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## Adopting the Stateless

Jay Milbrandt

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# ADOPTING THE STATELESS

*Jay Milbrandt\**

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\* Jay Milbrandt is an Assistant Professor at Bethel University in St. Paul, Minnesota, and a Senior Fellow in the Global Justice Program at the Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics at Pepperdine University School of Law. He is the author of the book *Go & Do: Daring to Change the World One Story at a Time*. He is also the author of various articles on global justice issues, including statelessness, genocide, and access to law. The author thanks Ryan Waggoner for important research on adoption and Stevie Newton for her diligent research on statelessness that continues to bear fruit.

## INTRODUCTION

Statelessness is the lack of legally recognized citizenship. This condition affects an estimated twelve million people worldwide.<sup>1</sup> Because stateless persons are not associated with a nation-state, they are frequently overlooked for care.<sup>2</sup> The consequences of statelessness frequently lead to compounding human rights abuses, including human trafficking, oppression, and neglect.<sup>3</sup> Few solutions exist for statelessness absent compelling nation-states to recognize citizenship. Intercountry adoption is another solution for statelessness and coincidentally, as this article will illustrate, intercountry adoption is growing in demand but contracting in available sending states. This Article proposes a nexus of statelessness and intercountry adoption where legislation is put forward to adopt stateless individuals, particularly children. This Article analyzes pending legislation for the adoption of North Korean stateless persons and recommends legislation to address broader issues of statelessness.

## I. INTERCOUNTRY ADOPTION BACKGROUND

The first documented intercountry adoptions began in the United States in the late 1940s.<sup>4</sup> Ushered in largely by the effects of World War II, intercountry adoption initially sought to assist children orphaned by parents killed in the war.<sup>5</sup> The

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1. *Stateless People*, UNHCR: THE UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646c155.html> (last visited Dec. 20, 2013).

2. See Jay Milbrandt, *Stateless*, 20 CARDOZO J. INT'L & COMP. L. 75 (2010).

3. *Id.*

4. See Richard R. Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317, 321 n.25 (1988) (providing an overview of the impact of World War II on intercountry adoption); see also ELIZABETH BARTHOLET & JOAN HEIFETZ HOLLINGER, INTERNATIONAL ADOPTION: OVERVIEW, in ADOPTION LAW AND PRACTICE §§ 10.02[1], 10.05 to 10.06 (Joan H. Hollinger ed., 2010) (providing a brief history of intercountry adoption); Kate O'Keeffe, Note, *The Intercountry Adoption Act of 2000: The United States' Ratification of the Hague Convention on the Protection of Children, and Its Meager Effect on International Adoption*, 40 VAND. J. TRANSNAT'L L. 1611, 1615–18 (2007).

5. See *56 Orphaned by War Due Today at Idlewild*, N.Y. TIMES, Apr. 22, 1949, at 8 (describing how orphans caused by deaths during World War II prompted adoptions); *How to Adopt a Child in Mexico: Three-Stage Process*, L.A. TIMES, Mar. 4, 1984, § V, at 26, col. 1. (describing the difficulties of U.S. citizens' adoption of children from Mexico in the 1980s); Ginger Thompson, *After Haiti Quake, the Chaos of U.S. Adoptions*, N.Y. TIMES (Aug. 3, 2010),

United States is the world's largest "receiving" country, accepting almost two-thirds of all intercountry adopted children.<sup>6</sup>

From World War II to 2004, the number of intercountry adoptions in the United States increased through a series of waves produced by foreign crises and changes in social conditions.<sup>7</sup> From the first intercountry adoptions in 1944, the number of annual adoptions rose to 22,990 in 2004.<sup>8</sup> However, after 2004, the number of intercountry adoptions rapidly declined by over half in the following six years, dropping to 11,059 in 2010.<sup>9</sup> Intercountry adoptions declined as a result of increased adoption costs, additional regulations, and the closing of several "sending" countries.<sup>10</sup>

The United Nations High Commissioner for Refugees ("UNHCR") collects data from fifty-eight countries with stateless populations.<sup>11</sup> The data UNHCR collects is not exhaustive, as several countries with stateless populations are not identified by UNHCR, including China and the Dominican Republic.<sup>12</sup> The following chart identifies the national population and number of adoptions in the United States from fifty-eight countries. Data from 2009 was selected for purposes of this Article

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<http://www.nytimes.com/2010/08/04/world/americas/04adoption.html> (describing how the earthquake in Haiti prompted an influx of international adoptions to the United States).

6. PETER SELMAN, THE MOVEMENT OF CHILDREN FOR INTERCOUNTRY ADOPTION: A DEMOGRAPHIC PERSPECTIVE 7 (2001), [www.archive-iussp.org/Brazil2001/s20/S27\\_P05\\_Selman.pdf](http://www.archive-iussp.org/Brazil2001/s20/S27_P05_Selman.pdf). America is also a "sending" country, although this is a relatively uncommon occurrence. Anne-Marie O'Neill, *Why Are American Babies Being Adopted Abroad?*, PEOPLE MAG. (June 6, 2005), <http://www.people.com/people/archive/article/0,,20147746,00.html>.

7. Carlson, *supra* note 4, at 318.

8. See also Elizabeth Bartholet, *International Adoption: A Way Forward*, 55 N.Y. L. SCH. L. REV. 687, 688 (2010–2011) [hereinafter Bartholet, *A Way Forward*].

9. See *id.*

10. See Kathryn Joyce, *The Evangelical Adoption Crusade*, NATION (Apr. 21, 2011), <http://www.thenation.com/article/160096/evangelical-adoption-crusade#>. Countries such as Guatemala and China have heavily restricted international adoption, which has impacted the number of adoptions into America. Also, nine other smaller countries have completely closed off adoption as a result of ethical scandals and child trafficking concerns, while dozens of other countries have placed heavy restrictions on international adoptions. *Id.*

11. *Stateless People*, *supra* note 1.

12. *Id.*

because it provides the most recent data on orphans. Adoptions to the United States from countries with stateless populations represent approximately 36% of all intercountry adoptions received by the United States. Additionally, twenty-eight of fifty-eight countries, or 48% of countries listed, allow the United States to receive children through intercountry adoption. Consequently, stateless persons are not beyond the reach of intercountry adoption. Significant populations of stateless persons live in countries with a functioning framework for adoption with the United States.

**Exhibit A.** All Adoptions to the United States from Countries with Stateless Populations

| Countries with stateless populations | 2009 population | Adoptions to U.S. in 2009 |
|--------------------------------------|-----------------|---------------------------|
| Austria                              | 8,210,281       | 0                         |
| Azerbaijan                           | 8,238,672       | 0                         |
| Belarus                              | 9,648,533       | 0                         |
| Belgium                              | 10,414,336      | 0                         |
| Bosnia and Herzegovina               | 4,613,414       | 3                         |
| Burma (Myanmar)                      | 48,137,741      | 0                         |
| Colombia                             | 45,644,023      | 238                       |
| Croatia                              | 4,489,409       | 0                         |
| Denmark                              | 5,500,510       | 0                         |
| Egypt                                | 83,082,869      | 2                         |
| Estonia                              | 1,299,371       | 9                         |
| Finland                              | 5,250,275       | 0                         |
| France                               | 64,057,792      | 0                         |
| Georgia                              | 4,615,807       | 0                         |
| Germany                              | 82,329,758      | 0                         |
| Greece                               | 10,737,428      | 2                         |
| Hungary                              | 9,905,596       | 7                         |
| Iceland                              | 306,694         | 0                         |
| Iraq                                 | 28,945,657      | 0                         |
| Italy                                | 58,126,212      | 2                         |
| Japan                                | 127,078,679     | 43                        |
| Kazakhstan                           | 15,399,437      | 296                       |

| <b>Countries with stateless populations</b> | <b>2009 population</b> | <b>Adoptions to U.S. in 2009</b> |
|---|------------------------|----------------------------------|
| Kenya                                       | 39,002,772             | 21                               |
| Kuwait                                      | 2,691,158              | 0                                |
| Kyrgyzstan                                  | 5,431,747              | 19                               |
| Latvia                                      | 2,231,503              | 28                               |
| Liechtenstein                               | 34,761                 | 0                                |
| Lithuania                                   | 3,555,179              | 22                               |
| Luxembourg                                  | 491,775                | 0                                |
| Macedonia                                   | 2,066,718              | 1                                |
| Malaysia                                    | 25,715,819             | 1                                |
| Moldova                                     | 4,320,748              | 5                                |
| Mongolia                                    | 3,041,142              | 8                                |
| Montenegro                                  | 672,180                | 0                                |
| Nepal                                       | 28,563,377             | 6                                |
| Netherlands                                 | 16,715,999             | 0                                |
| Norway                                      | 4,660,539              | 0                                |
| Panama                                      | 3,360,474              | 0                                |
| Poland                                      | 38,482,919             | 50                               |
| Portugal                                    | 10,707,924             | 0                                |
| Qatar                                       | 833,285                | 0                                |
| Romania                                     | 22,215,421             | 5                                |
| Russian Federation                          | 140,041,247            | 1,588                            |
| Saudi Arabia                                | 28,686,633             | 0                                |
| Serbia                                      | 7,379,339              | 4                                |
| Slovakia                                    | 5,463,046              | 0                                |
| South Korea                                 | 48,508,972             | 1,079                            |
| Spain                                       | 40,525,002             | 0                                |
| Sweden                                      | 9,059,651              | 0                                |
| Switzerland                                 | 7,604,467              | 0                                |
| Syrian Arab Republic                        | 20,178,485             | 0                                |
| Tajikistan                                  | 7,349,145              | 0                                |
| Thailand                                    | 65,905,410             | 58                               |
| Turkey                                      | 76,805,524             | 1                                |
| Turkmenistan                                | 4,884,887              | 0                                |
| Ukraine                                     | 45,700,395             | 607                              |

| Countries with stateless populations | 2009 population | Adoptions to U.S. in 2009 |
|--------------------------------------|-----------------|---------------------------|
| United Kingdom                       | 61,113,205      | 3                         |
| Vietnam                              | 86,967,524      | 481                       |
| Total Adoptions                      |                 | 4,589                     |

### A. Global Parties and Treaties

Several treaties and intermediary bodies govern or affect the intercountry adoption process. The Convention on the Rights of the Child (“CRC”), in particular, sets out the civil, political, economic, social, health, and cultural rights of children.<sup>13</sup> The CRC defines a child as any human being under the age of eighteen, unless the age of majority is attained earlier under a state’s own domestic legislation.<sup>14</sup> The CRC is considered “a universally agreed set of non-negotiable standards and obligations . . . that should be respected by governments.”<sup>15</sup> It is one

13. United Nations Convention on the Rights of the Child art. 21, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

14. *Id.*

15. UNICEF, *Convention on the Rights of the Child* (Feb. 18, 2014), [http://www.unicef.org/crc/index\\_30160.html](http://www.unicef.org/crc/index_30160.html). The United States is the only member of the United Nations that did not ratify the CRC. See Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151 (2007) [hereinafter Bartholet, *Human Rights*]; CRC, *supra* note 13. Article 21 of the CRC states:

Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary;

(b) Recognize that intercountry adoption may be considered as an alternative means of the child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin;

of the most widely ratified conventions; however, the United States is not a signatory.<sup>16</sup>

The CRC addresses intercountry adoption in ways that many view as anti-adoption.<sup>17</sup> Under the auspices of UNHCR,<sup>18</sup> the CRC follows the “principal of solidarity,” which states that an orphan should be placed in in-country foster care or any other “suitable” form of orphan care before being considered for permanent intercountry adoption placement.<sup>19</sup> While the CRC “fails to proscribe specific procedures that should be followed” in international adoption, it clearly places intercountry adop-

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(c) Ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavor, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

*Id.*

16. *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION,

[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (last visited Feb. 22, 2014).

17. See, e.g., Laura McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 379 (2007) (discussing the CRC’s preference for institutionalization over out-of-country adoption); see also Lisa M. Katz, *Comment: A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT’L L. REV. 283, 304 (1995); Bartholet, *Human Rights*, *supra* note 15, at 154–55 (noting UNICEF’s “generally negative attitude to international adoption” and noting that it “only grudgingly approves of such adoption, and places it low on the hierarchy of alternatives for children in need”); *UNICEF Says ‘No’ to Inter-country Adoption*, FREE LIBRARY (Jan. 5, 2005), <http://www.thefreelibrary.com/UNICEF+Says+No+to+Inter-Country+Adoption.-a0126700872> (noting UNICEF policy that intercountry adoption should be considered as a “last resort” to tsunami victims).

18. *Monitoring Human Rights*, COMM. ON THE RIGHTS OF THE CHILD (Oct. 8, 2013), <http://www2.ohchr.org/english/bodies/crc/index.htm>.

19. CRC, *supra* note 13; see also Richard Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption*, 55 N.Y.L. SCH. L. REV. 733, 736–37 (2010) (discussing the CRC).



tion at the bottom of the hierarchy of possible orphan care solutions.<sup>20</sup>

The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (“Hague Adoption Convention”) sets out to provide universal guidelines and standards for intercountry adoption, seeking to ensure adoptions are made in the best interests of the child and to prevent the child from “abduction . . . sale . . . [or] traffic[ing].”<sup>21</sup> Signatories to the Hague Adoption Convention, including the United States, agree to meet several requirements: establishing a “Central Authority” to serve as the country’s primary contact in adoption processes; satisfying several checks before deeming a child eligible for adoption, including verifying the propriety of the adoption under the laws of both countries and making a reasonable effort to first facilitate a domestic adoption; and agreeing to use only certified adoption agencies.<sup>22</sup>

Initially, the Hague Adoption Convention planned to facilitate intercountry adoption and expedite placement. However, the mandate of the convention changed to a “more single-

20. Elizabeth Long, *Where Are They Coming from, Where Are They Going: Demanding Accountability in International Adoption*, 18 CARDOZO J.L. & GENDER 827, 834 (2012).

21. U.S. DEP’T OF STATE, *Understanding the Hague Convention, INTERCOUNTRY ADOPTION*, [http://adoption.state.gov/hague\\_convention/overview.php](http://adoption.state.gov/hague_convention/overview.php) (last visited Feb. 17, 2012) [hereinafter *Understanding the Hague Convention*] (summarizing the facts and process set forth by the Hague Adoption Convention for international adoption in the United States). The stated goals of the Hague Adoption Convention are:

- a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;
- b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption art. 1, May 29, 1993, 1870 U.N.T.S. 167, 183 [hereinafter *Hague Adoption Convention*].

22. *Understanding the Hague Convention*, *supra* note 21; *see also* Hague Adoption Convention, *supra* note 21.

minded[] focus[] on preventing adoption abuses.”<sup>23</sup> Generally, the Hague Adoption Convention is viewed by scholars and advocates as more adoption-friendly than the CRC.

The preamble of the Hague Adoption Convention states that “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”<sup>24</sup> Put differently, the Hague Adoption Convention prioritizes intercountry adoption over in-country foster care or institutions.<sup>25</sup> These two international laws significantly impact the way intercountry adoptions are handled throughout the world.<sup>26</sup>

### 1. Government Legislation

Domestic leaders around the world take different views on adoption, with some leaders staunchly supporting intercountry adoptions<sup>27</sup> and others foreboding it as a human rights violation.<sup>28</sup> Nations prohibiting adoption may do so for religious rea-

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23. See Bartholet, *Human Rights*, *supra* note 15, at 154.

24. Hague Adoption Convention, *supra* note 21, pmb1.

25. See Richard Carlson, *An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L.J. 243, 255–65 (1994); see also Elizabeth Bartholet & David Smolin, *The Debate*, in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 371, 373, (2012), available at [http://www.law.harvard.edu/faculty/bartholet/The\\_Debate\\_1\\_13\\_2012.pdf](http://www.law.harvard.edu/faculty/bartholet/The_Debate_1_13_2012.pdf).

The Convention on the Rights of the Child (CRC) and the Hague Convention on Intercountry Adoption (Hague Convention or HCIA) both defer to state sovereignty, leaving nation states free to ban international adoption altogether regardless of whether they can provide children with nurturing homes in the absence of such adoption. Both provide that if countries choose to allow international adoption, they should exercise a preference for placing children in-country.

*Id.*

26. Americans seeking to adopt in countries that have not signed the Hague Adoption Convention may do so under the less stringent Orphan Adoption Process. See Long, *supra* note 20. While permissible under U.S. law, the Orphan Adoption Process provides fewer safeguards, particularly for adoptive parents. *Id.*

27. U.S. Senator Mary Landrieu is considered to be a powerful advocate for intercountry adoption. See, e.g., *Sen. Mary Landrieu Helps Adoption Standoff*, MARY LANDRIEU: U.S. SENATOR FOR LA. (Apr. 11, 2012), <http://www.landrieu.senate.gov/?p=news&id=3343>.

28. British politician Baroness Emma Nicholson fights hard against international adoption and views any orphan leaving his country for another as a failure by the orphan’s nation. See, e.g., Emma Nicholson, *Red Light on Hu-*

sons, as in Islamic countries, or for political reasons. Those who ban adoption for political reasons, including Romania, view intercountry adoption as a shameful failure by the country to care for its own children and, perhaps, such an implicit admission would invite further scrutiny into child welfare.<sup>29</sup>

## 2. Sending Countries

Legislators in sending countries have a different set of concerns than legislators in receiving countries. Legislators in sending countries must determine where orphans in the country may be sent<sup>30</sup> and set requirements for the type of people who are qualified to adopt.<sup>31</sup> When making decisions regarding intercountry adoption, these policy makers are influenced by internal pressure such as nationalism and fear of being seen as failing to take care of “their own” orphans. Policy makers also face external pressures from efforts by the United Nations Children’s Fund (“UNICEF”) and other human rights organization that advocate for tougher adoption regulations.<sup>32</sup>

In countries where intercountry adoption is permitted, the evolution of the legislative process often follows a similar pattern. First, adoptions are only lightly regulated. Second, reports of abusive practices surface. Third, political outrage grows over the abusive practices and citizens call for reform resulting in a “temporary” shut down of the program. Finally, intercountry adoption programs re-open, but with heavy re-

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*man Traffic*, GUARDIAN (July 1, 2004), available at <http://www.theguardian.com/society/2004/jul/01/adoptionandfostering.europe> anunion; *Romania Bans International Adoption*, CNN.COM/WORLD (June 22, 2001), available at <http://edition.cnn.com/2001/WORLD/europe/06/22/romania.adoption/>.

29. See Andrew Bainham, *International Adoption from Romania—Why the Moratorium Should Not Be Ended*, 15 CHILD & FAM. L.Q. 223, 227–28 (2003).

30. For a full discussion on the role of domestic policy makers, see Bartholet, *Human Rights*, *supra* note 15, at 166–70.

31. For example, China recently determined that people who are single or obese may not adopt Chinese orphans. See CHINA: *Intercountry Adoption*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=china](http://adoption.state.gov/country_information/country_specific_info.php?country-select=china) (last visited Dec. 19, 2013); see also Pam Belluck & Jim Yardley, *China Tightens Adoption Rules for Foreigners*, N.Y. TIMES (Dec. 20, 2006), <http://www.nytimes.com/2006/12/20/us/20adopt.html>.

32. Bartholet, *Human Rights*, *supra* note 15, at 167.

strictions.<sup>33</sup> The response is frequently reactionary, with abuses caused by a few affecting the majority and making a well-intended process more difficult, thus deterring would-be families from adopting.

### 3. Receiving Countries

Policy makers in receiving countries also affect adoption by regulating adoptions of children from other countries. For example, in the United States, federal lawmakers impacted international adoption by enacting the Intercountry Adoption Act (the “Act”).<sup>34</sup> The Act served as the United States’ implementation of the Hague Adoption Convention’s ideals and mechanisms.<sup>35</sup> The Act governs any adoption between the United States and another country that is a signatory to the Hague Adoption Convention.<sup>36</sup> Additionally, it preempts any state law that is not in compliance with the Hague Adoption Convention and also establishes its own provisions that go beyond those required under the Hague Adoption Convention.<sup>37</sup> Finally, the Act names the U.S. State Department as the “Central Authority” for intercountry adoptions involving the United States.<sup>38</sup>

#### *a. The U.S. State Department*

Under the authority of the Act, the State Department worked to build a regulatory framework to advance the ideals of both the Hague Adoption Convention and the Intercountry Adoption

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33. *Id.* (discussing China, Guatemala, and Russia following this pattern).

34. *See generally* 42 U.S.C. §§ 14901–14954 (2006).

35. *Adoption Process: Intercountry Adoption*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, [http://adoption.state.gov/adoption\\_process.php](http://adoption.state.gov/adoption_process.php) (last visited Feb. 22, 2014).

36. 42 U.S.C. §§ 14901–14954 (2006).

37. Long, *supra* note 20, at 847.

The IAA is an American-drafted piece of legislation that serves to aid the implementation of the Hague Adoption Convention in the United States. Confusing the IAA with the Convention results in misguided criticism of the statute based on a separate piece of legislation, rather than on the international statute’s requirements.

*Id.*

38. 42 U.S.C. §§ 14901–14954 (2006).

Act.<sup>39</sup> Under these regulations, Americans seeking to adopt a child must apply to the State Department, which then prepares a file on the potential adoptive parents' "identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care."<sup>40</sup>

Additionally, the State Department is charged with certifying adoption agencies under the Hague Adoption Convention.<sup>41</sup> The stringent requirements of the Hague Adoption Convention, Intercountry Adoption Act, and the State Departments' own regulations have led to as many as 15% of pre-Hague American adoption agencies shutting down.<sup>42</sup> Moreover, the State Department monitors the adoption practices of other countries, and in some cases, prohibits Americans from adopting from countries where abusive practices are suspected.<sup>43</sup>

The Hague Adoption Convention presents challenges and opportunities for the adoption of stateless children. On the one hand, the convention provides a fluid process between the two countries that ratified the document.<sup>44</sup> Some countries with stateless populations have signed and ratified the convention, and others practice the convention without formally agreeing to it.<sup>45</sup> However, several countries with stateless populations are not signatories. Even if a country is not a signatory, adoptions can still take place between a Hague ratifying country and a

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39. Trish Maskew, *The Failure of Promise: The U.S. Regulations on Intercountry Adoption under the Hague Convention*, 60 ADMIN. L. REV. 487, 494 (2008).

40. Hague Adoption Convention, *supra* note 21, art. 15(1).

41. *See* Long, *supra* note 20, at 845. Due to the stringent requirements of the Hague Adoption Convention, the U.S. State Department initially had a heavy backlog of over 300 agency applications. *Id.* at 846.

42. Advocacy groups have claimed that over 15% of American adoption agencies closed down because they could not meet the requirements of certification by the State Department. *Id.* at 846 n.192; *see also* Dan Frosch, *New Rules and Economy Strain Adoption Agencies*, N.Y. TIMES (May 11, 2008), <http://www.nytimes.com/2008/05/11/us/11adopt.html>.

43. *See Alerts and Notices: Intercountry Adoptions*, BUREAU OF CONSULAR AFFAIRS, U.S. DEPT OF STATE, [http://adoption.state.gov/country\\_information/alerts\\_notices.php](http://adoption.state.gov/country_information/alerts_notices.php) (last visited Feb. 17, 2012) (listing countries with adoption notices or alerts).

44. *See generally* Hague Adoption Convention, *supra* note 21.

45. *Id.*

non-convention country.<sup>46</sup> On the other hand, the Hague Adoption Convention poses some obstacles, particularly when both the sending and receiving countries have signed and ratified the convention. For instance, the Hague Adoption Convention imposes stricter requirements for documentation and proof that the child is in fact an orphan.<sup>47</sup> Such documents may be nonexistent in the case of stateless children, and proof that the child is an orphan may rely in part on circumstantial evidence.<sup>48</sup> As a result, the intercountry adoption of stateless children may prove easier from countries that are not signatories to the Hague Adoption Convention because they do not have an additional bureaucratic step. The following chart lists the Hague Adoption Convention status of countries with documented stateless populations.

**Exhibit B.** Countries with Stateless Populations and Hague Status

| Countries with stateless populations | Hague signature | Hague ratification | Hague acceptance | Entry into force | Non-Convention |
|--------------------------------------|-----------------|--------------------|------------------|------------------|----------------|
| Austria                              | x               |                    |                  |                  |                |
| Azerbaijan                           | —               | —                  | x                | x                | —              |
| Belarus                              | x               | x                  | —                | x                | —              |
| Belgium                              | x               | x                  | —                | x                | —              |
| Bosnia and Herzegovina               | —               | x                  | —                | x                | —              |
| Burma (Myanmar)                      | —               | —                  | —                | —                | x              |
| Colombia                             | x               | x                  | —                | x                | —              |
| Croatia                              | —               | —                  | —                | —                | x              |
| Denmark                              | x               | x                  | —                | x                | —              |
| Egypt                                | —               | —                  | —                | —                | x              |
| Estonia                              | —               | x                  | —                | x                | —              |
| Finland                              | x               | x                  | —                | x                | —              |
| France                               | x               | x                  | —                | x                | —              |
| Georgia                              | —               | x                  | —                | x                | —              |

46. *Id.*

47. *See id.*

48. *Id.*

| Countries with<br>stateless<br>populations | Hague<br>signature | Hague<br>ratification | Hague<br>acceptance | Entry into<br>force | Non-<br>Convention |
|--|--------------------|-----------------------|---------------------|---------------------|--------------------|
| Germany                                    | x                  | x                     | —                   | x                   | —                  |
| Greece                                     | x                  | x                     | —                   | x                   | —                  |
| Hungary                                    | x                  | x                     | —                   | x                   | —                  |
| Iceland                                    | —                  | —                     | x                   | x                   | —                  |
| Iraq                                       | —                  | —                     | —                   | —                   | x                  |
| Italy                                      | x                  | x                     | —                   | x                   | —                  |
| Japan                                      | —                  | —                     | —                   | —                   | x                  |
| Kazakhstan                                 | —                  | —                     | x                   | x                   | —                  |
| Kenya                                      | —                  | —                     | x                   | x                   | —                  |
| Kuwait                                     | —                  | —                     | —                   | —                   | x                  |
| Kyrgyzstan                                 | —                  | —                     | —                   | —                   | x                  |
| Latvia                                     | x                  | x                     | —                   | x                   | —                  |
| Liechtenstein                              | —                  | —                     | x                   | x                   | —                  |
| Lithuania                                  | —                  | x                     | —                   | x                   | —                  |
| Luxembourg                                 | x                  | x                     | —                   | x                   | —                  |
| Macedonia                                  | —                  | —                     | x                   | x                   | —                  |
| Malaysia                                   | —                  | —                     | —                   | —                   | x                  |
| Moldova                                    | —                  | —                     | x                   | x                   | —                  |
| Mongolia                                   | —                  | —                     | x                   | x                   | —                  |
| Montenegro                                 | —                  | —                     | —                   | —                   | x                  |
| Nepal                                      | —                  | —                     | —                   | —                   | x                  |
| Netherlands                                | x                  | x                     | —                   | x                   | —                  |
| Norway                                     | x                  | x                     | —                   | x                   | —                  |
| Panama                                     | x                  | x                     | —                   | x                   | —                  |
| Poland                                     | x                  | x                     | —                   | x                   | —                  |
| Portugal                                   | x                  | x                     | —                   | x                   | —                  |
| Qatar                                      | —                  | —                     | —                   | —                   | x                  |
| Romania                                    | x                  | x                     | —                   | x                   | —                  |
| Russian<br>Federation                      | x                  | —                     | —                   | —                   | x                  |
| Saudi Arabia                               | —                  | —                     | —                   | —                   | x                  |
| Serbia                                     | —                  | —                     | —                   | —                   | x                  |
| Slovakia                                   | x                  | x                     | —                   | x                   | —                  |
| South Korea                                | —                  | —                     | —                   | —                   | x                  |

| Countries with stateless populations | Hague signature | Hague ratification | Hague acceptance | Entry into force | Non-Convention |
|--------------------------------------|-----------------|--------------------|------------------|------------------|----------------|
| Spain                                | —               | —                  | —                | —                | x              |
| Sweden                               | x               | x                  | —                | x                | —              |
| Switzerland                          | x               | x                  | —                | x                | —              |
| Syrian Arab Republic                 | —               | —                  | —                | —                | x              |
| Tajikistan                           | —               | —                  | —                | —                | x              |
| Thailand                             | x               | x                  | —                | x                | —              |
| Turkey                               | x               | x                  | —                | x                | —              |
| Turkmenistan                         | —               | —                  | —                | —                | x              |
| Ukraine                              | —               | —                  | —                | —                | x              |
| United Kingdom                       | x               | x                  | —                | x                | —              |
| Viet Nam                             | x               | x                  | —                | x                | —              |
| Total Number                         |                 |                    |                  | 37               | 20             |

### *b. Other Stakeholders*

UNICEF impacts the adoption discussion in two ways. First, UNICEF prepares estimates of both the number of orphans in the world and the frequency of adoption abuses.<sup>49</sup> Second, UNICEF promotes an agenda of increased regulations and burdens on intercountry adoption.<sup>50</sup> UNICEF has been working to combat statelessness by registering children in their country of birth or residence.<sup>51</sup> Perhaps intercountry adoption would work against UNICEF's goals as it would give nation-states denying citizenship an alternative—to pass the handling of the stateless child problem to another country.

49. To understand the relevance of this, see *supra* notes 15, 17 and accompanying text.

50. Long *supra* note 20 at 836–38.

51. *Millions of Asian Children Living in Stateless Limbo*, UNICEF, [http://www.unicef.org/media/media\\_31593.html](http://www.unicef.org/media/media_31593.html) (last visited Dec. 20, 2013).



## II. STATELESSNESS BACKGROUND

A. *Defining Statelessness*

Statelessness is a frequently overlooked global struggle affecting an estimated 11–15 million individuals around the globe who lack citizenship.<sup>52</sup> Citizenship is the key to the door of basic human rights, such as education, health care, employment, and equality.<sup>53</sup> Without citizenship, it is difficult for stateless individuals to exercise these basic human rights. Despite the growing problem of statelessness and the severe vulnerability of those affected, the international response has been minimal.<sup>54</sup>

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52. See Indira Goris, Julia Harrington & Sebastian Köhn, *Statelessness: What It Is and Why It Matters*, FORCED MIGRATION REV., Apr. 2009, at 4, 4, available at <http://www.fmreview.org/FMRpdfs/FMR32/04-06.pdf>. As described in an appeal for why statelessness matters, an article by Goris, Harrington, and Köhn quipped:

For many of us, citizenship only really matters when we travel abroad, when the Olympic Games are on, or when we vote in national elections. We do not think about our citizenship on a daily basis. For others, citizenship is an ever-present issue, and often an obstacle. Because recognition of nationality serves as a key to a host of other rights, such as education, health care, employment, and equality before the law, people without citizenship—those who are ‘stateless’—are some of the most vulnerable in the world.

*Id.*

53. *Id.*

54. See Thawdar, *Bleak Future for Burmese Stateless Children*, IRRAWADDY (July 11, 2009), [http://www2.irrawaddy.org/article.php?art\\_id=16310&page=1](http://www2.irrawaddy.org/article.php?art_id=16310&page=1) [hereinafter *Bleak Future*]. *The Irrawaddy* is a Southeast Asian newspaper based in Northern Thailand that reports on regional matters with an eye particularly toward political matters and current events in Burma (Myanmar). In the article *Bleak Future for Burmese Stateless Children*, the newspaper reported on the migration of street children from Burma to Thailand. *The Irrawaddy* profiled the issue and its international response.

“Shockingly little is being done to protect the basic rights of millions of stateless children around the world,” said Maureen Lynch of Refugees International’s Senior Advocate for Stateless Initiatives, and author of *Futures Denied*.

“These children are stigmatized and blocked from such basic services as health care and education because a government won’t recognize them as citizens,” she said.

Statelessness is the condition of not possessing recognized citizenship in a state or nation.<sup>55</sup> “People are stateless because they did not acquire a nationality at birth, their state of origin no longer exists, or no state will accept them as citizens.”<sup>56</sup> UNHCR estimated in 2009 that 12 million people worldwide are stateless—“they are not considered as nationals by any State under the operation of its law.”<sup>57</sup> According to the State Department, data on statelessness is so limited that the international community does not even know if the numbers are growing or shrinking.<sup>58</sup>

Statelessness is a condition caused by governments, rather than by the actions of individuals.<sup>59</sup> Gaps in international law

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Lynch also said, “Although the Universal Declaration of Human Rights states that everyone has the right to a nationality, these children are forced into an underclass with little hope for the future through no fault of their own.”

*Id.*

55. 4 GOVERNMENTS OF THE WORLD: A GLOBAL GUIDE TO CITIZENS’ RIGHTS AND RESPONSIBILITIES 128 (C. Neal Tate ed., 2006).

56. *Id.*

57. DIV. OF INT’L PROTECTION, UNHCR, UNHCR ACTION TO ADDRESS STATELESSNESS: A STRATEGY NOTE 4 (2010), <http://www.unhcr.org/refworld/pdfid/4b9e0c3d2.pdf> [hereinafter UNHCR STRATEGY NOTE]; see also Goris et al., *supra* note 52, at 4 (“Estimates of the current number of stateless persons in the world range from 11 to 15 million. There is not only a lack of systematic attention given to collecting reliable statistics but also a lack of consensus on whom to include when counting stateless people.”); UNHCR: THE UN REFUGEE AGENCY, <http://www.unhcr.org> (last visited Sept. 15, 2011).

58. See Samuel M. Witten & David J. Kramer, *Imagine This: You Have No Country, No Country Will Claim You*, U.S. DEP’T OF STATE OFFICIAL BLOG (Sept. 16, 2008, 8:30 AM), <http://blogs.state.gov/stories/2008/09/16/imagine-you-have-no-country-no-country-will-claim-you>; see also BRAD K. BLITZ, REFUGEE STUDIES CTR., STATELESSNESS, PROTECTION AND EQUALITY 9 (2009), available at <http://www.refworld.org/docid/4e5f3d572.html>.

Some of the most widely cited cases of statelessness include minority groups that have been formally excluded from the right to nationality such as the Rohingyas in Myanmar (+ 1 million), Pygmy Banyarwanda in the Democratic Republic of Congo (1.5 million), Biharis in Bangladesh (300,000), ethnic Ethiopians and Eritreans in the Horn of Africa (500,000), and other groups such as the Meskhetian Turks in Southern Russia (15,000).

*Id.*

59. See BLITZ, *supra* note 58, at 1.

and the sovereignty of nation-states allow the phenomenon of statelessness not only to exist, but also to continue relatively unfettered. "International law traditionally affords states broad discretion to define the contours of, and delimit access to, citizenship."<sup>60</sup> However, "[p]eople are vulnerable to statelessness when governments determine citizenship based on descent, race, ethnicity, or the whim of those in power."<sup>61</sup> The risk of allowing individual states to determine citizenship independently is that those nations may define citizenship for the purpose of discriminating against particular classes of people.<sup>62</sup>

People arrive at the condition of statelessness through one of two different measures: (1) "de jure statelessness," or (2) "de facto statelessness."

### 1. De Jure Statelessness

De jure statelessness occurs when there is no recognized state to which a person may claim nationality and citizenship;<sup>63</sup> for instance, when an individual's state ceases to exist and there is no successor state.<sup>64</sup> Under the purview of UNHCR, the de jure situation is recognized by both the 1954 Convention Relating to the Status of Stateless Persons ("Status Convention") and the 1961 Convention on the Reduction of Statelessness ("Statelessness Reduction Convention" or "1961 Convention").<sup>65</sup>

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60. James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS & INT'L AFF. 321, 323 (2006).

61. GOVERNMENTS OF THE WORLD: A GLOBAL GUIDE TO CITIZENS' RIGHTS AND RESPONSIBILITIES, *supra* note 55, at 129.

62. *See id.* at 129–30.

63. *See* Convention Relating to the Status of Stateless Persons, art. 1, Sept. 28, 1954, 360 U.N.T.S. 117, 136 (defining a stateless individual as "a person not considered as a national by any State under the operation of its law").

64. De jure statelessness received pop culture attention through the 2004 movie *The Terminal*, where Tom Hanks plays a man who, while in transit through the United States, learns that his home country's government is overthrown and that the new government is not recognized by the United States. *See* THE TERMINAL (DreamWorks Pictures 2004).

65. Hugh Massey, *UNHCR and De Facto Statelessness*, in LEGAL AND PROTECTION POLICY RESEARCH SERIES (UNHCR No. 16 2010). Massey was Senior Legal Advisor to UNHCR. UNHCR STRATEGY NOTE, *supra* note 57, at 4.

## 2. De Facto Statelessness

De facto statelessness occurs when a person possesses a legally meritorious claim for citizenship, but is precluded from asserting it because of practical considerations such as cost, circumstances of civil disorder, or fear of persecution.<sup>66</sup> In de facto situations, the state is often in existence, but the individual lacks protection of the laws by a mechanical failure of the state.<sup>67</sup> In other words, de facto stateless people lack an effective nationality.<sup>68</sup> De facto statelessness may even include those inside the state of their nationality. Categories of persons fitting into de facto statelessness are: (1) persons who do not enjoy the rights attached to their nationality; (2) persons who are unable to establish their nationality, or who are of undetermined nationality; (3) persons who, in the context of state succession, are attributed the nationality of a state other than the state of their habitual residence.<sup>69</sup>

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UNHCR's responsibilities for stateless persons began with refugees who are stateless under paragraph 6(A) (II) of its Statute and article 1(A) (2) of the 1951 Convention relating to the Status of Refugees (1951 Convention), both of which refer to stateless persons who meet the criteria of the refugee definition. UNHCR's mandate responsibilities concerning statelessness were expanded following the adoption of the 1954 Convention relating to the Status of Stateless Persons (1954 Convention), and the 1961 Convention on the Reduction of Statelessness (1961 Convention). General Assembly resolutions 3274 (XXIV) and 31/36 designated UNHCR as the body mandated to examine the cases of persons who claim the benefit of the 1961 Convention and to assist such persons in presenting their claims to the appropriate national authorities.

*Id.*

66. See Massey, *supra* note 65, at ii.

[T]he Office has never clearly defined what *de facto* statelessness is, nor what the legal and operational responses to *de facto* statelessness should be. In this respect, it should be noted that whereas an international treaty regime has been developed for addressing problems of *de jure* statelessness—including most notably the 1954 and 1961 Statelessness Conventions—there is no such legally binding regime at the global level for *de facto* stateless persons who are not refugees.

*Id.*

67. *Id.*

68. *Id.* at i.

69. *Id.* at iii.

In 2006, James A. Goldston described how nations were wielding citizenship as a political weapon.<sup>70</sup> “Across broad swaths of the globe, the treatment of noncitizens—so-called foreigners and aliens, migrants, refugees, asylum seekers, stateless persons . . . is worsening precisely as states are increasingly bestowing, denying, or retracting citizenship as a political weapon.”<sup>71</sup>

This Article will address both forms of statelessness broadly, as both forms result in the stateless condition of orphans, although *de facto* statelessness has received less recognition within the international legal community.<sup>72</sup>

In a previous article entitled “Stateless,” I argue for a global system of universal identification for stateless persons building upon the foundation of the Nansen Passport, which I will briefly describe below.<sup>73</sup> Extending this concept, “Adopting the Stateless” presents a natural use and additional purpose for universal identification for stateless persons.

### *B. A Brief History of Statelessness*

In analyzing UNHCR policy, Hugh Massey, Senior Legal Advisor to UNHCR, noted that “[i]t was not until after the Second World War that international action was taken to establish a protection regime specifically for stateless persons.”<sup>74</sup> In the 1920s, due to fallout from World War I, Europe found itself with an influx of refugees spread across the continent.<sup>75</sup> The League of Nations established the *Office internationale Nansen pour les réfugiés* (Nansen International Office for Refugees) to oversee the refugee challenge.<sup>76</sup> The League of Nations High Commissioner for Refugees (“HCR”) was established in 1921 under the leadership of Fridtjof Nansen, a Norwegian explorer,

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70. *Id.*

71. Goldston, *supra* note 60, at 322. Goldston estimates that “as many as 175 million worldwide—are not citizens of the countries in which they reside.” *Id.*

72. *De facto* statelessness is not recognized by the 1954 Convention on the Prevention of Statelessness but it *is* covered by customary law and practices.

73. *See generally* Milbrandt, *supra* note 2.

74. Massey, *supra* note 65, at 1 (providing an elaborate history of post-World War II conventions, treaties, and studies with respect to statelessness).

75. *Id.*

76. *Id.*

scientist, and diplomat.<sup>77</sup> This represented the first time that the existence of refugees was analyzed as an international issue.<sup>78</sup> The HCR crafted the “Nansen Passport” for refugees, which was designed to be the first legal document that functioned to give refugees a legal existence and allow them to travel more freely than in the past.<sup>79</sup> The League of Nations agreed to the establishment of Nansen Passports at the Geneva Conference on July 5, 1922.<sup>80</sup> Nansen Passports were used during the period between World Wars I and II, with approximately 450,000 passports issued, aiding those stateless individuals to immigrate to a country willing to accept them.<sup>81</sup>

Nansen Passport documents were originally issued solely to refugees fleeing civil war in Russia, but were subsequently offered to various other refugee communities, including Armeni-

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77. *A Century of Nobel Peace Prize Laureates: Fridtjof Nansen*, INDIANA UNIV. CTR. FOR THE STUDY OF GLOBAL CHANGE, <http://archive.is/s3di0> (last visited Oct. 5, 2011).

Fridtjof Nansen was a Norwegian explorer, humanitarian, and statesman. He led a number of scientific expeditions to Greenland and the Arctic Ocean between 1888 and 1896 and accepted a faculty position at the University of Oslo as a zoologist. Nansen was the Norwegian delegate to the Versailles Peace Conference in 1919, advocating the adoption of the Covenant of the League of Nations and recognition of the rights of small states. He served as the Norwegian delegate to the League of Nations from 1920 to 1930 and held a number of high commissionerships. In this capacity he oversaw the repatriation of Central Power prisoners of war from Russia (1920 to 1922), developed the Nansen Passport for refugees in Eastern Europe and the Middle East (1921), supervised food shipments to famine-stricken Russia (1921-1922), monitored the exchange of Greek and Turkish refugees after the Turko-Greek War (1922), and planned for a national home for Armenian refugees in Syria and Lebanon (1925). Nansen received the Nobel Peace Prize in 1922 for his humanitarian work with refugees. He died on May 13, 1930 near Oslo.

*Id.*; see also Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 INT'L J. REFUGEE L. 238, 242 (2002).

78. Barnett, *supra* note 77.

79. See *id.*

80. *Id.*; see also *League of Nations Passport*, ENCYCLOPÆDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/333862/League-of-Nations-Passport> (last visited Dec. 20, 2013).

81. *Nansen Passport Donated to the Zohrab Center*, ZOHRAB CTR., <http://zohrabcenter.org/2010/08/20/nansen-passport-donated-to-the-zohrab-center> (last visited Sept. 15, 2011).

ans in 1924, and Turks, Assyrians, Syrians, Assyro-Chaldeans, and Kurds by 1928.<sup>82</sup> No state was required to permit the entry or resettlement of refugees holding a Nansen Passport, but every state that was a member of the League of Nations agreed to recognize the documents as a valid form of identification.<sup>83</sup>

Fifty-two governments ratified the original arrangement and issued Nansen Passports, but there was almost no defining unity as to the format and requirements of the various documents produced by these countries.<sup>84</sup> As a result, the power and value of the document varied according to the host country as well as the time period.<sup>85</sup> Often, these travel documents took the form of “nothing more than a sheet of paper (or . . . booklet) with printed categories to be filled in by the issuer,” and a space for the photograph and signature of the holder.<sup>86</sup> This wide array of documents, which came under the umbrella of the Nansen Passport, could be seen as merely “a loose convergence of policy, paper, and personal information.”<sup>87</sup> UNHCR eventually assumed the role carried out by the Nansen International Office for Refugees.<sup>88</sup>

Although these documents served to facilitate cross-border travel for many refugees, the documents provided no guarantees of protection from the state in which these individuals settled.<sup>89</sup> In effect, these individuals were granted increased freedom of movement through the Nansen Passport, but the Nansen Passport did not assure the protection enjoyed by citizens or nationals of the state in which they settled, such as personal welfare, access to employment, protection against expulsion,

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82. Esra Su, *Turkey's Asylum Dilemma and Process of Harmonization* 15 (Dec. 2008) (unpublished M.S. thesis, Middle East Technical University), available at <http://etd.lib.metu.edu.tr/upload/12610257/index.pdf>.

83. See generally *Nansen Passport Donated to the Zohrab Center*, supra note 81.

84. *Nansen Passport*, NYU DEP'T OF MEDIA, CULTURE, & COMM'C'N—DEAD MEDIA ARCHIVE, [http://cultureandcommunication.org/deadmedia/index.php/Nansen\\_Passport](http://cultureandcommunication.org/deadmedia/index.php/Nansen_Passport) (last visited Dec. 20, 2013).

85. See *id.*

86. *Id.*

87. *Id.*

88. See *id.*

89. See Barnett, supra note 77, at 242–43.

and other protections and liberties traditionally preserved through the state.<sup>90</sup>

The Universal Declaration of Human Rights (the “Declaration”) specifically enumerates statelessness as a matter of human rights.<sup>91</sup> Article 15 of the Declaration, issued in December 1948, affirms that: “(1) [e]veryone has the right to a nationality [and] (2) [n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”<sup>92</sup> In 1950, the United Nations created UNHCR whose responsibility toward stateless persons began in 1951 with those persons who qualified as refugees.<sup>93</sup>

The first significant step toward identifying statelessness took place at the 1954 Status Convention. UNHCR calls the 1954 Status Convention the “cornerstone of the international protection regime for stateless persons.”<sup>94</sup> According to UNHCR, the 1954 Status Convention defines the *de jure* stateless person and establishes an internationally recognized status for stateless persons.<sup>95</sup> This newfound status extended specific rights to stateless persons, most notably, the issuance of limited identity and travel documents.<sup>96</sup>

The next significant development was the 1961 Statelessness Reduction Convention.<sup>97</sup> This convention focused on strategy for eliminating statelessness. The most significant achievement of the 1961 Convention was that it mandated signatory states to respond to statelessness and not arbitrarily deprive persons of citizenship. According to UNHCR:

Specific obligations relating to prevention and reduction of statelessness are established under the 1961 Convention on the Reduction of Statelessness and in regional treaties. The 1961 Convention requires that States establish safeguards in legislation to address statelessness occurring at birth or later

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90. *See id.*

91. Universal Declaration of Human Rights [UDHR], G.A. Res. 217 (III) A, art. 15, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

92. *Id.*

93. UNHCR STRATEGY NOTE, *supra* note 57; *see also supra* note 65 and accompanying text.

94. UNHCR STRATEGY NOTE, *supra* note 57.

95. *Id.*

96. *Id.*

97. *See* Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.



in life. The Convention also establishes obligations for States in the event of State succession.<sup>98</sup>

The 1961 Convention became enforceable on December 13, 1975.<sup>99</sup> By 2007, however, only thirty-two countries had acceded to it.<sup>100</sup> The weak response from the international community damaged the intended strength of the convention.

Beyond the Universal Declaration of Human Rights and statelessness conventions, tangential conventions addressing susceptible classes of people have identified statelessness as an issue or recognized the right to nationality.<sup>101</sup> The 1959 United Nations Declaration of the Rights of the Child claims in Principle 3 that “[t]he child shall be entitled from his birth to a name and a nationality.”<sup>102</sup>

Massey summarizes the current UNHCR position on statelessness as follows:

UNHCR’s mandate has since been progressively developed to the point where it . . . lists a number of measures to be taken by UNHCR, States and other actors with respect to:

- The identification of “stateless persons and individuals with undetermined nationality”;
- The protection of “stateless persons”; and
- The prevention and reduction of “statelessness.”<sup>103</sup>

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98. UNHCR STRATEGY NOTE, *supra* note 57.

99. *See* Convention on the Reduction of Statelessness, *supra* note 97.

100. *See* Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117.

101. International instruments include: UDHR, *supra* note 91; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination art. 1, *opened for signature* Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination against Women art. 9, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13; CRC, *supra* note 13; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3; and the United Nations Convention on the Rights of Persons with Disabilities, G.A. Res. 61/611, Annex I, U.N. Doc. A/RES/61/611 (Dec. 13, 2006).

102. United Nations Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16 (Vol. I), U.N. Doc. A/4354 (Vol. I) (Nov. 20, 1959).

103. Massey, *supra* note 65, at ii.

### C. The Global Stateless Population

The exact global population of stateless persons is unknown. Estimates in 2010 by UNHCR put the stateless population at approximately 12 million.<sup>104</sup> Data aggregated by UNHCR estimates a 2009 population of nearly 6.5 million stateless persons.<sup>105</sup> The following chart identifies the countries where UNHCR has recorded stateless populations, along with the estimated number of stateless persons therein. It also presents the size of these stateless populations as a percentage of its national population.

This chart may represent as little as half of the global stateless population. Countries with high populations of stateless persons, such as China and the Dominican Republic, are not included in UNHCR's 2009 data.

#### Exhibit C. Stateless Persons as a Percentage of National Population

| Stateless populations in 2009 <sup>106</sup> | 2009 population <sup>107</sup> | Stateless persons <sup>108</sup> | Percent stateless |
|--|--------------------------------|----------------------------------|-------------------|
| Austria                                      | 8,210,281                      | 523                              | 0.006             |
| Azerbaijan                                   | 8,238,672                      | 2,078                            | 0.025             |
| Belarus                                      | 9,648,533                      | 7,799                            | 0.081             |
| Belgium                                      | 10,414,336                     | 637                              | 0.006             |
| Bosnia and Herzegovina                       | 4,613,414                      | 9,688                            | 0.210             |
| Burma (Myanmar)                              | 48,137,741                     | 723,571                          | 1.503             |
| Colombia                                     | 45,644,023                     | 11                               | 0.000             |
| Croatia                                      | 4,489,409                      | 237                              | 0.005             |

104. UNHCR STRATEGY NOTE, *supra* note 57, at 4; *see also* Goris et al., *supra* note 52, at 4; *see also* UNHCR: THE UN REFUGEE AGENCY, <http://www.unhcr.org> (last visited Sept. 15, 2011).

105. HUMANITARIAN INFORMATION UNIT, STATELESSNESS: A GLOBAL CHALLENGE (Aug. 26, 2010), <http://www.state.gov/documents/organization/181264.pdf>.

106. UNHCR POPULATION STATISTICS REFERENCE DATABASE, <http://popstats.unhcr.org/> (last visited Oct. 8, 2013).

107. All country populations are from the CIA World Factbook. *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook> (last visited Oct. 8, 2013).

108. UNHCR POPULATION STATISTICS REFERENCE DATABASE, *supra* note 106.

| <b>Stateless populations<br/>in 2009<sup>106</sup></b> | <b>2009<br/>population<sup>107</sup></b> | <b>Stateless<br/>persons<sup>108</sup></b> | <b>Percent<br/>stateless</b> |
|--|--|--|------------------------------|
| Denmark  | 5,500,510                                | 3,263                                      | 0.059                        |
| Egypt  | 83,082,869                               | 64   | 0.000                        |
| Estonia  | 1,299,371                                | 104,813                                    | 8.066                        |
| Finland  | 5,250,275                                | 2,407                                      | 0.046                        |
| France   | 64,057,792                               | 1,078                                      | 0.002                        |
| Georgia  | 4,615,807                                | 1,677                                      | 0.036                        |
| Germany  | 82,329,758                               | 8,226                                      | 0.010                        |
| Greece   | 10,737,428                               | 260  | 0.002                        |
| Hungary  | 9,905,596                                | 49   | 0.000                        |
| Iceland  | 306,694                                  | 133  | 0.043                        |
| Iraq   | 28,945,657                               | 230,000                                    | 0.795                        |
| Italy  | 58,126,212                               | 793  | 0.001                        |
| Japan  | 127,078,679                              | 1,525                                      | 0.001                        |
| Kazakhstan   | 15,399,437                               | 7,649                                      | 0.050                        |
| Kenya  | 39,002,772                               | 100,000                                    | 0.256                        |
| Kuwait   | 2,691,158                                | 93,000                                     | 3.456                        |
| Kyrgyzstan   | 5,431,747                                | 24,615                                     | 0.453                        |
| Latvia   | 2,231,503                                | 344,263                                    | 15.427                       |
| Liechtenstein  | 34,761                                   | 6  | 0.017                        |
| Lithuania  | 3,555,179                                | 3,902                                      | 0.110                        |
| Luxembourg   | 491,775                                  | 177  | 0.036                        |
| Macedonia  | 2,066,718                                | 1,911                                      | 0.092                        |
| Malaysia   | 25,715,819                               | 40,001                                     | 0.156                        |
| Moldova  | 4,320,748                                | 2,014                                      | 0.047                        |
| Mongolia   | 3,041,142                                | 373  | 0.012                        |
| Montenegro   | 672,180                                  | 1,500                                      | 0.223                        |
| Nepal  | 28,563,377                               | 800,000                                    | 2.801                        |
| Netherlands  | 16,715,999                               | 5,034                                      | 0.030                        |
| Norway   | 4,660,539                                | 2,860                                      | 0.061                        |
| Panama   | 3,360,474                                | 1  | 0.000                        |
| Poland   | 38,482,919                               | 865  | 0.002                        |
| Portugal   | 10,707,924                               | 31   | 0.000                        |
| Qatar  | 833,285                                  | 1,200                                      | 0.144                        |
| Romania  | 22,215,421                               | 306  | 0.001                        |

| Stateless populations<br>in 2009 <sup>106</sup> | 2009<br>population <sup>107</sup> | Stateless<br>persons <sup>108</sup> | Percent<br>stateless |
|---|-----------------------------------|-------------------------------------|----------------------|
| Russian Federation                              | 140,041,247                       | 50,000                              | 0.036                |
| Saudi Arabia                                    | 28,686,633                        | 70,000                              | 0.244                |
| Serbia  | 7,379,339                         | 16,700                              | 0.226                |
| Slovakia  | 5,463,046                         | 911                                 | 0.017                |
| South Korea                                     | 48,508,972                        | 103                                 | 0.000                |
| Spain   | 40,525,002                        | 28                                  | 0.000                |
| Sweden  | 9,059,651                         | 7,758                               | 0.086                |
| Switzerland                                     | 7,604,467                         | 67                                  | 0.001                |
| Syrian Arab Republic                            | 20,178,485                        | 300,000                             | 1.487                |
| Tajikistan                                      | 7,349,145                         | 2,626                               | 0.036                |
| Thailand  | 65,905,410                        | 3,500,000                           | 5.311                |
| Turkey  | 76,805,524                        | 2,739                               | 0.004                |
| Turkmenistan                                    | 4,884,887                         | 12,000                              | 0.246                |
| Ukraine   | 45,700,395                        | 56,500                              | 0.124                |
| United Kingdom                                  | 61,113,205                        | 205                                 | 0.000                |
| Viet Nam  | 86,967,524                        | 7,200                               | 0.008                |
| Total Stateless                                 |                                   | 6,555,377                           |                      |

The small number of stateless persons as a percentage of national population suggests why statelessness is frequently overlooked. Stateless persons regularly make up tenths, hundredths, and thousandths of a percent of the population of the countries in which they reside. For example, while statelessness affects only eight one-thousandths of a percent in Vietnam, it afflicts more than 7,000 individuals in the country. Although the percentages per country are small, the total stateless population rises to over 6.5 million as an international group.

#### *D. Challenges for Adopting the Stateless*

A primary challenge for the intercountry adoption of stateless persons under the Hague Adoption Convention is that the convention requires a sending country.<sup>109</sup> Technically, stateless persons with no citizenship would have no formal sending country.

109. Hague Adoption Convention, *supra* note 21.

Receiving states would need to rely on the "host" state, most likely the country where the stateless person is residing. In many cases of statelessness, this is improbable or impossible. First, the host country may be adverse to the group of stateless persons (for instance, in Thailand where statelessness is a matter of illegal immigration).<sup>110</sup> Alternatively, the country may be logistically incapable of addressing stateless persons in cases of de jure statelessness caused by ongoing wars or of de facto statelessness in under-resourced countries.<sup>111</sup> Understandably, host countries might not want to become involved in the adoption of stateless persons for reasons such as the added expense of administering an adoption facility.

It will take special legislation outside of the Hague Adoption Convention to accommodate this process. Such legislation would expand on the Intercountry Adoption Act and give the State Department more power to receive children for adoption. Specific legislation has already been proposed to assist stateless North Korean children, which will be addressed and analyzed in the following section.

### III. THE NORTH KOREAN DILEMMA

Children of defecting North Korean mothers currently face a statelessness dilemma.<sup>112</sup> Many of these women leave North Korea for China, which is problematic because China does not legally recognize these women as refugees.<sup>113</sup> These mothers frequently give birth to children while in China.<sup>114</sup> The fathers are often Chinese men who either developed a relationship with the North Korean mother, or fathered a child with a woman through the North Korean sex industry.<sup>115</sup> The child conse-

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110. *Bleak Future*, *supra* note 54.

111. Generally, if a nation does not have enough resources to care for its own citizens, it does not prioritize stateless persons residing within its borders.

112. Estimates of North Korean stateless children are around 20,000, but an accurate number is hard to estimate. Madison Park, *U.S. Law Aimed at Helping North Korean Orphans*, CNN (May 13, 2013), <http://www.cnn.com/2013/05/13/us/north-korea-adoption/>.

113. Kimberly Hyo-Jung Campbell, *De Facto Statelessness Places Adoption on the Table for Children of N. Korean Women in China*, HANKYOREH (June 18, 2010), [http://www.hani.co.kr/arti/english\\_edition/e\\_national/426317.html](http://www.hani.co.kr/arti/english_edition/e_national/426317.html).

114. *See id.*

115. *Id.*

quently becomes stateless when the child's mother is deported from China or dies.

The children born from stateless North Korean mothers are legally entitled to obtain Chinese citizenship, but face major obstacles and practical challenges in doing so. In order to obtain Chinese citizenship, a child must receive *hukou*, a family registry certificate.<sup>116</sup> To receive *hukou* "the Chinese father must submit legal proof including testimonies from witnesses that his North Korean wife has been arrested and repatriated back to North Korea. This is a requirement because the mother may not be listed on the *hukou* due to her status as an illegal migrant."<sup>117</sup>

The difficulties in obtaining proof, including witness testimony, are significant hurdles for the Chinese father.<sup>118</sup> Added to these challenges, Chinese men are reluctant to register their children because of the one-child policy.<sup>119</sup> The stigma and potential legal obstacles associated with his wife's illegal status further disincline Chinese men toward registration.<sup>120</sup>

These children meet the requirements for de facto statelessness under category two: "Persons who are unable to establish their nationality, or who are of undetermined nationality."<sup>121</sup> The children are unable to establish their nationality in China and are practically prevented from returning to North Korea and establishing their nationality there.<sup>122</sup>

North Korea is by no means the only example of de facto statelessness or the only location where intercountry adoption may provide a solution. An estimated one million stateless children live along the Thai Burma border, and the countries have been unable to find a workable solution.<sup>123</sup>

#### IV. ADOPTION AND STATELESSNESS

The Hague Adoption Convention poses some hurdles for intercountry adoption. While these hurdles are intended to protect the child, they also restrict the convention in ways that

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116. *Id.*

117. *Id.*

118. *Id.*

119. *See id.*

120. *Id.*

121. *See Massey, supra* note 65, at iii.

122. *See id.*

123. *Bleak Future, supra* note 54.

prevent it from adapting or innovating to new global challenges, such as statelessness.

The first challenge for intercountry adoption will be to establish that the child is adoptable under Article 4. The following chart lists countries with stateless populations and identifies whether the Hague Adoption Convention has entered into force in the corresponding country, or whether it falls outside the arms of the Hague as a non-convention country. Correlating data from UNHCR on stateless populations and the Hague Conference on Private International Law shows that stateless populations live largely outside the jurisdiction of the Hague Adoption Convention.<sup>124</sup>

In total, UNHCR tracks 3,477,101 stateless people. This figure is short of the global estimate of 12 million.<sup>125</sup> However, correlating stateless data with contracting countries, 1,007,816 stateless persons live within Hague contracting countries. A total of 2,469,285 live in non-contracting countries, or 71% of the known global population of stateless persons.

#### **Exhibit D. Countries with Stateless Populations Participating with the Hague Adoption Convention**

| Stateless populations in 2009 | Stateless persons | Entry into force | Non-convention |
|-------------------------------|-------------------|------------------|----------------|
| Austria                       | 523               | x                | —              |
| Azerbaijan                    | 2,078             | x                | —              |
| Belarus                       | 7,799             | x                | —              |
| Belgium                       | 637               | x                | —              |
| Bosnia and Herzegovina        | 9,688             | —                | x              |
| Burma (Myanmar)               | 723,571           | —                | x              |
| Colombia                      | 11                | x                | —              |

124. Statistics on statelessness are maintained by UNHCR. *Stateless People Figures*, UNHCR, <http://www.unhcr.org/pages/49c3646c26.html> (the latest data available is from 2011). A current list of ratifications and signatories to the Hague Adoption Convention is maintained by The Hague. *Status Table*, HCCH, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last visited Feb. 22, 2014).

125. UNHCR's count is much smaller than the global estimate. Presumably, the discrepancy is explained by countries underreporting, failing to report, or the challenges in identifying stateless populations.

| Stateless populations in 2009 | Stateless persons | Entry into force | Non-convention |
|-------------------------------|-------------------|------------------|----------------|
| Croatia                       | 237               | —                | x              |
| Denmark                       | 3,263             | x                | —              |
| Egypt                         | 64                | —                | x              |
| Estonia                       | 104,813           | x                | —              |
| Finland                       | 2,407             | x                | —              |
| France                        | 1,078             | x                | —              |
| Georgia                       | 1,677             | x                | —              |
| Germany                       | 8,226             | x                | —              |
| Greece                        | 260               | x                | —              |
| Hungary                       | 49                | x                | —              |
| Iceland                       | 133               | x                | —              |
| Iraq                          | 230,000           | —                | x              |
| Italy                         | 793               | x                | —              |
| Japan                         | 1,525             | —                | x              |
| Kazakhstan                    | 7,649             | x                | —              |
| Kenya                         | 100,000           | x                | —              |
| Kuwait                        | 93,000            | —                | x              |
| Kyrgyzstan                    | 24,615            | —                | x              |
| Latvia                        | 344,263           | x                | —              |
| Liechtenstein                 | 6                 | x                | —              |
| Lithuania                     | 3,902             | x                | —              |
| Luxembourg                    | 177               | x                | —              |
| Macedonia                     | 1,911             | x                | —              |
| Malaysia                      | 40,001            | —                | x              |
| Moldova                       | 2,014             | x                | —              |
| Mongolia                      | 373               | x                | —              |
| Montenegro                    | 1,500             | —                | x              |
| Nepal                         | 800,000           | —                | x              |
| Netherlands                   | 5,034             | x                | —              |
| Norway                        | 2,860             | x                | —              |
| Panama                        | 1                 | x                | —              |
| Poland                        | 865               | x                | —              |
| Portugal                      | 31                | x                | —              |
| Qatar                         | 1,200             | —                | x              |



| Stateless populations in 2009 | Stateless persons | Entry into force | Non-convention |
|-------------------------------|-------------------|------------------|----------------|
| Romania                       | 306               | x                | —              |
| Russian Federation            | 50,000            | —                | x              |
| Saudi Arabia                  | 70,000            | —                | x              |
| Serbia                        | 16,700            | —                | x              |
| Slovakia                      | 911               | x                | —              |
| South Korea                   | 103               | —                | x              |
| Spain                         | 28                | —                | x              |
| Sweden                        | 7,758             | x                | —              |
| Switzerland                   | 67                | x                | —              |
| Syrian Arab Republic          | 300,000           | —                | x              |
| Tajikistan                    | 2,626             | —                | x              |
| Thailand                      | 3,500,000         | x                | —              |
| Turkey                        | 2,739             | x                | —              |
| Turkmenistan                  | 12,000            | —                | x              |
| Ukraine                       | 56,500            | —                | x              |
| United Kingdom                | 205               | x                | —              |
| Viet Nam                      | 7,200             | x                | —              |
| Totals                        | 6,555,377         | 37               | 21             |

No statistically significant correlation exists between the size of the stateless population and the host nation's lack of entering into the Hague Adoption Convention.<sup>126</sup> Thus, it is not true that countries which allow stateless populations avoid or attract the Hague Adoption Convention.

After determining whether stateless populations exist in Hague Adoption Convention countries, it is necessary to estimate the number of stateless children who might be orphaned. Since this data has not been collected, this Article will extrapolate an estimation of orphaned stateless children based upon regional estimates of orphaned children in the general population.

126. Correlation coefficient of 0.004, or 0.4%. In other words, the size of the stateless population explains only 0.4% of why countries choose to enforce the Hague Adoption Convention. A *p* value of 0.973 suggests that the findings are not random.

An orphan is defined by UNICEF as a child who has lost one or more parents.<sup>127</sup> For the purposes of adoption under the Hague Adoption Convention, and in the spirit of keeping the child united with his or her original parents, this Article rejects the notion that a stateless orphan put up for adoption would have lost only one parent. Accordingly, this chart estimates the percentage of children who have lost both parents; the estimate is based upon data gathered in various regions of the world in 2009. Among the regions listed, on average, one in twelve children has lost both parents. As shown in Exhibit E, estimated orphaned stateless children are not insignificant in number; there are millions in most countries identified in Exhibit E.

### Exhibit E. Orphaned Stateless Children

| Region                       | Children who lost one or both parents due to any cause | Children who lost both parents due to any cause | Percent who lost both parents |
|------------------------------|--|---|-------------------------------|
| Africa, Sub-Saharan          | 56,100,000   | 9,100,000                                       | 16                            |
| Eastern and Southern Africa  | 27,600,000   | 4,900,000                                       | 18                            |
| West and Central Africa      | 26,400,000   | 4,100,000                                       | 16                            |
| Middle East and North Africa | 6,400,000  | 470,000   | 7                             |
| Asia                         | 71,400,000   | 5,300,000                                       | 7                             |
| South Asia                   | 41,000,000   | 3,400,000                                       | 8                             |
| East Asia and Pacific        | 30,500,000   | 1,800,000                                       | 6                             |
| Latin America and Caribbean  | 9,800,000  | 510,000   | 5                             |
| CEE/CIS                      | 7,300,000  | 410,000   | 6                             |
| Developing countries         | 145,000,000  | 15,400,000                                      | 11                            |
| World                        | 153,000,000  | 17,800,000                                      | 12                            |

The following chart estimates the number of stateless orphans in the world. By identifying the countries with stateless populations, the chart multiplies tracked stateless populations by regional estimates of the number of orphaned children who have lost both parents. This figure estimates the number of

127. *Press Centre: Orphans*, UNICEF, [http://www.unicef.org/media/media\\_45279.html](http://www.unicef.org/media/media_45279.html) (last updated May 25, 2012).

stateless orphans by country. Kenya, Burma, Nepal, and Thailand have the largest estimated population of orphaned stateless children.

**Exhibit F.** Estimated Number of Orphaned Stateless Children

| Stateless populations in 2009 | Stateless persons | Estimated stateless (lost both parents) | Estimated orphaned stateless |
|-------------------------------|-------------------|---|------------------------------|
| Austria                       | 523               | 11.6                                    | 0                            |
| Azerbaijan                    | 2,078             | 7.4                                     | 4                            |
| Belarus                       | 7,799             | 5.6                                     | 7                            |
| Belgium                       | 637               | 5.6                                     | 0                            |
| Bosnia and Herzegovina        | 9,688             | 5.6                                     | —                            |
| Burma (Myanmar)               | 723,571           | 8.3                                     | 1,994                        |
| Colombia                      | 11                | 5.2                                     | 0                            |
| Croatia                       | 237               | 5.6                                     | 0                            |
| Denmark                       | 3,263             | 11.6                                    | 4                            |
| Egypt                         | 64                | 7.3                                     | 0                            |
| Estonia                       | 104,813           | 5.6                                     | 86                           |
| Finland                       | 2,407             | 11.6                                    | 2                            |
| France                        | 1,078             | 11.6                                    | —                            |
| Georgia                       | 1,677             | 5.6                                     | 1                            |
| Germany                       | 8,226             | 5.6                                     | 2                            |
| Greece                        | 260               | 11.6                                    | 0                            |
| Hungary                       | 49                | 5.6                                     | 0                            |
| Iceland                       | 133               | 11.6                                    | 0                            |
| Iraq                          | 230,000           | 7.3                                     | —                            |
| Italy                         | 793               | 11.6                                    | —                            |
| Japan                         | 1,525             | 5.9                                     | —                            |
| Kazakhstan                    | 7,649             | 7.4                                     | 15                           |
| Kenya                         | 100,000           | 17.8                                    | 1,183                        |
| Kuwait                        | 93,000            | 15.3                                    | —                            |
| Kyrgyzstan                    | 24,615            | 7.4                                     | 47                           |
| Latvia                        | 344,263           | 5.6                                     | 277                          |
| Liechtenstein                 | 6                 | 5.6                                     | —                            |
| Lithuania                     | 3,902             | 15.3                                    | 9                            |

| Stateless populations in 2009   | Stateless persons | Estimated stateless (lost both parents) | Estimated orphaned stateless |
|---------------------------------|-------------------|---|------------------------------|
| Luxembourg                      | 177               | 11.6                                    | 0                            |
| Macedonia                       | 1,911             | 5.6                                     | —                            |
| Malaysia                        | 40,001            | 7.4                                     | 52                           |
| Moldova                         | 2,014             | 5.6                                     | 2                            |
| Mongolia                        | 373               | 7.4                                     | 1                            |
| Montenegro                      | 1,500             | 5.6                                     | —                            |
| Nepal                           | 800,000           | 7.4                                     | 1,351                        |
| Netherlands                     | 5,034             | 11.6                                    | 3                            |
| Norway                          | 2,860             | 11.6                                    | 2                            |
| Panama                          | 1                 | 5.2                                     | 0                            |
| Poland                          | 865               | 5.6                                     | 1                            |
| Portugal                        | 31                | 11.6                                    | 0                            |
| Qatar                           | 1,200             | 7.3                                     | 1                            |
| Romania                         | 306               | 5.6                                     | 0                            |
| Russian Federation              | 50,000            | 5.6                                     | —                            |
| Saudi Arabia                    | 70,000            | 7.3                                     | —                            |
| Serbia                          | 16,700            | 5.6                                     | 12                           |
| Slovakia                        | 911               | 5.6                                     | 1                            |
| South Korea                     | 103               | 5.9                                     | 0                            |
| Spain                           | 28                | 11.6                                    | —                            |
| Sweden                          | 7,758             | 15.3                                    | 8                            |
| Switzerland                     | 67                | 11.6                                    | —                            |
| Syrian Arab Republic            | 300,000           | 7.3                                     | —                            |
| Tajikistan                      | 2,626             | 7.4                                     | 6                            |
| Thailand                        | 3,500,000         | 7.4                                     | 5,519                        |
| Turkey                          | 2,739             | 7.3                                     | 3                            |
| Turkmenistan                    | 12,000            | 7.4                                     | —                            |
| Ukraine                         | 56,500            | 5.6                                     | 56                           |
| United Kingdom Northern Ireland | 205               | 11.6                                    | 0                            |
| Viet Nam                        | 7,200             | 7.4                                     | 9                            |
| <b>Total Stateless Orphans</b>  |                   |   | <b>11,077</b>                |

Exhibit F provides a rough but potentially conservative estimate of the number of stateless orphans worldwide. First, the study is limited to data gathered by UNHCR. This data may overlook unreported countries or stateless populations. Second, given the vulnerability of the stateless population, stateless children would conceivably be more vulnerable to the loss of both parents. Stateless populations are often under-resourced and underrepresented, making them more susceptible to poverty, disease, and human rights abuses.<sup>128</sup> A hypothesis that stateless populations suffer a higher rate of orphaned children deserves closer study.

Further, the data does not necessarily represent all adoptable orphans.<sup>129</sup> Some orphans who lost both parents may have extended family (grandparents, siblings, and aunts and uncles) who can take them in or communities who may act as surrogate families. Given that statelessness frequently occurs in conditions of international conflict or forced emigration, stateless children may be more likely to lack extended family or community.<sup>130</sup> Once again, a hypothesis that stateless populations have few options for local resettlement deserves further study.

The formal number of estimated orphaned stateless children represented by Exhibit F may appear small—11,077 globally.<sup>131</sup> This number, however, is significant. It is almost equivalent to the total number of intercountry adoptions to the United States in 2010.<sup>132</sup> It is also nearly three times the number of children adopted into the United States in 2009 from countries with stateless population, a total of 4589 children in 2009.<sup>133</sup> Most importantly, perhaps, these orphaned stateless children are the most vulnerable and most in need of adoption.

## V. LEGISLATION AND INTERCOUNTRY ADOPTION

In March 2010, the U.S. House of Representatives introduced a bill proposing a solution known as the “North Korean Refu-

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128. See generally Milbrandt, *supra* note 2.

129. See *supra* note 125.

130. Milbrandt, *supra* note 2.

131. See *supra* Exhibit F.

132. See Bartholet, *A Way Forward*, *supra* note 8, at 688.

133. See *supra* Exhibit A.

gee Adoption Act of 2010” (the “2010 Act”).<sup>134</sup> The bill was referred to committee and reintroduced on April 8, 2011.<sup>135</sup> The bill passed the House on September 11, 2012, and the Senate on January 1, 2013, under the new header of the “North Korean Child Welfare Act of 2012” (the “2012 Act”).<sup>136</sup> The bill “require[s] the Department of State regularly to brief appropriate congressional committees on efforts to advocate for and develop a strategy to provide assistance in the best interest of these children.”<sup>137</sup>

The North Korean Refugee Adoption Act of 2010 legislation read as follows:

**A BILL**

To develop a strategy for assisting stateless children from North Korea, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the ‘North Korean Refugee Adoption Act of 2010’.

**SECTION 2. SENSE OF CONGRESS.**

It is the sense of Congress that—

- (1) thousands of North Korean children do not have families and are threatened with starvation and disease if they remain in North Korea or as stateless refugees in surrounding countries;
- (2) thousands of United States citizens would welcome the opportunity to adopt North Korean orphans; and
- (3) the Secretary of State and the Secretary of Homeland Security should make every effort to facilitate the adoption of any eligible North Korean children.

**SECTION 3. DEFINITIONS.**

In this Act:

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134. North Korean Refugee Adoption Act of 2012, H.R. 1464, 112th Cong. (2012) (enacted).

135. *Id.*

136. *Id.*

137. *Id.*

(1) FOREIGN-SENDING COUNTRY- The term 'foreign-sending country'—

(A) means—

(i) the country of the orphan's citizenship; or

(ii) if the orphan is not permanently residing in the country of citizenship, the country of the orphan's habitual residence; and

(B) excludes any country to which the orphan—

(i) travels temporarily; or

(ii) travels as a prelude to, or in conjunction with, his or her adoption or immigration to the United States.

(2) HAGUE COUNTRY- The term 'Hague countries' means a country that is a signatory of the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993.

(3) NON-HAGUE COUNTRY- The term 'non-Hague country' means a country that is not a signatory of the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993.

#### **SECTION 4. STRATEGY ON ADOPTION OF NORTH KOREAN CHILDREN BY UNITED STATES CITIZENS.**

(a) In General- The Secretary of State, in consultation with the Secretary of Homeland Security and the Secretary of Health and Human Services, shall develop a comprehensive strategy for facilitating the adoption of North Korean children by United States citizens.

(b) Considerations- In developing the strategy under this section, the Secretary shall—

(1) consider the challenges that United States citizens would encounter in attempting to adopt children from North Korea who are currently living in Hague countries and non-Hague countries regardless of their legal status in such countries;

(2) propose solutions to deal with the situation in which a North Korean child does not have access to a competent authority in the foreign-sending country;

(3) propose solutions to deal with North Korean children who are not considered habitual residents of the countries in which they are located;

(4) evaluate alternative mechanisms for foreign-sending countries to prove that North Korean children are orphans when documentation, such as birth certificates, death certificates of birth parents, or orphanage documentation, is missing or destroyed;

(5) provide suggestions for working with South Korea to establish pilot programs that identify, provide for the immediate care of, and assist in the international adoption of, orphaned North Korean children living within South Korea;

(6) provide suggestions for working with aid organizations in Southeast Asia to identify and establish pilot programs for the identification, immediate care, and eventual international adoption of orphaned children from North Korea;

(7) identify other countries in which large numbers of stateless, orphaned children are living who might be helped by international adoption; and

(8) propose solutions for assisting orphaned children with Chinese fathers and North Korean mothers who are living in China and have no access to Chinese or North Korean resources.

(c) Reporting Requirement- Not later than 90 days after the date of the enactment of this Act, the Secretary of State shall submit to Congress a report that contains the details of the strategy developed under this section.<sup>138</sup>

The North Korean Child Welfare Act of 2012 received significant changes from the proposed North Korean Refugee Adoption Act of 2010. Notably, the new proposed law withdraws from an aggressive posture toward stateless children and inter-country adoption specifically.<sup>139</sup> In particular, the 2010 version of the Act mandated the development of a strategy to address stateless North Korean children. The 2012 Act is weaker on

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138. North Korean Refugee Adoption Act of 2010, H.R. 4986, 111th Cong. (2010).

139. *Id.*



implementation, instead requiring regular briefings related to an analysis of “challenges that United States citizens would encounter in attempting to adopt” stateless North Korean children. Even the modification of the title from the “Refugee Adoption Act” to the “Child Welfare Act” illustrates the accepted Act’s weak stance toward stateless adoption in favor a broader posture toward general welfare.<sup>140</sup>

HR 1464, the North Korean Child Welfare Act of 2012, reads as follows:

An Act

To express the sense of Congress regarding North Korean children and children of one North Korean parent and to require the Department of State regularly to brief appropriate congressional committees on efforts to advocate for and develop a strategy to provide assistance in the best interest of these children.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the ‘North Korean Child Welfare Act of 2012’.

**SEC. 2. SENSE OF CONGRESS.**

It is the sense of Congress that—

(1) hundreds of thousands of North Korean children suffer from malnutrition in North Korea, and North Korean children or children of one North Korean parent who are living outside of North Korea may face statelessness in neighboring countries; and

(2) the Secretary of State should advocate for the best interests of these children, including, when possible, facilitating immediate protection for those living outside North Korea through family reunification or, if appropriate and eligible in individual cases, domestic or international adoption.

**SEC. 3. DEFINITIONS.**

In this Act:

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140. H.R. 1464.

(1) **APPROPRIATE CONGRESSIONAL COMMITTEES-** The term ‘appropriate congressional committees’ means the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives.

(2) **HAGUE COUNTRY-** The term ‘Hague country’ means a country where the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, done at The Hague May 29, 1993, has entered into force and is fully implemented.

(3) **NON-HAGUE COUNTRY-** The term ‘non-Hague country’ means a country where the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, done at The Hague May 29, 1993, has not entered into force.

#### **SEC. 4. BRIEFINGS ON THE WELFARE OF NORTH KOREAN CHILDREN.**

(a) **In General-** The Secretary of State shall designate a representative to regularly brief the appropriate congressional committees in an unclassified setting on United States Government efforts to advocate for the best interests of North Korean children and children of one North Korean parent, including efforts to address, when appropriate, the adoption of such children living outside North Korea without parental care.

(b) **Contents-** The Secretary’s designee shall be prepared to address in each briefing the following topics:

(1) The analysis of the Department of State of the challenges facing North Korean children residing outside North Korea and challenges facing children of one North Korean parent in other countries who are fleeing persecution or are living as de jure or de facto stateless persons.

(2) Department of State efforts to advocate for the best interest of North Korean children residing outside North Korea or children of one North Korean parent living in other countries who are fleeing persecution or are living as de jure or de facto stateless persons, including, when possible, efforts to address the immediate care and family reunification of these children, and, in individual cases where appropriate, the adoption of eligible North Korean children living

outside North Korea and children of one North Korean parent living outside North Korea.

(3) Department of State efforts to develop a comprehensive strategy to address challenges that United States citizens would encounter in attempting to adopt, via intercountry adoption, North Korean-origin children residing in other countries or children of one North Korean parent residing outside North Korea who are fleeing persecution or are living as de jure or de facto stateless persons, including efforts to overcome the complexities involved in determining jurisdiction for best interest determinations and adoption processing, if appropriate, of those who habitually reside in a Hague country or a non-Hague country.

(4) Department of State diplomatic efforts to encourage countries in which North Korean children or children of one North Korean parent are fleeing persecution or reside as de jure or de facto stateless persons to resolve issues of statelessness of North Koreans residing in that country.

(5) Department of State efforts to work with the Government of the Republic of Korea to establish pilot programs that identify, provide for the immediate care of, and assist in the family reunification of North Korean children and children of one North Korean parent living within South Korea and other countries who are fleeing persecution or are living as de jure or de facto stateless persons.<sup>141</sup>

## VI. ANALYSIS OF NORTH KOREAN LEGISLATION

The 2010 Act worked to aggressively develop a mechanism for the adoption of stateless children.<sup>142</sup> The 2012 Act is more in line with the Hague Adoption Convention, prioritizing family reunification.<sup>143</sup> The original 2010 bill stalled in committee and was reintroduced in 2011 before being reconstituted through Senate amendments to the 2012 bill.<sup>144</sup> The final bill was, perhaps, a more palatable product for Congress. The 2012 bill appears to make few promises, instead requiring an update

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141. *Id.*

142. *See id.*

143. *See id.*

144. *Id.*

on “efforts” to be shared at various briefing meetings. Alternatively, the 2012 Act may have been aligned with the original drafters’ view that the aggressive language of the 2010 Act would be traded for the opportunity to pass the bill. Whatever the reason, several notable changes are apparent.

The 2012 Act fails to define “stateless.” The breadth of definitions for the terms statelessness and orphan may present challenges to the law. For instance, if the child of a mother remains in a host country, but the mother is deported to a hostile country, the child may not legally be an orphan, but it may be impossible to reunite them. Furthermore, a child may not have legal status in a host country, but may be receiving the same rights as a citizen of the host country.

The 2012 Act seeks solely to establish a pilot program in the Republic of Korea. While a singular pilot program may be a necessary starting point, South Korea has a very limited stateless population.<sup>145</sup> According to the recorded population of stateless persons in Table F, South Korea reports 103 stateless persons. Using the formula presented in this Article, it is estimated that none of these individuals would be orphaned children.<sup>146</sup> Presumably, some orphaned stateless children must reside in South Korea for this pilot program to be given consideration. If the legislation is interpreted narrowly, the potential impact is likely much smaller than the regional statelessness dilemma, and expansion to more countries may require new legislation. Perhaps the legislation could be construed more broadly, allowing stateless children from the region to enter South Korea for the purpose of intercountry adoption processing. Such a plan would circumvent probable resistance from the governments of Russia and China.

## VII. RECOMMENDATIONS FOR FUTURE LEGISLATION

Future legislation should not be limited to North Korea. Statelessness is a broad problem affecting millions of children, and the North Korean dilemma is only a small portion of the larger statelessness challenge. Statelessness is not a static problem but a shifting global issue that evolves based on conflicts and nation-state policies. Legislation should be drafted that explores the adoption of stateless people broadly, while

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145. *See supra* Exhibit F.

146. *Id.*

prioritizing the Hague Adoption Convention ideals of family reunification or resettlement in a country of origin.

This legislation would largely circumvent the Hague Adoption Convention by creating a parallel adoption system. While the Hague Adoption Convention governs intercountry adoptions between contracting states, this legislation would create an adoption system governed privately between two contracting states. In some cases of stateless adoption, the Hague Adoption Convention would still apply because the stateless child will reside in the host country contracting to the Hague Adoption Convention. In many cases, particularly related to countries with large stateless populations, the Hague Adoption Convention will not apply since the host country will not have ratified the convention.

The most important challenge in addressing statelessness through adoption is the protection of children. Intercountry adoption has experienced the negative effects of abuse of the system.<sup>147</sup> Inherent risks exist in developing a parallel intercountry adoption system for stateless children. Specifically, there is a high risk that a black market will develop for adopting children if demand from receiving states is high.

Additionally, the definition of "foreign sending country" should be changed to "foreign host country." The countries may not be sending the children, they may instead be disinterested and essentially deporting the child to the custody of the receiving country.

"Compassionate circumstances" is inspired by a British system for adopting stateless individuals, particularly children. The British system allows stateless people to become "subjects."<sup>148</sup> This method presents an alternative method for inter-

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147. 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, 442 (2010).

148. *People Who Are Stateless*, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/britishcitizenship/othernationality/britishsubjects/statelesspeople/> (last visited Oct. 6, 2013)

A person who is stateless may be eligible to be registered as a British subject. The Home Secretary can register any child under 18 as a British subject but will normally only agree to do this if:

- at least one of the parents is a British subject; and

country adoption. For instance, instead of directly receiving stateless individuals through intercountry adoption, the stateless person might become a subject of the receiving country, then be adopted domestically in the receiving country (thereby not triggering the Hague Adoption Convention).<sup>149</sup> In Uganda, a similar mechanism for sending children to receiving countries is employed by foreign adopting parents to avoid the mandatory three-year residency requirement to adopt.<sup>150</sup> In Uganda, the adoptive parents ask for legal guardianship, which is granted by the court. They then take the child to the United States as the child's guardian, where the adoption is then performed domestically.<sup>151</sup>

It must also be noted that stateless children may be denied citizenship, yet have access to basic rights as a citizen of a host country would. If treated as a resident, there may be no reason to remove the child from the host country and it may be in the best interest of the child to remain in the most familiar culture.

Recommended language for addressing intercountry adoption of stateless persons is as follows:

A BILL

To develop a strategy for assisting stateless children.

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- the child is stateless and is not able to gain any other citizenship; and
  - there are compassionate circumstances, such as the child being unable to benefit from health care or education because he/she does not have a passport; and
  - the family is facing deportation from the country in which they live and the United Kingdom is the only country they could go to if they were deported; and
  - the child is of good character (this applies only if the child is aged 10 or older).

*Id.*

149. *Id.*

150. See *UGANDA: Intercountry Adoption*, BUREAU OF CONSULAR AFFAIRS, U.S. DEPT OF STATE, [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=uganda](http://adoption.state.gov/country_information/country_specific_info.php?country-select=uganda) (last visited Feb. 22, 2014).

151. *Id.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Stateless Children Adoption Act'.

**SECTION. 2. SENSE OF CONGRESS.**

It is the sense of Congress that—

- (1) millions of children worldwide do not have families and are threatened with lack of access to education, healthcare, and regular deportation if they remain as orphaned, stateless refugees;
- (2) thousands of United States citizens would welcome the opportunity to adopt orphans;
- (3) intercountry adoption is growing increasingly scarce as sending nations reduce mechanisms for child adoption and politicize intercountry adoption; and
- (4) the Secretary of State and the Secretary of Homeland Security should make every effort to facilitate the adoption of any eligible stateless children.

**SECTION. 3. DEFINITIONS.**

In this Act:

- (1) FOREIGN-SENDING COUNTRY- The term 'foreign-sending country'—
  - (A) means—
    - (i) the country of the orphan's habitual or emergency residence; and
    - (B) excludes any country to which the orphan—
      - (i) travels temporarily; or
      - (ii) travels as a prelude to, or in conjunction with, his or her adoption or immigration to the United States.
- (2) STATELESS - The term 'stateless'—
  - (A) means—
    - (i) an orphan who does not have a county of permanent citizenship;
    - (B) because

(i) operation of law in their country of birth prevents obtaining legal citizenship; or

(ii) the orphan's country of birth or country of permanent citizenship no longer exists; and

(C) compassionate circumstances exist, such as the child being unable to benefit from healthcare or education due to status as a stateless person.

(3) HAGUE COUNTRY- The term 'Hague countries' means a country that is a signatory of the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993.

(4) NON-HAGUE COUNTRY- The term 'non-Hague country' means a country that is not a signatory of the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993.

**SECTION. 4. STRATEGY ON ADOPTION OF STATELESS CHILDREN BY UNITED STATES CITIZENS.**

(a) In General- The Secretary of State, in consultation with the Secretary of Homeland Security and the Secretary of Health and Human Services, shall develop a comprehensive strategy for facilitating the adoption of stateless orphaned children by United States citizens.

(b) Considerations- In developing the strategy under this section, the Secretary shall—

(1) identify countries in which large numbers of stateless, orphaned children are living;

(2) collaborate with foreign host countries to provide immediate care to stateless children and families and assist in accessing resources for family reunification, or obtaining citizenship in their countries of birth, countries of habitual residence, or countries of emergency residence;

(3) collaborate with foreign host countries to establish pilot programs that identify, provide for the immediate care of, and assist in the international adoption of orphaned stateless children living within their borders who cannot be reunified with family or properly cared for in the host country;



- (4) collaborate with aid organizations to identify and establish pilot programs for the identification, immediate care, and eventual international adoption of orphaned stateless children;
- (5) develop a mechanism for foreign-sending countries to prove that stateless children are orphans when documentation, such as birth certificates, death certificates of birth parents, or orphanage documentation, is missing or destroyed;
- (6) develop a solution for United States citizens to adopt stateless children who are currently living in Hague countries and non-Hague countries regardless of their legal status in such countries.

In practice, the greatest challenge for legislation and a program for adopting the stateless will be accurately determining who is, and who is not, an orphan. The risk in adopting the stateless is that non-orphaned children have the potential to be exploited for adoption. Despite the risks, a solution will only come through experimentation with programs determining the adoptability of stateless children.

The legislation this Article recommends would open the opportunity for the adoption of stateless children more broadly, allowing for adoption demand to address shifting statelessness dilemmas. Furthermore, the recommended legislation would more aggressively pursue the development of a legal mechanism for stateless adoption. This legislation would accomplish many of the goals of the North Korean legislation while simultaneously opening doors to other sending nations.

## CONCLUSION

Adoption of stateless children is not a first choice option. The preferred response is that a child be reunified with its family. However, when reunification is not an option, nations should prioritize local and community adoption in the country where the child resides. Unfortunately, there are circumstances where the community response is hostile and unworkable; in those cases, intercountry adoption may be the best solution.

Intercountry adoption is seen as an option when all other options have been exhausted. In many cases, the options for stateless children will indeed be exhausted and intercountry adoption will be the only solution for the protection of their

best interests. The greatest hurdle to adopting the stateless is the lack of an authorized channel to facilitate this process. Legislation will be needed to explore this solution and open the pathway for this form of adoption. Within that channel, the challenge will be determining whether the child is indeed an orphan, particularly when stateless circumstances provide little or no paper trail on the child's history. Nonetheless, we will not develop a caring response to stateless children without experimentation and innovation. Exploring legislation and a new legal mechanism will do just that, and it will present a life-changing, and potentially life-saving, opportunity to thousands of stateless orphans.