U.S. immigration law, the Immigration and Nationality Act (INA)<sup>160</sup> still governs a Petition for Alien Relative child. Under § 1101(b)(1)(E)(i), "[t]he term 'child' means an unmarried person under twenty-one years of age who is . . . adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years . . . ."<sup>161</sup> The two-year co-residency requirement is further substantiated by 8 C.F.R. § 204.2(d)(2)(vii).<sup>162</sup>

The reason why the INA still governs this intercountry adoption is because the functional provisions of the IAA are not yet effective. Technically, the only provision of § 14901 adjudged to be effective is subsection (a), which merely ratifies congressional findings of fact. These

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155. The letter was sent by the National Visa Center to Jennifer in the Philippines. The notice includes information regarding the case and its status.

156. This is the direct language from the notice denying Jennifer a visa sent in late April of 2000.

157. 42 U.S.C.S. § 14901.

158. Inter-Country Adoptions, *supra* note 1.

159. This letter was sent by the Vermont Service Center to Natalia's home in the U.S. The revocation did provide a period of 15 days to appeal, but this was not done. Therefore, the revocation of the September 1999 petition was officially revoked.

160. 8 U.S.C.S. § 1101 et seq. (2005).

161. *Id.*

162. 8 C.F.R. § 204.2(d)(2)(vii) (2005).

include the Convention's "international character[,]"<sup>163</sup> "the need for uniform interpretation and implementation[,]"<sup>164</sup> and the need for the U.S. to enact federal law to govern intercountry adoptions.<sup>165</sup> Essentially, § 14901(a) justifies the importance of recognizing the Convention without actually adopting it as law.

Other provisions of the IAA, including implementation of the Convention under § 14901(b)(1), do not take effect until the Convention requirement under Article 46(2)(a) has been met.<sup>166</sup> Article 46(2)(a) provides that the Convention shall enter into force three months after depositing the ratification with the Ministry of Foreign Affairs of the Kingdom of the Netherlands ("depository").<sup>167</sup> Since the U.S. has yet to submit an instrument of ratification with the depository, the mandates of the Convention are not binding upon the U.S.<sup>168</sup> As a result, the two-year co-residency requirement is in conformity with U.S. immigration law and its enforcement is not subject to penalty<sup>169</sup> under the Convention. Moreover, the U.S. is under no obligation to recognize Jennifer's adoption in the Philippines because § 14951, Recognition of Convention Adoptions, is also ineffective until the Article 46(2)(a) requirement has been met.<sup>170</sup>

Therefore, the U.S. has been acting under the auspices of recognizing an international convention while not truly committing itself to its purpose. The imposition of the two-year co-residency requirement is contrary to the Convention, but not a violation because the U.S. has not formally ratified these provisions. While the purpose of the IAA is to facilitate intercountry adoptions, because the U.S. has not joined the international effort, those goals are not being accomplished.<sup>171</sup>

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163. 42 U.S.C. § 14901(a)(1).

164. *Id.* § 14901(a)(2).

165. *Id.*

166. *Id.* § 14901; *see also* Status Table, *supra* note 4; The Convention, *supra* note 2, art 46(2)(a); Pub. L. No. 106-279, 114 Stat. 825 (2000).

167. The Convention, *supra* note 2, arts. 46(2)(a), 43 (designating the official depository of the Convention).

168. *See id.* art. 46(a)(2); 42 U.S.C. § 14901; Status Table, *supra* note 4.

169. *Id.* Even 42 U.S.C.S. § 14944 (2005), which is the provision setting forth civil and criminal penalties for violations of the Convention, is not effective until the Convention's article 46(a)(2) requirements have been met. *Id.*

170. *See* 42 U.S.C. § 14901 n.4 (for provisions of the IAA that have not been established by force of law).

171. Although this case study does not demonstrate a conflict with Shari'a Law, it does serve to show that the process is susceptible to each States' governing bodies. Just as the U.S. strategically avoids full implementation of the Convention it is equally foreseeable that a State influenced by Shari'a Law, yet to ratify the Convention, could circumvent the requirements just as readily. It is quite possible that freedom of religion without penalty could rest on such a method of maneuvering. If, per chance, there is a conflict between adherence to the Convention and Shari'a Law the governing legal body of the state could, and arguably should, provide for an exception so long as a child's fundamental or human rights are not violated.

## V. SHOULD THERE BE LEEWAY UNDER THE CONVENTION?

The formation and ratification of the Convention is crucial to the protection of children's humanitarian rights.<sup>172</sup> This proposition cannot be refuted because children across the world are traded and used like commodities.<sup>173</sup> Hence, the goal of the Convention is to create an international system to assist in uniting needy children with wanting families. Adherence to the Convention can protect the rights of the child while giving them an otherwise unavailable opportunity to succeed. It is not a secret that children who grow up in third-world orphanages or households do not receive the same quality of life<sup>174</sup> as they would in developed countries.

Although adoption is rarely addressed in most Muslim countries,<sup>175</sup> illegitimate and orphaned children are afforded substantial protection.<sup>176</sup> In addition, Muslim States have joined the international community by ratifying the CRC.<sup>177</sup> The ratification, however, was entered subject to reservations regarding the provisions relating to adoption.<sup>178</sup> Although there are critics seeking to reform "historical Shari'a"<sup>179</sup> to conform to the modern world, the most persuasive argument for that proposition is the extent adherence to Shari'a Law will lead to human rights violations. However, this view ignores increasing opposition to inhumane practices by Muslim States around the world.<sup>180</sup>

It is imperative that the international community respects and recognizes, first and foremost, religion as an influential component of Muslims' lives.<sup>181</sup> Traditionally, Islam embodies a Muslim's "identity and loyalty,"<sup>182</sup> which serves "as a unifying and motivating force"<sup>183</sup> behind most political and social movements in modern Muslim history.<sup>184</sup> While it

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This is a particularly effective approach given the fact that there lacks an international enforcement mechanism policing the Convention requirements.

172. See discussion *supra* Part II.

173. See discussion *supra* Parts II A and B for a complete discussion on the deplorable conditions and violations of children's rights as a result of child trafficking.

174. Quality of life, of course, is highly subjective particularly for those religions that feel life on earth is merely a stop on the way toward eternal life in heaven.

175. This is mostly because adoption is not recognized. See discussion *supra* Part III.

176. See discussion *supra* Part III. These protections include the prohibition of abortion, government assistance, and the "guardianship system." *Id.*

177. See Declarations and Reservations, *supra* note 60.

178. See discussion *supra* Part III. See also BADERIN, *supra* note 54; Declarations and Reservations, *supra* note 60.

179. AN-NA'IM, *supra* note 64, at 7.

180. *Id.* at 9; see also discussion *supra* Part III B.

181. AN-NA'IM, *supra* note 64, at 3.

182. *Id.*

183. *Id.*

184. *Id.*

is not determinative, what Islam says regarding a given subject is instrumental in the minds of Muslim individuals and policy-makers.<sup>185</sup> As a result of the increasing growth of Islam in the public sphere, it is clear that religious ideologies influence Muslims' behavior.<sup>186</sup>

One way or another, the Convention could affect Shari'a Muslims living in Contracting States, particularly those with influential and political strongholds.<sup>187</sup> For instance, where adoption is contrary to public policy,<sup>188</sup> but constructive notice<sup>189</sup> was not given, protection is not expressly provided to those adhering to Shari'a Law. If this occurs, the state in which the conflict arises must carefully balance the purpose of the Convention with freedom of religion. Finally, the Convention imposes a duty to report serious risks of violation.<sup>190</sup> It is unlikely that Shari'a Law poses a serious risk of interference,<sup>191</sup> but must be considered when the two areas of law converge.

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185. *Id.* at 152.

186. AN-NA'IM, *supra* note 64, at 152.

187. *Id.* at 153. An-Na'im specifically states:

Shari'a is very much present in the hearts and minds of Muslims throughout the world. Even where it is not the formal legal system, Shari'a has a powerful influence on Muslim attitudes and policies in most Muslim countries. Shari'a notions are relevant to vital contemporary issues and are likely to have far-reaching consequences with serious international implications.

*Id.*

188. The Convention, *supra* note 2, art. 24.

189. *See id.* art. 25.

190. *Id.* art. 33.

191. For a discussion on a way in which to remedy this problem, *see* text accompanying note 174.