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INTRODUCTION

Intercountry adoption is broadly defined as "the transfer of children for parenting purposes" from one country to another.[1] In 2011, families in the United States adopted over 9,000 children from around the world.[2] Originally, intercountry adoption began as a humanitarian effort in the 1950s but has since developed into a lucrative, global industry.[3] On average, each adoptive family must pay their international adoption agency or service provider between $15,000 and $35,000 in fees in order to obtain their children.[4] Lured by these exorbitant sums of money, corrupt actors have infiltrated the intercountry adoption process.[5] Institutional corruption and reports of child abduction and selling

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1. Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 152 (2007).

2. U.S. DEP'T OF STATE, FY 2011 ANNUAL REPORT ON INTERCOUNTRY ADOPTION (2011)., *available at* http://adoption.state.gov/content/pdf/fy2011_annual_report.pdf [hereinafter *2011 Annual Report*].

3. E.J. Graff, *The Lie We Love*, FOREIGN POLICY, Nov./Dec. 2008, at 60 *available at available at* http://www.brandeis.edu/investigate/adoption/docs/FPFinalTheLieWeLove.pdf.

4. *Id.*

5. *See id.*

in their countries of origins are now common place in the media.[6] These reports have caused considerable frustration and confusion for adoptive parents in the United States.[7] With these concerns in mind, adoptive parents, biological families, and adoptive children are entitled to transparency throughout the adoption process and certainty that children are not being illegally procured and adopted. Because the United States adopts more children internationally than rest of the world combined,[8] it is in a unique position to prevent and deter the corruption and abuse within the intercountry adoption system. One such means of curbing abuses in intercountry adoption is the possible use of the Alien Tort Statute ("ATS").[9] This once dormant grant of federal jurisdiction to adjudicate tort claims committed against U.S. noncitizens abroad in violation of international law was resuscitated by the Second Circuit in 1980.[10] The court's decision in *Filartiga v. Pena-Irala* opened the door for noncitizens to pursue future private causes of action that allege gross human rights abuses.[11]

This Note examines the application of the Alien Tort Statute to future intercountry adoption litigation. The purpose of this Note is to analyze the strength of a claim of child abduction, sale, and trafficking effectuated through intercountry adoption brought against an adoption agency or its employees under the ATS. Part

6. *See* Kathryn Joyce, *How Ethiopia's Adoption Industry Dupes Families and Bullies Activists*, THE ATLANTIC, Dec. 21, 2011, http://www.theatlantic.com/international/archive/2011/12/how-ethiopias-adoption-industry-dupes-families-and-bullies-activists/250296/; Sharon LaFraniere, *Chinese Officials Seized and Sold Babies, Parents Say*, N.Y. TIMES, Aug. 4, 2011, at A1, *available at* http://www.Nytimes.com/2011/08/05/world/asia/05kidnapping.html; Peter S. Goodman, *Stealing Babies for Adoption: With U.S. Couples Eager to Adopt, Some Infants Are Abducted and Sold in China*, WASH. POST, Mar. 21, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/03/11/AR2006031100942.html.

7. *See* Goodman, *supra* note 6.

8. Patricia J. Meier, *Small Commodities: How Child Traffickers Exploit Children and Families in Intercountry Adoption and What the United States Must Do to Stop Them*, 12 J. GENDER RACE & JUST. 185, 186 (2008).

9. 28 U.S.C §1350 (2000). The statute is alternatively referred to as the Alien Tort Claims Act.

10. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

11. *See* Igor Fuks, *Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability*, 106 COLUM. L. REV. 112, 113 (2006).

I of this Note provides a general overview of intercountry adoption in the United States followed by a discussion of some of the adoption abuses reported in China and Ethiopia, the two primary sources of internationally adopted children in the United States.[12] Part II discusses the origins of the Alien Tort Statute, the Supreme Court's sole decision addressing the proper jurisdictional reach of the ATS in *Sosa v. Alvarez-Machain*, and the Sixth Circuit's decision in *Huyhn Thi Anh v. Levi* where a Vietnamese grandmother unsuccessfully brought suit under the ATS to recover custody of her grandchildren who were invalidly released into the custody of the adoption agency. Part III will examine the strength of a future claim against an adoption agency or its employees under the *Sosa v. Alvarez-Machain* standard where a biological family alleges child abduction, sale, and trafficking effectuated through formal intercountry adoption.

I. BRIEF HISTORY AND OVERVIEW OF INTERCOUNTRY ADOPTION IN THE UNITED STATES

Intercountry adoption is a modern phenomenon that traces its origins to humanitarian purposes in the aftermath of international armed conflict.[13] The first large scale intercountry adoptions occurred in the 1950s following the Korean War.[14] Henry and Bertha Holt, an evangelical couple from rural Oregon, spearheaded the endeavor when they adopted eight, bi-racial Korean orphans after learning of their plight as social outcasts.[15] In 1953, as part of the humanitarian effort following the Korean armistice, Congress passed emergency legislation that allowed for the issuance of non-quota orphan visas for military personnel who adopted or wanted to adopt Korean children.[16] In 1961, Congress

12. 2011 Annual Report, *supra* note 2.

13. Ethan B. Kapstein, *The Baby Trade*, 82 FOREIGN AFF. 115, 116 (2003).

14. Bethany G. Parsons, *Intercountry Adoption: China's New Laws Under the 1993 Hague Convention*, 15 NEW ENG. J. INT'L & COMP. L. 63, 65 (2009).

15. *Id.* Most of these Korean War orphans were the offspring of American servicemen no longer in the country and Korean women who faced social ostracism. *Id.*

16. Stephanie Zeppa, *"Let Me In, Immigration Man": An Overview of Intercountry Adoption and the Role of the Immigration and Nationality Act*, 22 HASTINGS INT'L & COMP. L. REV. 161, 164 (1998).

went further and amended the Immigration and Nationality Act ("INA") to add a permanent provision for the immigration of adoptable children.[17] The next large scale intercountry adoptions occurred in 1975 following the Vietnam War, where some 3,000 children were sent to the United States as part of "Operation Babylift."[18] With the end of the Cold War, in the absence of major armed conflicts, intercountry adoption began to shift from a humanitarian mechanism responding to displaced children to an actual market system where Western families actively searched the developing world for adoptable children.[19]

Today, intercountry adoption "behaves much like a commodities market" where demand for children in wealthy receiving countries stimulates the supply of children in poorer sending countries.[20] In the United States, this increased demand for foreign children is the direct result of a lack of supply of healthy domestic infants and the irresistible benefits associated with adopting internationally for adoptive parents.[21] Several factors have contributed to the disparity between supply and demand in the domestic adoption market in the United States. Notably, "greater infertility rates, delayed childbearing, wider tolerance of unmarried pregnancy, and increased acceptance of unmarried parenting" have led to an increased demand and a decreased supply of adoptable domestic children.[22] On a more practical level, intercountry adoption provides adoptive families significant benefits over domestic adoption. Adopting internationally allows many parents to avoid a continuing relationship with domestic birth parents and the "undesirable age and special needs of adoptive children in the U.S. foster care system."[23] Furthermore, adoptive parents experience shorter wait periods, a more certain and favorable outcome, and adoptive parents are able to specify the gender, age, and medical history of

17. *Id.* at 165.
18. Kapstein, *supra* note 13, at 116.
19. *See id.*
20. *Id.* at 117.
21. *See, e.g.*, Graff, *supra* note 3, at 60.
22. Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 521 (2005).
23. Cynthia Ellen Szejner, *Intercountry Adoptions: Are the Biological Parents' Rights Protected?*, 5 WASH. U. GLOBAL STUD. L. REV. 211, 212 (2006).

their adopted child.[24]

Pursuant to the self-regulating nature of any commodities market, the current increase in demand for healthy, adoptable children in the United States has spurred an equally impressive increase in the supply of children in the developing world.[25] Many factors contribute to this increase in the supply of adoptable children including "the stigma of illegitimacy, the minimal use of contraceptives, stringent laws on abortion, conflict, and poverty."[26] Consequently, some of these factors stimulate intercountry adoptions because many adoptive parents are motivated to adopt children "whose lives would otherwise be profoundly marred by poverty, disease, war, sickness, or discrimination."[27] However, because the majority of children adopted internationally are from the less-developed world, the lack of adequate institutional procedures and regulations in conjunction with poverty and illiteracy can create adoption systems susceptible to exploitation and child trafficking.[28] Professor David Smolin designates this particular type of child trafficking condoned and legitimized through intercountry adoption as "child laundering."[29] Essentially, child laundering describes how traffickers essentially hijack the official adoption process in the child's nation of origin to create new "orphan"[30] identities for children who were obtained illegally through "force, fraud, or financial inducement."[31] Therefore, it is essential that sending countries, with the aid and supervision of receiving countries, ensure that the children sent abroad for intercountry adoption are actually abandoned or voluntarily relinquished.

24. *See* Zeppa, *supra* note 16, at 166.

25. *See, e.g.*, Graff, *supra* note 3, at 60.

26. Benyam D. Mezmur, *From Angelina (to Madonna) to Zoe's Ark: What are the 'A-Z' Lessons from Intercountry Adoptions in Africa?*, 23 INT'L J.L. POL'Y & FAM. 145, 146 (2009).

27. Szejner, *supra* note 23, at 212.

28. *See* David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 CAP. U. L. REV. 413, 419 (2007).

29. David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113, 115 (2006).

30. Meier, *supra* note 8, at 198.

31. David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. LOUISVILLE L. REV. 441, 443 (2010).

Both the United States and the international community have responded to this significant need for greater regulation in the intercountry adoption market. Under section 101(b)(1)(F) of the INA, the federal government must first determine whether an internationally adopted child may immigrate into the country.[32] The United States Citizenship and Immigration Service ("USCIS") must evaluate and approve the prospective adoptive parents[33] and determine that the child satisfies the definition of an "orphan" under the INA.[34] Before 2008, the federal government used section 101(b)(1)(F) as the primary regulatory means of ensuring the legal adoption of international children. However, on April 1, 2008, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions ("Hague Convention") entered into force in the United States,[35] and pursuant to the Convention, all intercountry adoptions between the United States and a signatory country to the Convention must proceed through the Intercountry Adoption Act of 2000 ("IAA").[36] Under the IAA, all Hague Convention adoptions must meet the requirements of section 101(b)(1)(G) of the INA.[37] Thus, the child's country of origin will determine whether the USCIS will apply section 101(b)(1)(F) or section 101(b)(1)(G) of the INA when

32. *See* 8 U.S.C. §1101(b)(1)(F).

33. *See* 8 C.F.R. §204.3(a)(1)(i).

34. *See* 8 U.S.C. §1101(b)(1)(F). This method of intercountry adoption is often referred to as the "orphan route" because in order to satisfy the definition of an "orphan" the child must be under the age of sixteen and "an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption." *Id.*

35. Hague Conference on Private International Law, *Status table: Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Jan. 15, 2013) [hereinafter *Status Table*]. The fundamental objectives of the Hague Convention were to establish safeguards to protect children in intercountry adoption and a "system of cooperation among the [c]ontracting [s]tates to guarantee the observation of those safeguards." G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, at ¶ 52 (1994), *available at* http://www.hcch.net/index_en.php?act=publications.details&pid=2279&dtid=3 [hereinafter *Explanatory Report*].

36. 42 U.S.C. §§ 14901-14944 (2000).

37. *See* 8 U.S.C. §1101(b)(1)(G).

determining whether the child is adoptable under U.S. immigration law.

II. INTERCOUNTRY ADOPTION ABUSES IN CHINA AND ETHIOPIA

In 2011, Americans adopted the most children from China and Ethiopia.[38] On average, China boasts a substantially higher per capita gross domestic product[39] and higher literacy rates than Ethiopia.[40] China has also ratified and implemented the Hague Convention and thus affirmed its commitment to prevent the abduction, sale of, or traffic in children.[41] On the other hand, Ethiopia relies solely on its domestic adoption laws to oversee and process intercountry adoptions.[42] However reports of irregularities in finalized intercountry adoptions and allegations of institutional corruption, baby selling, and coercion have plagued both countries.[43] These reports point to the cold reality that intercountry adoption abuses will persist regardless of whether or not a country adopts and implements the more stringent adoption regulations dictated by the Hague Convention. Thomas DiFilipo, president of the Joint Council on International Children's Services, believes that the only way to prevent adoption abuses is to "control the money" exchanged between international adoption agencies and prospective adoptive parents.[44] An overview of the intercountry adoption systems in China and Ethiopia is integral to understanding why China and Ethiopia are susceptible to intercountry adoption abuses.

38. *2011 Annual Report*, *supra* note 2.

39. *See Gross Domestic Product –Per Capita*, CIA WORLD FACT BOOK, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html.

40. *Literacy Rates*, CIA WORLD FACT BOOK, https://www.cia.gov/library/publications/the-world-factbook/fields/2103.html.

41. *Status Table*, *supra* note 35.

42. U.S. DEP'T OF STATE, *Country Information: Ethiopia*, http://adoption.state.gov/country_information/country_specific_info.php?country-select=ethiopia (last visited Jan. 15, 2013) [hereinafter *Ethiopia Country Information*].

43. *See* Graff, *supra* note 3, at 60-62.

44. *Id*. at 66.

A. China: Historical Background of Intercountry Adoption and Current Intercountry Adoption Regulations

The People's Republic of China stands at the forefront of intercountry adoption because it sends, by far, more children to the United States for adoption than any other country.[45] In 2011, American families adopted 2,589 children from China.[46] This huge number of adoptable children was largely due to China's restrictive family planning policies.[47] In 1979, the government formally introduced the "One-Child Policy" that required couples from China's ethnic Han majority to have only one child.[48] Couples who violate the policy could face fines of thousands of dollars.[49] Supporters of the "One-Child Policy" have credited the law with preventing some 250 million births since 1979, but critics of the policy have highlighted its social consequences.[50] One unintended result of China's family policies was the infusion of thousands of abandoned and relinquished girls in state and private orphanages across the country.[51]

China has been a contracting state to the Hague Convention since January 1, 2006.[52] Therefore, all adoptions between China and the United States must meet the adoption requirements of Convention, the IAA, and section 101(b)(1)(G) of the INA.[53] China has designated the China Centre of Adoption Affairs ("CCCWA") as the country's Central Authority to oversee all intercountry

45. *See 2011 Annual Report, supra note 2.*

46. *Id.*

47. D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349, 379-380 (2005).

48. Laura Fitzpatrick, *China's One-Child Policy,* TIME, July 27, 2009, http://www.time.com/time/world/article/0,8599,1912861,00.html. However, the law has largely exempted ethnic minorities. *Id.*

49. *Id.*

50. *Id.* The cultural preference for boys in conjunction with the One-Child Policy has led to the abandonment and infanticide of millions of female infants. *Id.*

51. *See Id.*

52. *Status Table*, *supra* note 35.

53. U.S. DEP'T OF STATE, *Country Information: China,* http://adoption.state.gov/country_information/country_specific_info.php?country_select=china (last visited Jan. 15, 2013) [hereinafter *China Country Information*].

adoptions.[54] Families interested in intercountry adoption from China must first acquire authorization from both USCIS and the CCCWA.[55] Both agencies must determine that the prospective adoptive parents are eligible and suitable to adopt.[56] The CCCWA then determines whether an adoptive child is eligible for adoption under Chinese law.[57] After USCIS has verified that the child is eligible under U.S. law to be adopted, the U.S. Consulate General Guangzhou's Adopted Children's Immigrant Visa Unit ("ACIVU") must determine that the child is eligible to immigrate to the United States.[58] After ACIVU determines that the child may immigrate to the United States, it will issue an "Article 5 letter" to the CCCWA who will then issue a "Travel Approval" to the prospective adoptive parents.[59] The adoptive parents must then travel to China and appear in person before the Civil Affairs Bureau in the city where the child resides.[60] After the Bureau issues a notarized adoption decree, the adoptive parents can apply for a Chinese passport and an exit visa at the local Public Safety Bureau before leaving for the United States with their child.[61]

B. Intercountry Adoption Abuses in China

In August 2011, the New York Times reported that Chinese police had rescued 89 babies from child traffickers.[62] Earlier in 2006, the Washington Post reported that Chinese courts had successfully prosecuted nine child traffickers in Hunan Province for abducting and selling children to orphanages that participated in intercountry adoptions.[63] These stories provide concrete evidence that China's international adoption program has created real incentives for child trafficking. These incentives are fostered by the high demand for Chinese infants in the United States and the lucrative fees that accompany each intercounty adoption.[64]

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *See* Zeppa, *supra* note 16, at 170.
61. *Id.*
62. LaFraniere, *supra* note 6.
63. *See* Goodman, *supra* note 6.
64. *Id.*

Chinese orphanages charge prospective adoptive parents mandatory orphanage contributions that range anywhere between $3,000 and $5,400 per baby.[65] These incredibly high adoption fees have caused orphanages to pay child traffickers to scour the country in search of healthy infants.[66] In China, these traffickers or "finders" routinely target the children of poor migrant workers and either purchase the infants or outright steal them.[67] This underground industry poses a real threat to the legality and integrity of intercountry adoptions between the United States and China. As long as the international demand for Chinese babies continues to exceed the number of available babies,[68] the adoption industry will continue to be vulnerable to child trafficking. Without an effective enforcement mechanism to punish baby theft and coercion, child traffickers will continue to abuse the system.

C. Ethiopia: Historical Background of Intercountry Adoption and Current Intercountry Adoption Regulations

In 2011, Ethiopia sent a total of 1,727 children to the United States for adoption, which accounted for over sixty percent of all intercountry adoptions from Africa.[69] Ethiopia has become a popular international adoption choice for several reasons. First, Ethiopia has one of the largest numbers of orphans in sub-Saharan Africa "as a result of armed conflict, poverty, and disease."[70] Second, Ethiopia has embraced international adoption as a solution to its orphan crisis while many African nations have "outlawed or impeded" the adoption of their children by foreigners.[71] Third, Ethiopia has "short[er] waiting periods and

65. *See Id.;* LaFraniere, *supra* note 6.

66. *See* Meier, *supra* note 8, at 196.

67. *See id.*

68. Pam Belluck and Jim Yardley, *China Tightens Adoption Rules for Foreigners*, N.Y. TIMES. Dec. 20, 2006, http://www.nytimes.com/2006/12/20/us/20adopt.html?pagewanted=all.

69. *2011 Annual Report*, *supra* note 2. While still a substantial number, this marks a considerable decrease from the previous year when Americans adopted a little over 2,500 children from Ethiopia. U.S. DEP'T OF STATE, FY 2010 ANNUAL REPORT ON INTERCOUNTRY ADOPTION (2010), *available at* http://adoption.state.gov/content/pdf/fy2010_annual_report.pdf.

70. Mezmur, *supra* note 26, at 147.

71. Jane Gross and Will Connors, *Surge in Adoptions Raises Concern in Ethiopia*, N.Y. TIMES, June 4, 2007, http://www.nytimes.com/2007/06/04/us/04adopt.html?pagewanted=all.

high availability of very young children" which make it very attractive to prospective adoptive parents.[72] Finally, the country is not a contracting state to the Hague Convention and therefore not subject to the Convention's accreditation and oversight regulations.[73]

Section 101(b)(1)(F) of the INA governs intercountry adoptions between the United States and Ethiopia.[74] Families interested in adopting from Ethiopia follow largely the same immigration process as those families adopting from Hague Convention countries. Once USCIS has approved the prospective adoptive parents for adoption, the Ethiopian Ministry of Women's Affairs ("MOWA") must review the parent's application before approving the adoption.[75] After the prospective adoptive parents are deemed eligible to adopt, the MOWA must identify an orphan who is eligible for intercountry adoption. Under Ethiopian law, a child is eligible for adoption if he or she is abandoned, orphaned, or relinquished.[76] A child is abandoned or orphaned if he or she has become a ward of the state because the child has been orphaned or abandoned by both parents or has been found to have two HIV/AIDS-infected parents or one living HIV/AIDS infected parent.[77] A child is relinquished if a Contract of Adoption is signed between the child's legal guardian and the adoptive parents or their agency representative.[78] After MOWA determines that the child is adoptable, the consular officer at the Ethiopian Embassy must determine if the child is adoptable under section 101(b)(1)(F) of the INA.[79]

D. Intercountry Adoption Abuses in Ethiopia

The relatively sudden and high volume of children leaving Ethiopia has "set off alarm bells among children's lobby groups."[80]

72. Joyce, *supra* note 6.
73. *Ethiopia Country Information, supra* note 42.
74. *Id.*
75. *Id.*
76. *Id.*
77. *See* Mezmur, *supra* note 26, at 154.
78. *Ethiopia Country Information*, *supra* note 42.
79. *Id.*
80. Peter Heinlein, *Under Pressure, Ethiopia Plans Crackdown on Baby Business*, VOICE OF AMERICA NEWS, Dec. 14, 2010, http://www.voanews.com /english/news/Under-Pressure-Ethiopia-Plans-Crackdown-on-Baby-Business-

Professor Smolin stated that "Ethiopia may be poised to be the next illustration of the cycle of abuse." [81] This cycle of intercountry adoption abuse begins with a rapid increase in the number of internationally adopted children followed by "abusive adoption practices, corruption, and scandal" that finally result in a moratorium on intercountry adoptions.[82] In addition to the high volume of children entering the intercountry adoption pipeline, Alessando Conticini, the former head of child protection at UNICEF Ethiopia, expressed concern over the increase in the number of unregulated private adoption companies operating in Ethiopia.[83] Ethiopian officials have even expressed their inability and lack of "capacity" to oversee and monitor all of these intercountry adoption agencies.[84]

International investigations have discovered evidence that child traffickers and "finders" routinely trick Ethiopian parents into relinquishing their children in order to claim a part of the international adoption fees.[85] Other investigative reports have found that a majority of adoption cases include clear ethical concerns such as: adoption agencies providing false information on court documents, parent's relinquishing children with the hope of receiving financial or educational support from adoptive families, and orphanages recruiting directly from intact families.[86] Reports of child trafficking, coercion, and fraud have even been reported by the children's adoptive parents. In 2010, the Parents for Ethical Adoption Reform conducted a survey of parents who had previously adopted from Ethiopia.[87] Results of the survey included allegations that adoption agencies extorted more money from adoptive parents while in Ethiopia, allegations that money

111848424.html.

81. David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. LOUISVILLE L. REV. 441, 483 (2010).

82. *Id.*

83. Gross, *supra* note 71.

84. *Id.*

85. Peter Heinlein, *Ethiopia to Cut Foreign Adoptions by Up to 90 Percent*, VOICE OF AMERICA NEWS, Mar. 4, 2011, http://www.voanews.com /english/news/africa/-Ethiopia-to-Cut-Foreign-Adoptions-by-Up-to-90-Percent-117411843.html.

86. Joyce, *supra* note 6.

87. *Results of PEAR's Ethiopia Study*, PARENTS FOR ETHICAL ADOPTION REFORM,http://www.pear-reform.org/docs/PEAR-Ethiopia-Survey-Results.pdf.

was exchanged directly for children, and allegations that adoption agencies processed relinquished children as abandoned in order to circumvent the normal legal adoption process.[88] These reports leave an indelible impression that the current intercountry regulatory regime is ill equipped to deter child trafficking through intercountry adoption. As with China, the real potential for intercountry adoption abuse in Ethiopia occurs at the local level before any paperwork has been documented.[89]

III. THE ALIEN TORT STATUTE OF 1789

In 1789, the first United States Congress enacted the ATS[90] as part of the Judiciary Act.[91] Today, federal courts continue to be perplexed by the statute's proper function and purpose owing to a "complete absence of legislative history."[92] The origins of the ATS were so enigmatic that Judge Friendly described it as a "legal Lohengrin"[93] because "no one seems to know whence it came."[94] Federal courts were so wary of the statute that between 1789 and 1980, only two courts maintained jurisdiction over alien tort claims under the ATS.[95] Presently, the ATS is codified in section 1350 of the U.S. Code and states: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the

88. *See id.*

89. *See* Joyce, *supra* note 6.

90. 28 U.S.C. § 1350 (2000).

91. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

92. Lucien J. Dhooge, *Lohengrin Revealed: The Implications of Sosa v. Alvarez-Machain for Human Rights Litigation Pursuant to the Alien Tort Claims Act*, 28 LOY. L.A. INT'L & COMP. L. REV. 393, 397 (2006).

93. Lohengrin is an ancient Celtic story that was rendered into a fairy tale by the Grimm brothers and later dramatized into an opera by Richard Wagner. Originally, Lohengrin was dispatched as a knight to protect the Holy Grail during the Crusades but chooses instead to accompany a swan pulling a boat down a river. Lohengrin sails to a different country with the swan and falls in love with a foreign duchess who promises never to inquire about his ancestors or from "whence he had come." When the duchess later inquires as to his origins, Lohengrin retreats back to the boat with the swan and returns to his mission to protect the Grail. *See* OTTO RANK, THE MYTH OF THE BIRTH OF THE HERO, at 59-62 (2004), *available at* http://www.sacred-texts.com/neu/mbh/mbh16.htm.

94. *Sosa*, 542 U.S. at 712. (quoting IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975)).

95. *See* Taveras v. Taveraz, 477 F.3d 767, 771 (6th Cir. 2007).

United States."[96] This relatively simple and straightforward statute has forced federal courts to grapple with its jurisdictional reach following its resurrection in *Filartiga v. Pena-Irala*.[97]

In *Filartiga*, the Second Circuit held that the Alien Tort Statute created federal jurisdiction for a claim of torture perpetrated by a state actor because state sponsored torture "violates universally accepted norms of the international law of human rights."[98] The court's rational for creating a new civil cause of action rested on the fact that "the torturer has become—like the pirate and slave trader before him hostis humani generis, an enemy of all mankind."[99] *Filartiga* has both revitalized the ATS as a federal jurisdictional statute and established a legal remedy for bereaved noncitizens in search of justice for human rights abuses.[100]

To date, the U.S. Supreme Court has agreed to hear only two cases that have addressed the ATS.[101] In 2010, the Court granted certiorari in *Kiobel v. Royal Dutch Petroleum* to resolve the question whether the ATS allows federal courts to hear claims against corporations for violations of human rights abuses.[102] The real question that the Court must determine is whether the tort "in violation of the law of nations" contained in the ATS refers to a tort of civil corporate liability or the human rights abuses alleged in the complaint.[103] The case was reargued before the Court on October 1, 2012.[104] A final decision is still pending. Therefore, the

96. 28 U.S.C §1350 (2000).

97. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

98. *Id.* at 878. The Second Circuit focused exclusively on two questions: whether the claim was "an action by an alien" and whether the action was "a tort only, committed in violation of the law of nations." *Id.* at 887.

99. *Id.* at 890.

100. *See id.* at 890. "Our holding today, *giving effect to a jurisdictional provision* enacted by our First Congress, is a small but important step in the fulfillments of the ageless dream *to free all people* from brutal violence." *Id.* (emphasis added.)

101. *See* Kiobel v. Royal Dutch Shell, 132 S.Ct. 472 (2011), Sosa v. Alvarez, 542 U.S. 692, 712 (2004).

102. Mike Sacks, *Supreme Court to Rule on Corporate Personhood for Crimes Against Humanity*, HUFFINGTON POST (OCT. 17, 2011, 8:16 PM), http://www.huffingtonpost.com/2011/10/17/supreme-court_n_1015953.html.

103. *Id.*

104. Supreme Court Docket No. 10-1491, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1491.htm (last visited Jan. 15, 2012).

applicability of the ATS to foreign adoption agencies that actively abduct, sell, or traffic children through intercountry adoption rests on the Court's resolution on the matter of corporate liability. However, in *Sosa v. Alvarez-Machain*, the Supreme Court officially sanctioned the use of the ATS as a grant of federal jurisdiction and upheld the Second Circuit's decision in *Filartiga*.[105] In addition, the Court clarified the proper standard for recognizing new claims for violations of customary international law.[106]

A. Sosa v. Alvarez-Machain

In 1993, Humberto Alvarez–Machain ("Alvarez"), a Mexican citizen, sued fellow Mexican citizen Jose Francisco Sosa ("Sosa") in federal district court under the ATS alleging that his arbitrary arrest and detention was in violation of the law of nations.[107] Prior to Alvarez's civil suit, the U.S. Drug Enforcement Agency ("DEA") had approved a plan to hire Sosa and other Mexican nationals to seize Alvarez in Mexico and bring him to the United States to stand trial for charges of torture and murder.[108] Pursuant to the officially approved DEA plan, Sosa and his compatriots abducted Alvarez, held him overnight in a motel, and flew him to Texas for arrest.[109] Both the district court and the Ninth Circuit found that Alvarez's arrest amounted to a tort in violation of the law of nations and awarded him compensatory damages.[110] In 2004, the U.S. Supreme Court granted certiorari to clarify the proper scope of the ATS.[111]

Sosa v. Alvarez-Machain was the first time that the U.S. Supreme Court had considered the ATS and its jurisdictional

105. *See Sosa*, 542 U.S. at 725.
106. *Id.*
107. *See id.* at 697-699. Alvarez also sued the federal government under the Federal Torts Claims Act ("FTCA"), 28 U.S.C. §1346(b) for false arrest. The Supreme Court dismissed Alvarez's FTCA claim because it fell within "an exception to waiver of sovereign immunity for claims arising in a foreign country." *Id.*
108. *Id.* at 698. Alvarez's torture and murder charges were ultimately acquitted of by the district court. *Id.*
109. *Id.*
110. *Id.* at 699. The District Court for the Central District of California awarded Alvarez $25,000 in compensatory damages. *Id.* at 697-699.
111. *Id.* at 699.

scope.[112] The Court's ultimate disposition would steer the course for all future claims under the statute and limit the discretion of district court judges.[113] The Court first held that the ATS was a "jurisdictional statute creating no new causes of action" that did not require additional implementing legislation to give the statute "practical effect."[114] The Court then considered the proper "standard or set of standards" for determining an actionable violation of the law of nations under the ATS.[115] Finally, the Court considered whether Alvarez's claim of officially sanctioned "arbitrary" arrest and detention violated the law of nations to establish federal jurisdiction under the ATS.[116]

First, the Court held that the ATS not only established jurisdiction but also allowed federal courts to entertain certain claims for torts in violation of the law of nations.[117] The Court reasoned that the Founders would have recognized certain torts in violation of international law "within the common law" at the time that the ATS was enacted.[118] The Court then defined the law of nations as including both "the general norms governing the behavior of national states with each other" and the "body of judge-made law regulating the conduct of individuals situated outside domestic boundaries" that carried an international flavor.[119] The Court then elucidated three specific violations of the law of nations that fell into the latter category of offenses including: "violation of safe conducts,[120] infringement of the rights of ambassadors, and piracy."[121]

However, the most important aspect of the case rested on the Supreme Court's standard for determining when a federal court

112. Fuks, *supra* note 11, at 120.
113. *See id.*
114. *Sosa*, 542 U.S. at 724.
115. *Id.* at 731.
116. *See id.* at 736.
117. *See id.* at 714.
118. *Id.*
119. *Id.* at 714-15.
120. The doctrine of safe conducts refers to the host country's "sovereign obligation…to prevent injury to the person or property of an alien within its territory." *Tavaras*, 477 F.3d at 773.
121. *Sosa*, 542 U.S. at 715. Sir William Blackstone, in his Commentaries on the Laws of England, referred to these three specific offenses against the law of nations because all three were addressed by the criminal law of England during the enactment of the Alien Tort Statute. *Id.*

should consider a new cause of action that violated the law of nations.[122] In the absence of a binding international treaty or specific legislative act, claimants under the ATS must allege a violation of customary international law[123] that is "specific, universal and obligatory."[124] The Supreme Court provided further guidance as to the proper sources of international law that a district court may consult when determining a "violation of the law of nations."[125] These sources include the "works of jurists and commentators" that accurately reflect the current state of customary international law.[126] While this heightened standard for recognizing new violations of the law of nations clearly limits the jurisdictional reach of the ATS, the Court failed to "shut the door"[127] for district courts to hear other "heinous actions"[128] tantamount to a violation of customary international law.

Finally, the Court assessed whether Alvarez's claim of arbitrary arrest and detention amounted to a violation of customary international law to bring the case under the reach of the ATS.[129] The Supreme Court found that Alvarez's general claim of arbitrary arrest and detention failed to include the requisite "specificity" for establishing a violation of the law of nations.[130] The Court dismissed his ATS claim because his claim expressed only an overly broad "aspiration that exceeds any

122. *See id.* at 725. The Supreme Court held that district courts "should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.*

123. Customary international law refers the "general and consistent practice of states followed by them from a sense of legal obligation" that create binding international rules. Ernest A. Young, *Sorting out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 372 (2002).

124. *Sosa*, 542 U.S. at 732. (citing *In re* Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)).

125. *Id.* at 721.

126. *Id.* at 734. "[R]esort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." *Id.* (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).

127. *Id.* at 731.

128. *Id.* at 732. (citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)).

129. *See id.* at 732.

130. *Id.* at 738.

binding customary rule"[131] and would threaten "breathtaking" international implications.[132] Notably, the Court expressed disapproval of Alvarez's reliance on two international agreements enacted by the United Nations because they proved only "moral"[133] disapproval of arbitrary arrest and detention and failed to establish a "relevant and applicable rule of international law."[134]

Essentially, Justice Souter[135] fashioned a justiciable framework for analyzing claims under the Alien Tort Statute. Most notably, the Court cabined the discretion of district court judges hearing ATS jurisdictional claims to only those violations of customary international law that are "specific, universal and obligatory."[136] This "high bar to new private causes of action" was required because the Court found that inevitable foreign policy consequences demanded judicial restraint in recognizing new international legal remedies.[137] Nevertheless, the Court left the door open for future, specific claims in violation of customary international law under the ATS "to support the creation of a federal remedy."[138]

B. Intercountry Adoption and the Alien Tort Statute

While the ATS has only been invoked in a "modest" number of cases, it has never succeeded as either a jurisdictional basis or a legal remedy in the sphere of intercountry adoption.[139] There are

131. *Id.*
132. *Id.* at 736.
133. *Id.* at 734. Alvarez cited the Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948), and article 9 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. *Id.* Both international agreements proscribe arbitrary arrests. *Id.*
134. *Id.* at 735.
135. Justice Souter delivered the majority opinion of the Supreme Court. *Id.* at 696.
136. *Id.* at 732 (quoting *In re* Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)).
137. *Id.* at 727.
138. *Id.* at 738.
139. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 588 (2002). Before *Filartiga v. Pena-Irala*, there were only fifteen cases that invoked the Alien Tort Statute as their basis for federal jurisdiction. *See id.* at n.4-5.

only two intercountry adoption cases that have referenced or utilized the ATS as a jurisdictional ground for the federal court.[140] Both cases involved Vietnamese children evacuated as part of "Operation Babylift" during the chaotic fall of Saigon in 1975.[141] In *Nguyen Da Yen v. Kissinger*, the children's biological Vietnamese parents sued the U.S. Immigration and Naturalization Service ("INS") for access to the agency's records concerning the children's admission into the U.S. and adoption status.[142] The court held that the INS was required to allow the parents access to the records, but relied ultimately on the federal court's habeas corpus power as the basis for its decision.[143] Moreover, discussion of the ATS as an appropriate basis for the court's jurisdiction was relegated to a single footnote.[144] However, the Sixth Circuit in *Huynh Thi Anh v. Levi* specifically addressed the applicability of the ATS in a suit to enjoin an intercountry adoption and return custody of the children to their biological family.[145] While the court ultimately declined federal jurisdiction,[146] the court's analysis pre-dated the Supreme Court's decision in *Sosa*. Nevertheless, the Sixth Circuit's decision may be persuasive for future courts that may be forced to grapple with illegal intercountry adoptions.

C. Huynh Thi Anh v. Levi

In 1975, the U.S. Department of Justice and the INS in concert with various private and public child-welfare and adoption agencies secured the release of over two thousand Vietnamese

140. Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978); Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975).

141. *See id.* Saigon was renamed Ho Chi Minh City in 1976. *Vietnam County Profile*, BBC NEWS, (Jan. 29, 2013, 7:04 AM), http://www.bbc.co.uk/news/world-asia-pacific-16568035.

142. 528 F.2d at 1205.

143. *See id.* "[T]he governmental involvement in facilitating and maintaining the allegedly illegal physical and legal custody exercised respectively by the foster parents and adoption agencies does present that possibility here, and habeas jurisdiction is proper." *Id.* at 1202-03.

144. *Id.* at 1201-02 n.13. The Ninth Circuit was "reluctant" to rely on the applicability of the Alien Tort Statute due to inadequate briefing and the complaint did not join the adoption agencies as defendants. *Id.*

145. *Huynh*, 586 F.2d at 628.

146. *Id.* at 630.

children for immigration into the United States.[147] This humanitarian effort to effectuate the evacuation and permanent resettlement of the Vietnamese children became known as "Operation Babylift."[148] However, several cases following the evacuation questioned whether the children were in fact orphaned, abandoned, or validly released into the custody of the adoption agencies by their custodial relatives in Vietnam.[149] The four children involved in *Huynh Thi Anh* were examples of children improperly released into the custody of their private adoption agency.[150]

Fearing for the lives of her four grandsons, Mrs. Anh arranged for the children's evacuation from Vietnam through a local orphanage worker.[151] She left the four boys in the care of the orphanage worker only to "effectuate [their] safe removal from Vietnam."[152] She never signed an adoption release nor did she intend to relinquish legal rights to custody of the children.[153] In fact, Mrs. Anh intended to follow her grandsons to the United States by ship and rejoin them there.[154] However, unbeknownst to Mrs. Anh, the director of the Vietnamese orphanage had signed fraudulent releases for the children that specified that the four boys were orphans.[155] The four children were then placed in foster homes in Michigan by social workers who knew that Mrs. Anh was in the United States and that "the releases were probably invalid."[156] When the foster parents in Michigan instituted adoption proceedings in state court, Mrs. Anh and the children's uncle filed suit in the federal district court to enjoin the adoption proceedings and reacquire custody of the boys.[157] When the Sixth Circuit issued its opinion, Mrs. Anh's grandsons had

147. Huynh Thi Anh v. Levi, 427 F.Supp. 1281, 1284 (E.D. Mich. 1977).
148. *Id.*
149. *See, e.g.* Huynh Thi Anh, 586 F.2d 625; Nguyen Da Yen, 528 F.2d 1194; Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511 (Iowa 1976).
150. *Huynh Thi Anh*, 427 F.Supp. at 1284.
151. *Id.* In 1975, Mrs. Anh left her four grandsons for safekeeping with Mrs. Tran Thai Khiem, who worked at the Hoa Binh Orphanage in Xom Moi, Vietnam. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *See Huynh*, 586 F.2d at 628.
157. *Id.*

been in the custody of their foster parents for three years.[158]

In *Huynh Thi Anh*, the Sixth Circuit held that there was "no rule or principle of international law" or federal law that entitled Mrs. Anh to an injunction or the immediate return of her grandchildren.[159] The court found that the proper venue for her custody suit was in state court where a family court judge must determine the children's eligibility for adoption and "weigh[] the desires of the children and their best interests."[160] However, the court's analysis of the Alien Tort Statute was both brief and erroneous. Applying the Court's analysis from *Sosa*, the Sixth Circuit's discussion and analysis of the ATS was flawed for three reasons. First, the court mischaracterized Mrs. Anh's alleged tort in violation of the law of nations as a general and ambiguous claim for the "wrongful refusal to return a child to the custody of its parent."[161] Second, the court assumed "[a]rguendo" that this tort fell under the jurisdiction of the ATS without determining whether Mrs. Ahn alleged a specific, universal, and obligatory "tort" in violation of customary international law.[162] Finally, it muddled the ATS analysis with federal jurisdictional concerns that included choice-of-law rules[163] and the inexperience of federal court judges in determining questions of child custody.[164]

Putting aside the fact that the court misapplied the ATS, it considered several factors that would be relevant in a present day claim against an individual or an adoption agency accused of abducting, selling, or trafficking children. The Vietnamese orphanage and the American adoption agency filed and procured invalid adoption releases for Mrs. Anh's children with the INS.[165]

158. *Id.* at 634.
159. *Id.* at 629.
160. *Id.*
161. *Id.*
162. *See id.* at 629-30.
163. *See id.* The Sixth Circuit examined the Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants during its international choice-of-law discussion. *Id.* Under this convention, the child's place of "habitual residence" should be taken into account when determining the child's adoptability and custody rights. *Id.*
164. *See id.* at 634. Federal courts must rely on family court judges to balance the equities and seek compromises that best accommodate the interests of the parties. *Id.*
165. *Huynh Thi Anh*, 427 F.Supp. at 1284.

The sole reason for leaving the children in the care of the orphanage was to effectuate their evacuation from Vietnam.[166] At no time did Mrs. Anh release her grandchildren for adoption or intend to relinquish custody rights to them.[167] The un-notarized adoption releases created by the orphanage and the adoption agency were clearly invalid because Mrs. Anh failed to irrevocably consent to adoption of her grandchildren.[168] Furthermore, the court considered application of U.S. immigration laws under section 101(b)(1)(F) of the INA.[169] However, the court failed to properly apply whether the adoptions were invalid under section 101(b)(1)(F) because the INS exercised its "parole" power under 8 U.S.C. §1182(d)(5).[170] Under section 1182, the Attorney General may waive the usual requirements for an alien's entry into the United States for "urgent humanitarian reasons or significant public benefit."[171] Therefore under section 1182, the Attorney General does not decide whether the child has been abandoned or whether parental rights were voluntarily and irrevocably released abroad.[172] Because the court in *Huynh Thi Anh v. Levi* failed to analyze Mrs. Anh's claim under section 101(b)(1)(F) of the INA, it is uncertain whether future claims that allege an invalid adoption procured through either section 101(b)(1)(F) or 101(b)(1)(G) of the INA would proceed under an ATS analysis or relegated simply to state family courts.

166. *Id.*
167. *Id.*
168. *Id.*
169. *Huynh*, 586 F.2d at 628.
170. *Id.* at 631.
171. 8 U.S.C. § 1182(d)(5)(A)(2008):

> The Attorney General may … in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Id.
172. *Huynh*, 586 F.2d at 631.

IV. APPLICATION OF THE ALIEN TORT STATUTE TO INTERCOUNTRY ADOPTION ABUSES

While the application of the ATS to claims of serious intercountry adoption abuses provides a novel theory, it is by no means farfetched. Before the Supreme Court's disposition in *Sosa*, the Sixth Circuit directly addressed whether to recognize an alien grandmother's private cause of action to recover her biological grandchildren under the ATS.[173] The following section analyzes the strength of an alien's claim under the ATS against an adoption agency that alleges child abduction, sale, and trafficking effectuated through formal intercountry adoption.

The first step in the analysis, under the *Sosa* framework, is to determine whether the alien has pled an actionable tort in violation of customary international law.[174] The threshold question becomes whether the violation of international law is sufficiently "specific, universal, and obligatory" to warrant a federal court's jurisdiction under the ATS.[175] Therefore, a claimant must demonstrate that child abduction, sale, and trafficking have become a violation of the law of nations.

From a moral perspective, child trafficking is a reprehensible activity, especially when it involves the sale of children for money. Child trafficking through abduction and sale is incredibly dehumanizing to the adopted child. Quantifying a child's life to a specific pecuniary amount relegates the child to a mere commodity. This can adversely affect the child psychologically and exacerbate the adoptee's "pain and loss of family, belonging, and history."[176] Where a child is sold and trafficked through intercountry adoption, the activity is analogous to slavery. The dehumanizing purchase and sale of human beings is the specific evil that slavery perpetrates.

Human trafficking is defined as the "illegal recruitment, transportation, transfer, harboring, or receipt of a person" perpetrated with "intent to hold the person captive or exploit the person for labor services, or body parts."[177] Child trafficking

173. *See e.g. id.*
174. *See Sosa*, 542 U.S. at 732.
175. *Id.*
176. ELEANA J. KIM, ADOPTED TERRITORY: TRANSNATIONAL KOREAN ADOPTEES AND THE POLITICS OF BELONGING, 205 (2010).
177. BLACK'S LAW DICTIONARY 1635 (9th ed. 2009).

seems to fit comfortably within the general framework of human trafficking. However, the U.S. State Department has explicitly rejected child trafficking through intercountry adoption as constituting human trafficking.[178] The federal government will only recognize child trafficking through intercountry adoption when an adopted child is subjected to forced labor or sexual exploitation.[179] Nevertheless, specific international and domestic laws directly address the abduction, sale, and trafficking of children through intercountry adoption. Therefore, a federal district court would be forced to examine each instrument as evidence of a violation of the law of nations.

The most pertinent international accord that directly addresses the evils of child trafficking through intercountry adoption is the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions.[180] As of today, the Hague Convention is binding on over ninety countries.[181] Article 1 sets forth the primary objectives of the Convention including the establishment of a "system of co-operation amongst Contracting States to ensure that those safeguards are respected and there by prevent the abduction, the sale of sale, or traffic of children."[182] In order to effectuate its purpose, to protect children from trafficking and other abuses, the Hague Convention established a multilateral system of cooperation among the contracting countries.[183] The Convention even specifically bars the sale of children for the purpose of intercountry adoption. Under Article 4, the Central Authorities must ensure that the

178. U.S. DEP'T OF STATE, *Trafficking in Persons Report* (June 3, 2005), http://www.state.gov/j/tip/rls/tiprpt/2005/46606.htm [hereinafter *Trafficking Report*].

179. *Id.*

180. *See* Hague Conference on Private International Law, *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, *available at* http://www.hcch.net /index_en. php?act=conventions.text&cid=69 (last visited Jan. 15, 2012) [hereinafter *Hague Convention*].

181. *Status Table*, *supra* note 35.

182. *Hague Convention*, *supra* note 180.

183. *See* Kapstein, *supra* note 13, at 122-123. Under the Hague Convention, each country must specify a Central Authority to oversee the adoption process within its borders. These Central Authorities are responsible for the accreditation process of adoption service providers within their territory. *Id.*

voluntary and informed consents of the birth families in releasing their children for intercountry adoption have "not been induced by payment or compensation of any kind."[184] Article 32 of the Convention reinforces the bar on the sale of children by stating "[n]o one shall derive improper financial or other gain from an activity related to an intercountry adoption."[185]

While the Hague Convention directly addresses the need for greater regulation of intercountry adoption to eradicate child trafficking, it is closer to an "aspiration" than a binding international norm. First, the dictates of the Hague Convention are only binding between countries that are signatories to the Convention.[186] Second, as with most international treaties and agreements, the Hague Convention lacks "an international supervisory body to ensure the compliance" of the contracting countries.[187] Enforcement of the Hague Convention standards is thus left to the individual country "to police its own intercountry adoptions."[188] Therefore, a federal district court would likely analogize the Hague Convention to the broad human rights treaties relied on by the plaintiff in *Sosa*.[189] An alien's claim that alleged child trafficking through intercountry adoption would likely suffer the same "specificity" problems under international law.

However, an alien claimant may also refer to domestic laws as evidence of customary international law. Federal immigration law specifically prohibits child trafficking through intercountry adoption where there is evidence of "child buying."[190] For

184. *Hague Convention*, *supra* note 180.

185. *Id.*

186. Patricia Meier and Xiaole Zhang, *Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 113 (2009).

187. Rachel J. Wechsler, *Giving Every Child A Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy*, 22 PACE INT'L L. REV. 1, 28 (2010).

188. *Id.* at 29.

189. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III)(Dec. 10,1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

190. 8 C.F.R. §204.3(i)(2011):

> An orphan petition must be denied under this section if the prospective adoptive parents or adoptive parent(s), or a person or entity working on their behalf, have given or will given money or

countries, such as Ethiopia, that are not parties to the Hague Convention, intercountry adoptions are regulated under section 101(b)(1)(F) of the INA.[191] Under section 101(b)(1)(F), USCIS has the authority to deny an orphan visa petition where adoptive parents or their adoption agencies "have given. . . money . . . or other consideration" for the adopted child or "as an inducement to release the child."[192] While this provision empowers the federal government to deny the adopted child entry into the United States, it does not empower the federal government or private parties to prosecute international adoption agencies or child traffickers. However, this provision does provide direct evidence that the federal government considers child-buying through intercountry adoption as sufficiently odious to deny the adoption petition and the child's entry into the United States.

For countries that are signatories to the Hague Convention, such as China, intercountry adoptions are regulated by section 101(b)(1)(G) of the INA and the Intercountry Adoption Act of 2000.[193] In 1994, the United States became a signatory to the Hague Convention.[194] Congress passed the IAA specifically "to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions."[195] In order to prevent and punish child trafficking through intercountry adoption, the IAA codified civil and criminal penalties to deter disingenuous actors from participating in the adoption process.[196] Under section 404 of the IAA, any person who violates the agency accreditation process, "makes a false or fraudulent statement, or misrepresentation, with respect to a material fact, or offers, gives, solicits or accepts inducement by way of compensation, intended to

> other consideration either directly or indirectly to the child's parent(s), agent(s), other individual(s), or entity as payment for the child or as an inducement to release the child. Nothing in this paragraph shall be regarded as precluding reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings.

Id.

191. *Ethiopia Country Information, supra* note 42.
192. §204.3(i).
193. *China Country Information, supra* note 53.
194. *Status Table*, *supra* note 35.
195. 42 U.S.C. § 14901(b)(2) (2000).
196. *See* 42 U.S.C. § 14944(2000).

influence or affect" a decision by an accrediting entity or the relinquishment of parental rights shall be subject to civil money penalties.[197] The Act further authorizes the Attorney General to bring a civil action in any district court[198] and authorizes the court to impose a "civil money penalty of not more than $50,000 for a first violation, and not more than $100,000 for each succeeding violation."[199] Finally, the IAA subjects any person who "knowingly and willfully violates" the provisions of the IAA to criminal penalties.[200] However, it is noteworthy that the IAA does not extend the criminal penalties to "foreign agents working for adoption agencies."[201] Furthermore, aliens are unable to bring an enforcement action against corrupt adoption agencies or their agents under the IAA because civil and criminal enforcement is limited to the discretion of the Attorney General.[202]

Notably, these enforcement provisions within the IAA criminalize monetary compensation for children in intercountry adoption. Improper inducement is specifically defined under the IAA as "any money (in any amount) or anything of value (whether the value is great or small), directly or indirectly, to induce or influence any decision concerning: (1) The placement of a child for adoption; (2) The consent of a parent, a legal custodian, individual, or agency to the adoption of a child; (3) The relinquishment of a child to a competent authority, or to an agency or person as defined in 22 CFR 96.2, for the purpose of adoption; or(4) The performance by the child's parent or parents of any act that makes the child a Convention adoptee."[203] While the implementing legislation of the IAA also includes "permissible payments" as exceptions to the statute's prohibition of improper inducements,[204] a claimant under the ATS may still direct a court to the specific prohibitions in intercountry adoption that are punishable under federal immigration law. [205]

197. § 14944(a).
198. § 14944(b).
199. § 14944(a).
200. § 14944(c). Violators "shall be subject to a fine of not more than $250,000, imprisonment for not more than 5 years, or both." *Id.*
201. Meier, *supra* note 8, at 222.
202. § 14944(b)(1).
203. 8 C.F.R. § 204.304(a).
204. *See* § 204.304(b).
205. *See* § 204.304(a).

Based on an examination of the relevant international and domestic laws that prohibit child abduction, sale, and trafficking through intercountry adoption, it seems as though an alien pursuing a claim under the ATS has a daunting battle in federal court. The most challenging aspect of all ATS litigation is establishing a norm of customary international law that is specific, universal, and obligatory. In *Sosa*, the Supreme Court required that a claimant show a "norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms we have recognized."[206] While child trafficking through intercountry adoption is generally considered illegal when it involves the abduction and sale of children, claimants under the ATS must overcome the State Departments position on the issue[207] and also show that the norm is specifically defined and obligatory.[208] Because the Hague Convention expresses only "moral authority" and does bind all countries that participate in intercountry adoption, federal courts are unlikely to accept it as a basis for jurisdiction under the ATS.[209] Therefore claimants must rely on federal immigration law that specifically condemns and addresses child trafficking through intercountry adoption when children are exchanged for money or other consideration.[210] While it seems unlikely that a federal court will accept jurisdiction over an intercountry adoption ATS claim, it is not impossible. There may be a strong claim, if the court is able to recognize the similarities between child trafficking and slavery.[211]

CONCLUSION

The Alien Tort Statute and orphans in intercountry adoption share one common characteristic. Both are of unknown provenance. There are substantial risks associated with intercountry adoption when the "altruistic veneer" is lifted.[212]

206. *Sosa*, 542 U.S. at 725.
207. *Trafficking Report*, *supra* note 178.
208. *See Sosa*, 542 U.S. at 732.
209. *See* Graff, *supra* note 3, at 66.
210. *See* §204.3(i); § 204.304(a).
211. Fuks, *supra* note 11(analogizing bonded labor and slavery under the Alien Tort Statute).
212. Graff, *supra* note 3, at 66.

Media reports of child abduction, sale, and trafficking legitimized through intercountry adoption are direct evidence of these risks. While current international treaties and conventions have failed to criminalize and prosecute child traffickers, this does not disclose the possibility of future international cooperation on the matter. Furthermore, the real test for the viability of a claim under the ATS for child trafficking will be decided this year. The Supreme Court will definitively settle the question whether an international corporation and its employees are subject to federal jurisdiction under the ATS.[213]

213. Sacks, *supra* note 102.