

7-1-2004

Making Sure Children Find Their Way Home: Obligating States Under International Law to Return Dependent Children to Family Members Abroad

Amity R. Boye

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Amity R. Boye, *Making Sure Children Find Their Way Home: Obligating States Under International Law to Return Dependent Children to Family Members Abroad*, 69 Brook. L. Rev. 1515 (2004).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol69/iss4/10>

Making Sure Children Find Their Way Home

OBLIGATING STATES UNDER INTERNATIONAL LAW TO RETURN DEPENDENT CHILDREN TO FAMILY MEMBERS ABROAD*

I. INTRODUCTION

Ease in international trade, travel, and communication has made it easier for families to move abroad while maintaining strong ties to their home country. Immigrants often bring their children with them or have children after they arrive. According to the U.S. Census Bureau, almost twenty percent of children residing in the United States have at least one foreign-born parent, up five percent from 1994.¹ Approximately 2.5 million children living in the United States are not American citizens.² Inevitably, some of these children will become dependents of the state, due either to a parent's death or the child's removal on the basis of abuse or neglect

* © 2004 Amity R. Boye. All Rights Reserved.

¹ Forum on Child and Family Statistics, *America's Children: Key Indications of Well-Being*, at 5 (2004) (reporting statistics from the U.S. Census), available at <http://childstats.gov/americaschildren/pdf/ac04brief.pdf>.

² U.S. Census Bureau, *Table 1.1. Population by Sex, Age, and Citizenship Status* (March 2000), available at <http://www.census.gov/population/socdemo/foreign/p20-534/tab0101.pdf>. Additional evidence of the growing population of recently immigrated children in the U.S. is reflected in statistics regarding the linguistic abilities of the nation's children: In 1999, approximately 17 percent of children in the U.S. spoke a second language. Five percent of those children were reported to speak English with difficulty, nearly double the number since 1979. See Forum on Child and Family Statistics, *supra* note 1, at 14; Forum on Child and Family Statistics, *Table Pop5: Difficulty Speaking English – 1979-99*, available at <http://www.childstats.gov/ac2004/tables/pop5.asp> (last visited Aug. 25, 2004).

allegations.³ When a child comes into state care, the first priority is to place the child with the closest living relative.⁴ If the child cannot successfully be placed with a parent, child welfare officials look to other relatives, such as grandparents or aunts, who are willing to take custody of the child, either permanently or temporarily. The difficulty in cases concerning children of immigrants is that often the closest living relative resides in another country.⁵ Many hurdles exist in the process of placing a child in the care of someone outside of the country. The decentralized and underfunded foster care system in the United States does not lend itself to transnational placements.⁶ Many placements will fail and many will not even be attempted. As a result, children end up left behind in a country to which they have little or no connection, stagnating in a foster care system that places them in institutionalized homes or adopts them away to strangers. Despite competent relatives in their home country who are ready and willing to take custody, most of these children remain trapped in a land foreign to them because there is no framework to protect their best interests or implement their individual and family rights.

³ In fact, evidence suggests that recently immigrated children are more likely than other children to end up in the foster care system due to abuse or neglect. Statistics report that children with foreign-born parents (28%) are more likely than children with native-born parents (20%) to live below the poverty level. Forum on Child and Family Statistics, *Children of at Least One Foreign-Born Parent*, at <http://childstats.gov/americaschildren/pdf/ac04brief.pdf> (last visited Aug. 25, 2004). Statistics also show a correlation between poverty and maltreatment. Jill Goldman et al., U.S. Dept. of Health and Human Services, *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice*, at 33 & n.73 (2003). One study found that children from families with annual incomes below \$15,000 were twenty-two times more likely to be abused or neglected than children from families with annual incomes above \$30,000. *Id.*

⁴ In the case of parental death, this means attempting placement with the surviving parent, if any. In the case of abuse or neglect, this means either eventual reunification with the parent from which the child was removed or placement with the other parent, if any.

⁵ This situation commonly results when a family has recently immigrated, when a parent gets deported, or in the situation of mixed nationality marriages.

Of the total foreign-born population, 39.5% arrived to the United States sometime within the last 14 years. Many of these new residents are thus likely to still have strong family ties to their home country. U.S. Census Bureau, *Table 1.6. Year of Entry of the Foreign-Born Population by Sex and Citizenship Status* (March 2000), available at <http://www.census.gov/population/socdemo/foreign/p20-534/tab0106.pdf>.

⁶ International placements occur everyday in the adoption and immigration context, but not so in the child protection context. In adoption, parents will go to any length (both financially and geographically) to adopt a child from abroad. In immigration, especially in current times, the government is anxious to deport visa violators, even if they are children. Unlike adoption and immigration, there is no force motivating foreign placements in foster care. The dependent children cannot speak for themselves and no one else speaks on their behalf.

A parent or relative's location abroad presents many challenges for any child welfare agency assigned by the state to oversee the welfare of the child. Such agencies are local institutions ill equipped to initiate and manage transnational relationships with relatives seeking custody. There are many unavoidable obstacles, including information disadvantages, financial limitations, cultural differences, communication barriers, and the involvement of multiple judicial systems. How a child welfare agency should proceed in such cases is a difficult question. Agencies are often reluctant and many never attempt to tackle the legal, financial and logistical hurdles involved in returning a child to her home country. Some agencies seize upon the initial "uncooperative" behavior of the parental resource⁷ in order to justify terminating parental rights or ceasing efforts to place the child abroad, despite the fact that such conduct would never be enough in a domestic setting to cease placement efforts. For example, many relatives cannot travel to the jurisdiction where the child is located to facilitate the process of their approval as custodians and to participate in visits with the child. However, child welfare officials often hold this failure to travel to their jurisdiction against the relatives seeking custody, even though they may have legitimate financial, occupational, or familial responsibilities that prevent an extended absence from their home country.

International law and domestic law⁸ generally favor returning a child to parents and relatives instead of placement in foster care. Foster care is disfavored because it usually entails separating the child from her family and placing the child with a stranger. Many children are not even lucky enough to be placed with a foster parent, but are instead sent to live in "group homes" – institutions lacking family settings and often filled with children who have emotional and physical problems.

⁷ The term "parental resource" refers to any relative expressing a willingness to take care and custody of a dependent child. It may include a respondent parent accused of abuse or neglect, a non-respondent parent, a surviving but non-custodial divorced parent, any other known relative of the child, or any third party in *loco parentis* of the child.

⁸ References to domestic law refer to any federal or state laws contained within a national system. Domestic law in international terminology means municipal law, or in other words, the "internal law of a nation, as opposed to international law." BLACK'S LAW DICTIONARY 428 (Pocket ed. 1996). In the United States, domestic law will primarily refer to state law since all child welfare proceedings are administered on the state level. Some federal constitutional principles also apply to certain aspects of child protection law.

Child welfare agencies routinely fail to respect legally recognized principles favoring placement within the family – sometimes deliberately and sometimes as a result of a lack of resources – even when it is clearly in the child's best interests.⁹

Consider the following story about a boy named Jonathan. Jonathan was only three months old when his father took him to Hawaii.¹⁰ While there, Jonathan was placed into foster care because his father had a mental disability preventing him from adequately caring for the child.¹¹ Jonathan's mother was residing in the Philippines at the time and unable to obtain a visa to come to the U.S.¹² She was in frequent contact with the family court and social workers and on numerous occasions pleaded for the return of her son.¹³ Twenty-one months passed before Jonathan's mother was properly served and represented by counsel at court proceedings in the U.S.¹⁴ The child welfare agency expressed frustration with the Mother's continued residence in the Philippines and the agency's inability to secure a home study or psychological evaluation of the mother.¹⁵ After eight and a half years of court proceedings, including numerous termination hearings and appeals, the Supreme Court of Hawaii issued a final ruling in favor of Jonathan's mother.¹⁶ At age nine, Jonathan was finally returned to his mother's custody after spending most of his life in foster care.¹⁷

The caseworker's decision not to proactively pursue reunification with the child's mother abroad had a profound effect on Jonathan's life. For eight and a half years, he lived in

⁹ See *E.R. v. Marion County*, 729 N.E.2d 1052 (Ind. App. 2000) (denying placement with relative in Mexico because of lack of agreement or procedure regarding who would translate the home study); *In re Yuridia*, 80 Cal. Rptr. 2d 921 (Cal. App. 1998) (denying placement with grandparents in Mexico because they failed to get an official Mexican decree, which they were not subsequently granted time to obtain); *In re Stephanie M.*, 867 P.2d 706 (Cal. 1994) (denying custody to grandmother although her home had been approved, Mexican officials had vowed to monitor the case, and grandmother had agreed to be bound by Mexican authorities); *L.H. v. Youth Welfare Office of Wiesbaden, Germany*, 568 N.Y.S.2d 852 (N.Y. Fam. Ct. 1991) (noting that German court refused to accept American home studies).

¹⁰ *In re Jon Doe*, 926 P.2d 1290 (Haw. 1996). The child's name was not really Jonathan. Jonathan was derived from "Jon Doe" and chosen for ease of telling the story behind this case.

¹¹ *Id.* at 1292.

¹² *Id.* at 1292-94.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 926 P.2d at 1294.

¹⁶ *Id.* at 1300.

¹⁷ *Id.*

the foster care system with no sense of permanency. If the caseworker had been obligated and able to obtain the information necessary to make a custody determination (such as a home study and psychological evaluation of the mother), Jonathan's fate would have been decided within a much more appropriate time frame and Jonathan would have been spared a lengthy period of instability and separation from his mother.

Jonathan's story involved a non-American parent struggling with the U.S. judicial system for the return of her son. Now consider the similar but converse story of an American parent fighting a foreign judicial system. In October 1992, Joseph Cooke's ex-wife went on a trip to her home country of Germany, taking with her the divorced couple's two children.¹⁸ On the verge of a nervous breakdown, Cooke's ex-wife surrendered the children to German authorities and released them for adoption.¹⁹ The German court never attempted to contact Cooke, and when he petitioned German courts for custody, all he got in reply was a bill for child support.²⁰ Despite the fact that the children's permanent country of residence was the United States and the fact that a U.S. court granted custody to Cooke, German courts refused to acknowledge Cooke's claims or the possibility that returning the children to their father could be in their best interests.²¹ Cooke traveled numerous times to Germany to grapple with the judicial system and make attempts to visit his children.²² In the United States, Cooke spent a considerable amount of time and money fighting for the return of his children, only to endure the apathy of American diplomats unwilling to take decisive action on his behalf.²³ Even though a New York court certified a report holding Cooke to be a fit father with an appropriate home, German courts never granted custody to Cooke.²⁴ They did not even grant access for visits.²⁵ Cooke has not given up fighting for his two children, but as of June 2002, even after President Clinton personally requested Chancellor

¹⁸ Cindy Loose & William Drozdiak, *A Family Kept Apart: U.S. Father Loses Custody of Children to German Couple*, WASH. POST, May 7, 2000, at A1.

¹⁹ Imre Karacs, *Clinton to Tackle Berlin Over the 'Stolen Children'*, THE INDEPENDENT (London), May 31, 2000, at 18.

²⁰ *Id.*

²¹ Loose & Drozdiak, *supra* note 18.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

Schroeder to help Mr. Cooke, the children remain in foster care in Germany.²⁶

Even though general international standards of child welfare law suggest the children should have been returned to their father,²⁷ German officials nevertheless felt they were under no obligation to grant Cooke custody, even after a clear demonstration of his desire and competence to care for the children.²⁸ After a protracted series of judicial proceedings, enough time elapsed for German officials to claim the children had become too attached to their new culture and family.²⁹ If there is a system in place to bill parents abroad for child support, there also, at the very least, ought to be a system in place to reunify families and children who find themselves separated by legal and physical borders. Situations like this, which are just as unfair to children as they are to parents, would not be allowed if nations were by law required to respect the familial bond between natural parents and their children. In this situation, such a requirement would call for the imposition of an obligation on German child welfare officials to work with Cooke towards reunification. Even though such an obligation can be implied from current international standards, countries like Germany will not feel compelled to observe such standards unless there is a legally binding body of law that imposes specific obligations.

As this Note will argue, international law should adopt specific provisions imposing an obligation on states to pursue reunification of a child with a parent, or in the alternative, placement with a relative.³⁰ Moreover, this obligation should be no less applicable solely because of geographical distance of the parental resource. Calling for an international solution may seem to be a sweeping proposal, but the dimensions of this problem demand it. The issue of child welfare is a matter of universal human rights, and the successful implementation of the proposed obligation requires international cooperation.

²⁶ Kevin Chaffee, *Fighting for Abducted Children*, June 7, 2002, WASH. TIMES, at B9.

²⁷ See *infra* Part III.A.

²⁸ Chaffee, *supra* note 26.

²⁹ *Id.*

³⁰ "Reunification" refers to the process of working towards the return of the child to one of his natural parents. "Placement," unless otherwise specified, refers to the process of giving custody of the child either permanently or temporarily to a relative. "Relative" means a non-custodial parent, grandparent, sibling, aunt, uncle, other family member, or in some cases, a close family friend.

Thus, in addition to imposing an obligation on countries to make sure their child welfare systems keep children with their families, regardless of the distance that may separate them, international law should also establish a practical framework that enables countries and their child welfare agencies to meet this obligation.

This Note begins in Part II with an overview of the universal and guiding standards of child protection law. Part III examines specific principles derived from these standards, both in domestic and international law. This Part argues that these principles support imposing an obligation on nations to work toward reunification with the parent or placement with a relative. Part IV argues that this obligation should be observed regardless of where the parental resource resides. Part V explains why this obligation should be explicitly codified. Part VI argues that this codification should be part of international law and explores various existing legal mechanisms that could assist in implementing the proposed obligation, concluding with some suggestions about what an ideal mechanism would include.³¹

II. GUIDING STANDARDS OF CHILD PROTECTION LAW

There are two guiding standards in both international and domestic law that set the overall framework for any claim made with respect to a child's welfare. The first is the best interests standard, which is widely accepted as the fundamental and overriding concern to be applied in every legal proceeding involving children. The second is the protection of familial and parental rights. Although also important, this second consideration often conflicts with a child's best interests and has been increasingly qualified to include fewer and fewer entitlements. If a parent's rights conflict with a child's welfare, the child's best interests must prevail.³²

³¹ This Note does not directly address the various immigration issues that apply to the separated families who are the focus of this Note.

Also, while this Note is international in scope, it will take an American perspective of domestic law, drawing most illustrations of the problem from U.S. statistics and jurisprudence.

³² See *In re Kerry D.*, 737 A.2d 662, 669 (N.H. 1999); *In re J.S.N.*, 371 N.W.2d 361, 365 (S.D. 1985); *In re A.B.E.*, 564 A.2d 751, 754 (D.C. 1989); *In re C.A.R.*, 693 P.2d 1214, 1219 (Mont. 1984) (quoting section of Montana code that states "when the rights of a youth to an adequate physical and emotional environment encounter demonstrated acts of commission or omission by the parents which deprive the youth of this

A. *Best Interests*

Under international law and under most national legal systems, the most important consideration in any child welfare case is the best interests of the child. The United Nations Convention on the Rights of the Child (CRC) states that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration."³³ In 1986, the United Nations General Assembly issued a set of declarations, embodied in U.N. Resolution 41/85, setting forth guiding principles with respect to dependent children.³⁴ Similar to the CRC, Resolution 41/85 states, "In all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration."³⁵ Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women states that in matters regarding guardianship, "the interests of the children shall be paramount."³⁶

This standard is also widely recognized on the domestic level. The United States unequivocally applies the best interests standard³⁷ and most other countries in the world have codified the dominant standard of a child-centered approach

environment, the best interest of the youth is paramount and takes precedence over parental rights or familial bonds"); *In re Lee*, 442 A.2d 893, 897 (R.I. 1982) ("although the rights of the parents are a 'most essential consideration' in such proceedings, the children's best interests and welfare outweigh all other considerations"); Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 3.

³³ Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 3. Even though the United States has signed, but not ratified this document, all U.S. states apply the best interests standard. *See infra* note 37 and accompanying text. Also, a federal court has ruled that the CRC has gained the status of customary international law. *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002).

³⁴ United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally, G.A. Res. 41/85, U.N. GAOR, 41st Sess. (1986).

³⁵ *Id.* art. 5.

³⁶ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, art. 16(1)(f).

³⁷ *See, e.g.,* Commonwealth ex rel. Conway v. Preston, 24 A.2d 772, 772 (Pa. 1942) ("The guiding star for the court in coming to a conclusion . . . is the welfare of the child. To this all other considerations are subordinate."). *See also* 59 AM. JUR. 2D *Parent and Child* § 26 (2004) ("What action is in the best interest of the child always governs decisions involving custodial matters.").

into their domestic laws.³⁸ Based on this state practice, the above-mentioned instruments, and corresponding *opinio juris*, many argue that the best interests standard has achieved the status of customary international law.³⁹

The best interests of a child is not merely the most important factor in a child welfare case; it is the overriding factor. All other considerations are secondary.⁴⁰ For another factor to carry weight, it must be couched in terms of the child's welfare. To illustrate this point, consider a child with severe behavioral problems who the state has removed because the

³⁸ See, e.g., BGB § 1671(2) (Germany) (stating the family court in Germany is to reach "a decision which most closely corresponds to the well-being of the child"), cited in *Schiereck v. Schiereck*, 439 N.E.2d 859, 861 (Mass. App. Ct. 1982); GUARDIANS AND WARDS ACT § 17 (Pakistan) ("In appointing or declaring the guardian of the minor, the Court shall . . . be guided by what . . . appears in the circumstances to be for the welfare of the minor."), cited in *Hosain v. Malik*, 671 A.2d 988, 998 (Md. Ct. Spec. App. 1996); but see *Amin v. Bakhaty*, 812 So.2d 12, 21 (La. Ct. App. 2001) (finding that Egyptian courts are not compelled to consider the child's best interest); Ramadan, *supra* note 39, at 608-09 ("While some Arab States have recognized [the best interests] principle in certain cases, it is certainly not universally applicable to the entire subject of child custody. It does not constitute a "fundamental principle" as it does in the French law, or even in Israeli law. Some Arab States attach greater importance than others to the child's best interests, but even then, it does not constitute an exclusive interest.").

³⁹ One U.S. federal court found that the best interests provision of the CRC was a codification of customary international law:

The CRC has been adopted by every organized government in the world except the United States. This overwhelming acceptance is strong reason to hold that some CRC provisions have attained the status of customary international law.

While the CRC is relatively new, it contains many provisions codifying longstanding legal norms. It states that "the family. . . should be afforded the necessary protection and assistance" and that "in all actions concerning children. . . the best interests of the child shall be a primary consideration." These provisions of the CRC are not so novel as to be considered outside the bounds of what is customary. Similar doctrines have long been a part of our law. . . . They are also applied by other nations. . . . Given its widespread acceptance, to the extent that it acts to codify longstanding, widely-accepted principles of law, the CRC should be read as customary international law.

Beharry v. Reno, 183 F. Supp. 2d 584, 597-601 (E.D.N.Y. 2002). See also Moussa Abou Ramadan, *The Transition from Tradition to Reform: The Shari'a Appeals Court Rulings on Child Custody (1992-2001)*, 26 FORDHAM INT'L L.J. 595, 607 (2003) ("The principle of the child's best interests is enshrined in international law . . ."); Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 230 n.111 (2003) (noting that while a continued international dialogue will produce increasing consensus on the "meaning and implications" of the best interests principle, "[t]he best interest principle itself probably enjoys the status of customary international law already").

⁴⁰ See, e.g., *Cushman v. Lane*, 277 S.W.2d 72, 74 (Ark. 1955) ("The controlling consideration in determining the custody of an infant is the best interest and welfare of the infant, that is, the physical, intellectual, moral, and spiritual well-being of the child, and to this all other considerations are subordinate."); U.N. Resolution 41/85, *supra* note 34, art.5 (stating that the best interests of the child is the "paramount consideration") (emphasis added). See also *supra* note 32.

parents are unable to control her and who is a danger to herself and others. The state will often medicate the child because it is the quickest and easiest solution, although counseling and a modified school setting may prove to be more effective and less numbing.⁴¹ The best interests standard does not permit forced medication simply because it will result in improved behavior. The state must show that the child should be medicated *for her own interests*, not for the sake of her parents, for her teacher, for the state as a cost-saving measure, or for any other person or entity.

Best interests determinations are often difficult since there is no single definition or complete list of relevant factors. Theoretically, the list of relevant factors includes anything that could conceivably affect the child's well-being. As a result, child welfare decisions are incredibly fact driven. Decision makers possess a great amount of discretion.⁴² As the Massachusetts Supreme Judicial Court noted, "[s]tandards of mathematical precision are neither possible nor desirable in this field; much must be left to the trial judge's experience and judgment. Underlying each case are predictions as to the possible future development of a child, and these are beyond truly accurate forecast."⁴³

Such decisions are not only difficult, but are also susceptible to cultural and personal bias. While any process involving great amounts of discretion creates a potential for such abuse, decisions regarding children and families are particularly vulnerable since people tend to hold strong and inflexible opinions about the proper functioning of families."

⁴¹ See Carol Marbin Miller, *Bill to Regulate Psychiatric-Drug Use on Foster Kids Pushed*, MIAMI HERALD, January 13, 2002, at 2B.

⁴² *In re Minor* (No. 2), 327 N.E.2d 875, 878-79 (Mass. 1975) (Best interests determinations are "a classic example of a discretionary decision.").

⁴³ *In re New England Home for Little Wanderers*, 328 N.E.2d 854, 863 (Mass. 1975).

⁴⁴ See generally Kathryn L. Mercer, *A Content Analysis Of Judicial Decision-Making: How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 31-33, 39-40 ("critics found that the phrase [best interests of child] was used to justify any decision reached").

The concept of "children's best interests," unlike such concepts as distance or mass, has no objective content. Whenever the word "best" is used, one must always ask "according to whom?" The state, the parents, and the child might all be sources of views, worthy of consideration, about the child's interests and how best to serve them.

Id. at 31 (quoting David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 488-89 (1984)).

Given the wide discretion inherent in the standard, a judge is often free to apply her own ethical standard while reiterating the best interests test.

Although there may be many appropriate ways to raise a child, most people believe that there is one best method. As such, many jurisdictions find it necessary to establish guidelines to structure best interests decisions and provide an adequate basis for review. Some jurisdictions include lists of “typically relevant” factors and others identify an ordered list of “preferred” factors.⁴⁵ Still, it is important for every decision maker to keep in mind that these are just guidelines. There are no hard and fast rules.

B. *Protecting Family and Parental Rights*

Subordinate to best interests, but still relevant in many jurisdictions, are the rights of the family and parents.

1. Familial Integrity – An International Concept

The Universal Declaration of Human Rights (UDHR), the world’s most influential human rights document,⁴⁶ states that “no one shall be subjected to arbitrary interference with his . . . family” and that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁴⁷ The International Covenant on Civil and Political Rights replicates these ideas.⁴⁸ The purpose of these provisions is to stress the government’s duty to avoid taking action that would fragment families, including an affirmative duty to assist families in ways that keep them together.

Furthermore, sometimes all ethical perspectives are used, resulting in subjective judicial outcomes, in order to justify conflicting custody awards.

When the best interests of the child are not clearly defined, the judge must impose her own ethical framework on the decision-making process.

Id. at 40.

⁴⁵ See, e.g., N.Y. FAM. CT. ACT § 1055(b)(iv)(B) (McKinney 2002) (list of relevant factors); MINN. STAT. § 260C.212 subd. 2(b) (2003) (list of different types of placements in order of preference).

⁴⁶ Although not officially binding as treaty law, the norms set forth by the UDHR have become universal state practice and enjoy wide *opinio juris*. As such, the provisions of the UDHR are enforceable as customary rules of international law. In addition to obtaining the status of customary law, many of the norms contained in the UDHR have been reproduced in various treaties. See generally Anne F. Bayefsky, *The Legacy of the Universal Declaration of Human Rights*, 5 ILSA J. INT’L & COMP. L. 261 (1999).

⁴⁷ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc A/810 (1948), arts. 12, 16.

⁴⁸ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, arts. 12, 23.

Article 8 of the European Convention on Human Rights (European Convention) states that "everyone has the right to respect for his private and family life. . . . There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and as is necessary in a democratic society"⁴⁹ Article 17 of the American Convention on Human Rights declares the family is "the natural and fundamental group unit of society and is entitled to protection by society and the state."⁵⁰ Article 18 of the African Charter on Human and People's Rights states that the family is "the natural unit and basis of society," to be "protected by the State which shall take care of its physical health and moral."⁵¹

A number of courts, including international tribunals, have produced a line of cases protecting family unity.⁵² The European Court of Human Rights, the body responsible for implementing the European Convention, in particular has issued a rich amount of case law favoring family unity.⁵³

2. Parental Rights – The Traditional Domestic Principle

Although internationally not recognized as an operative principle, parental rights are an important consideration in many domestic jurisdictions. Indeed, in the past, the rights of a parent were the only salient consideration.⁵⁴ Any arguments based on the welfare of a child were actually rooted in a

⁴⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 8.

⁵⁰ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, art. 17(1).

⁵¹ African Charter on Human and People's Rights, June 26, 1981, 21 I.L.M. 59, art. 18(1).

⁵² See, e.g., *Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh*, (1995) 183 C.L.R. 273 (Austl.) (reversing deportation order of Malaysian citizen even though he had committed crime because negative impact his absence would have on his children, citing Convention on the Rights of Child); *Berrehab v. Netherlands*, 138 Eur. Ct. H.R. (ser. A) (1988) (finding deportation of native Moroccan was violation of right to respect for family life because deportee had resided lawfully in the Netherlands for years and had real family ties there, including a daughter); *Moustaquim v. Belgium*, 193 Eur. Ct. H.R. (ser. A) (1991) (finding deportation of native Moroccan was violation of right to respect for family life because court failed to consider fact that deportee's close relatives lived in Belgium).

⁵³ Giovanna I. Wolf, *Preserving Family Unity: The Rights of Children to Maintain the Companionship of Their Parents and Remain in Their Country of Birth*, 4 IND. J. GLOBAL LEG. STUD. 207, 211-13 (1996).

⁵⁴ Rochelle D. Jackson, *The War Over Children's Rights: And Justice for All? Equalizing the Rights of Children*, 4 BUFF. HUM. RTS. L. REV. 223, 230-33 (1999).

parent's entitlement to custody, control, and protection.⁵⁶ Parents were entitled to protection of their children just as they were entitled to protection of their property.⁵⁶ A child's interests received protection only so far as that protection would promote the parents' interests. In light of the global trend to recognize children as individuals rather than chattel, the old derivative view of children's rights has understandably waned. Children now possess rights of their own.⁵⁷ However, parental rights have not completely disappeared. A parent's rights will be trumped only in the event that they clearly conflict with a child's best interests.⁵⁸ Otherwise, parental rights can factor very strongly into child welfare decisions.⁵⁹

The United States affords strong protection to parents.⁶⁰ The U.S. Supreme Court has stated that its decisions have made it clear "beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"⁶¹ The Supreme Court recognizes broad parental authority over children as a constitutional right grounded in the Fourteenth Amendment

⁵⁶ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 236. See also *Tropea v. Tropea* (*In re Tropea*), 665 N.E.2d 145 (N.Y. 1996) ("Children are not chattel, and custody and visitation decisions should be made with a view toward what best serves their interests . . .").

⁵⁸ For example, a child is not entitled to be removed and placed into another family just because the new family will provide him a better upbringing. See *Griggs v. Barnes*, 78 So. 2d 910 (Ala. 1955):

While it is true that the 'pole star' in custody cases is the best interest and welfare of the child, the courts of this state do not have the power to sever the bonds of a blood relationship merely in order to gain some real or fancied advantage for a minor child.

Id. at 914; *In re Klugman*, 97 N.W.2d 425, 429-30 (Minn. 1959) ("best interests' does not mean that the child may have an easier or more luxurious life and greater prospect of inheritance with others than with the natural parents").

⁵⁹ In fact, the default position when there has been no court involvement is to allow parental rights to trump a child's best interests. *Reno v. Flores*, 507 U.S. 292, 303-04 (1993) (finding that when a parent already has legal custody, best interests is not the standard, but, rather, "[s]o long as certain minimum requirements of child care are met, the interests of the child may be subordinated to interests of other children or indeed even to interests of the parents or guardians themselves").

⁶⁰ *Jackson*, *supra* note 54, at 234-35.

⁶¹ *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). See also *Troxel v. Granville*, 530 U.S. 56 (2000) (holding that an open ended statutory provision allowing visitation by any interested person was violation of parental rights); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that indigent parent cannot be required to pay court fees to appeal the termination of parental rights).

due process guarantee.⁶² As such, the parental right to the custody and control of a child is a fundamental liberty interest.⁶³

III. FINDING A LEGAL BASIS FOR ASSERTING AN OBLIGATION

An examination of international and domestic law reveals a preference for children to be in the custody of a parent or relative. As expected, that preference is notably less strong with respect to non-parent relatives. But, all other things being equal, relatives are universally favored over strangers or institutional care. Principles that favor placement with persons of the same nationality or cultural background further support a preference for placement with relatives. Overall, these preferences provide a strong legal basis for imposing an obligation on child welfare officials to return a dependent child to parents or relatives.⁶⁴

The following sections examine how a preference for reunification with parents and placement with relatives is derived from the three general principles described above – best interests, familial integrity, and parental rights. This examination is followed by a discussion about the distinction between preferences and obligations and why this makes a difference in the context of child protection.

A. *Reunification with a Parent*

1. International Law

International law views children as best off with their natural parents.⁶⁵ Resolution 41/85 states that the “first priority for a child is to be cared for by his or her own parents.”⁶⁶ The CRC asserts that nations “shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial

⁶² *Quilloin v. Walcott*, 434 U.S. 246, 255-56 (1978).

⁶³ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (defining a parent's right in care, custody and management of their children as a fundamental liberty interest).

⁶⁴ This preference would nevertheless have to fall in those situations where there is evidence that reunification or placement would be against the child's best interests.

⁶⁵ See generally Alexandra Maravel, *Intercountry Adoption and the Flight From Unwed Fathers' Rights: Whose Right is it Anyway?*, 48 S.C. L. REV. 497, 561-68 (1996).

⁶⁶ U.N. Resolution 41/85, *supra* note 34, art.3.

review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”⁶⁷ Governments must exercise a policy of non-interference unless they can prove that a child’s welfare is endangered. This means that a child cannot be removed from her parents simply because child welfare officials think the child will be better off under someone else’s care. The child must be at a risk of harm before the state can take the child away from her parents. Nations must acknowledge and respect that children have a protectable right in remaining in the custody of their parents.

Likewise, after the state has separated a family, the state is obligated to continue to respect the relationship between parent and child. The CRC recognizes a child’s right to maintain contact with parents after separation, as well as a parent’s right to participate and be heard in court proceedings.⁶⁸ Most importantly, international law imposes a duty on the state to assist separated families. The International Covenant on Economic, Social and Cultural Rights calls for the “widest possible protection and assistance” to be accorded to the family and stresses that the state must adhere to this duty particularly “while it is responsible for the care and education of dependent children.”⁶⁹ The Hague Convention of Children and Cooperation in Respect of Intercountry Adoption (Hague Adoption Convention) instructs that “each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin.”⁷⁰ In the context of abuse and neglect cases, this means that before the state can offer a dependent child for adoption, states must work with the family to resolve and cure the initial problem that justified the removal of the child.

⁶⁷ Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 9(1).

⁶⁸ *Id.* art. 9(3) (“State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”); *id.* art. 9(2) (“In any proceedings [to remove a child from his or her parents], all interested parties shall be given an opportunity to participate in the proceedings and make their views known.”).

⁶⁹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, 993 U.N.T.S. 3, art. 10.

⁷⁰ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, pmbl.

2. Domestic Law

Domestic law also protects the parent-child relationship and urges the state to restore the family. Unlike international law, which derives the priority of reunification from the rights of child and family, domestic law tends to recognize the priority of reunification as a natural extension of a parent's widely recognized right in custody of their own child.⁷¹ Removing a child from a parent is understood as only a temporary measure while the state works with the parent toward reunification.⁷² American law recognizes that "a child's best interests are presumptively served by being with a parent, provided that the parent is not unfit."⁷³ The U.S. Supreme Court established the relatively high standard of clear and convincing evidence in proceedings involving the permanent removal of a child from her family.⁷⁴ The Court has held that a parent's fundamental liberty interest "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."⁷⁵

In some jurisdictions in the United States, state law contains explicit language establishing an obligation to reunify. Most states require child welfare agencies to exercise some qualified effort in attempting to return a child to her family.⁷⁶

⁷¹ See *In re D.T.*, 491 A.2d 7, 10 (N.J. Super. Ct. App. Div. 1985).

⁷² See *In re Hastings*, 318 N.W.2d 80, 87 (Neb. 1982); *In re Deborah S.*, 453 N.Y.S. 2d 1007, 1008 (N.Y. Fam. Ct. 1982).

⁷³ *In re S.G.*, 581 A.2d 771, 785 (D.C.1990).

⁷⁴ *Santosky v. Kramer*, 455 U.S. 745, 747 (1982) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

⁷⁵ *Id.* at 745; 59 AM. JUR. 2D *Parent and Child* § 38 (2004).

⁷⁶ See, e.g., *In re Guardianship of K.H.O.*, 736 A.2d 1246, 1255 (N.J. 1999) (noting that "best interests standard requires [State] to undertake diligent efforts to reunite the family," a standard which "contemplates efforts that focus on reunification of the parent with the child and assistance to the parent to correct and overcome those circumstances that necessitated the placement of the child into foster care"); *Champagne v. Welfare Div. of Nevada Dept. of Human Resources*, 691 P.2d 849 (Nev. 1984); *In re Brianna D.*, 798 A.2d 413 (R.I. 2002); *In re Star Leslie W.*, 470 N.E.2d 824 (N.Y. 1984).

[B]efore terminating a parent's rights the State must first attempt to reunite the parent with her child . . . efforts must include counseling, making suitable arrangements for visitation, providing assistance to the parents to resolve or ameliorate the problems preventing discharge of the child to their care and advising the parent at appropriate intervals of the child's progress and development. . . .

In re Star Leslie W., 470 N.E.2d at 827.

In most cases, minimal or token efforts are not acceptable; they must be diligent or reasonable.⁷⁷

In addition to these safeguards, domestic law also provides a right of visitation.⁷⁸ Visitation between a removed child and the parent is a crucial step in the process of reunification, both legally and psychologically.⁷⁹ Observation by child welfare officials during visits between child and parent can serve as a useful source of evidence in determining whether the child should be returned to the parent.⁸⁰ Visits also serve as an important transitional aid, emotionally preparing both parent and child for living together again. Visits are thus a key tool in working toward successful reunification.⁸¹ The prevalence of visitation rights in the United States reflects the nation's dedication to the goal of returning a child to a respondent parent.

B. Placement with a Relative

1. International Law

After reunification with parents, international law recognizes placement with a relative as a priority. U.N. Resolution 41/85 states, "When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute – foster or adoptive – family or, if necessary, by an appropriate institution should be considered."⁸² This resolution points out various options when a child's parents cannot be caregivers. It first mentions relatives, then other families, and lastly institutions. Because institutional care is unambiguously a less ideal environment

⁷⁷ See, e.g., *Star Leslie W.*, 470 N.E.2d at 827. Minnesota defines "reasonable efforts" as:

the exercise of due diligence by the responsible social services agency to use appropriate and available services to meet the needs of the child and the child's family in order to prevent removal of the child from the child's family; or upon removal, services to eliminate the need for removal and reunite the family.

MINN. STAT. 260.012(b) (2003).

⁷⁸ See, e.g., N.Y. FAM. CT. ACT § 1081 (McKinney 2004).

⁷⁹ See *Visitation and Concurrent Planning*, CHILDREN'S SERVICES PRACTICE NOTES (Oct. 2000), available at http://sswnt7.sowo.unc.edu/fcrp/Cspn/Vol5_no4/visitation_concurrent_planning.htm.

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² U.N. Resolution 41/85, *supra* note 34, art.4.

for children⁸³ and because there is a preference for keeping a child with "his family" and in his country and culture of origin,⁸⁴ the most reasonable interpretation of this provision is as a prioritized list of options, ranging from the most to the least preferred.

When a viable relative has stepped up and is willing to care for a child, or when such a relative can be easily located and is willing to explore placement, international law should be interpreted to generally favor placement with relatives since the other options are less ideal. Introduction into a new family, especially when the members of that family are strangers who may not have the same religious, cultural, or ethnic background as the child, can subject a child to a psychologically burdensome transition that could easily be avoided by placement with relatives.

Even less ideal is placement in a group home or institution. Institutional homes are, at least in the United States, notoriously places where children with various problems end up. Instead of being therapeutic, often these homes are breeding grounds for the development of more complex and severe problems. Even though international law does not explicitly state a preference for placement with relatives over institutions and other families, a best interests argument supports such a preference, which is strengthened by

⁸³ One commentator noted the following about group homes:

Unlike foster homes, there is no pretense that [a] group home will be like a family. There are no parents; youth are responsible to attend school or work, meet with their social workers, and prepare for life on their own after they reach the age of majority. Youth from various backgrounds with different reasons for being in state custody find themselves thrown together with limited supervision. This lack of supervision can result in the laws of the streets being played out within the state-sponsored facilities.

Miriam Aviva Friedland, *Too Close to the Edge: Lesbian, Gay, Bisexual and Transgender Youth in the Child Welfare System*, 3 GEO. J. GENDER & L. 777 (2002). An organization called "Lifting the Veil" conducted research on group homes and published a scathing report, which included the following criticisms:

A longtime foster care licensing official . . . maintained that the group home system is still tainted by providers who enrich themselves and by regulators incapable of stopping them. . . . Children are placed for inappropriately long and arbitrarily determined periods of time. Little or no work is done to return children to their families. Most programs consider home visits to be a privilege, and visits are used as rewards for good behavior rather than as reunification tools. . . . Staffing continues to be a problem in these facilities. Many group home owners pay minimum wage, or slightly above, and turnover remains high, just as it does in the rest of the child welfare industry.

Lifting the Veil, *A Critical Look at the Foster Care System: The Group Homes*, at <http://www.liftingtheveil.org/foster09.htm> (last visited Aug. 26, 2004).

⁸⁴ See *infra* Part III.C.

both domestic practice and the internationally recognized principles of parental and cultural preferences.

2. Domestic Law

Most jurisdictions within the United States establish a clear preference for kinship placements.⁸⁵ For example, the California Family Code declares that “[p]lacement shall, if possible, be made in the home of a relative” and that “[d]iligent efforts shall be made to locate an appropriate relative.”⁸⁶ The Connecticut Supreme Court has ruled that the state may not offer a child for adoption until it shows that there are no available relatives.⁸⁷ Furthermore, a New Jersey court has stated that a strong family affiliation is a crucial factor in determining custody.⁸⁸ Still, a few states are more reserved in declaring that relatives have preference in custody decisions. New York courts have even gone as far as holding that being a relative receives no precedence in adoption proceedings.⁸⁹ At the same time, though, the New York State Family Court Act orders its social service agencies, after a child is removed from her home, to “conduct an immediate investigation to locate relatives of the child and inform them of the pendency of the proceeding and of the procedures for becoming foster parents or for seeking custody or care of the child.”⁹⁰ Statistics suggest that New York courts commonly place children with non-relatives.⁹¹ In practice, states that don’t give preference to relatives are a minority. In determining who should have custody of the infant, a relative of the child will usually be preferred over a stranger.⁹²

⁸⁵ See, e.g., *In re M.M.*, 452 N.W.2d 236, 238 (Minn. 1990) (“Today there remains a strong preference to award the permanent care and custody of a child to a relative if either or both of the natural parents are unable to perform that responsibility.”); *In re Cooper*, 410 P.2d 475, 476 (Utah 1966) (“all things else being equal, near relatives should generally be given preference over nonrelatives”).

⁸⁶ CAL. FAM. CODE § 7950 (2004).

⁸⁷ *In re Theresa S.*, 491 A.2d 355, 362 (Conn. 1985).

⁸⁸ *S.M. v. A.W.*, 656 A.2d 841, 844-45 (N.J. Super. Ct. App. Div. 1995).

⁸⁹ *In re D. Children*, 576 N.Y.S.2d 136, 137 (N.Y. App. Div. 1991); *In re Netfa P.*, 496 N.Y.S.2d 21 (N.Y. App. Div. 1985).

⁹⁰ N.Y. FAM. CT. ACT § 1017 (McKinney 2004).

⁹¹ Jill Duer Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, at 74 (Spring 1998), available at http://www.futureofchildren.org/usr_doc/vol8no1ART5.pdf.

⁹² Randi Mandelbaum, *Trying to Fit Square Pegs into Round Holes: The Need for a New Funding Scheme for Kinship Caregivers*, 22 FORDHAM URB. L.J. 907, 928 (1995) (“In 1992, twenty-nine states had policies that required child welfare workers to

While parents often successfully claim an entitlement to custody, relatives claiming custodial rights are markedly less successful. In fact, domestic law in some countries refuses to acknowledge that a relative has any right with respect to a child.⁹³ This, however, does not preclude the assertion of an obligation to place a child with a relative as a priority over non-relatives. Instead of making reference to a relative's *right* to custody, the obligation should be premised on the child's welfare. A relative must argue that custody should be granted as a matter of the child's best interests or maybe even perhaps on the basis of a parent's wishes for the child to be with a relative.⁹⁴

C. *Preserving Culture and Nationality*

In general, the argument for asserting an obligation on states to place children with relatives is much weaker than for asserting an obligation to place children with parents. Other considerations that might aid in asserting an obligation with respect to relatives include the generally accepted principles of preserving a child's connection to his or her culture and nationality.

1. International Law

The importance of keeping a child in a culturally similar environment has been recognized on the international level. The CRC says that "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."⁹⁵ The CRC also asserts that inter-country adoption may be considered as an

give preference to relatives as foster care providers for their kin. Another fifteen states placed children with relatives routinely.").

⁹³ See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000) (refusing to grant custody rights to grandparents); *L.H. v. Youth Welfare Office of Wiesbaden, Germany*, 568 N.Y.S.2d 852 (N.Y. Fam. Ct. 1991) (noting that Germany refused to grant visitation rights to grandparents and eventually even to parent).

⁹⁴ Even after a determination of abuse or neglect, courts often recognize that parents are in a unique position to understand what's best for their child. Some states recognize that parents have a right to speak and have their opinions heard with respect to what is in their child's best interests, even though they have been disqualified from obtaining custody. See, e.g., N.Y. DOM. REL. LAW § 111(3)(b) (McKinney 2002) (granting fathers who have no cognizable custodial claim the right to be sent notice regarding dispositional hearing where best interests of child will be determined, as well as the right to be heard at such hearing).

⁹⁵ Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 20(3).

alternative means to caring for a child only when the child cannot in any suitable manner be cared for in her country of origin.⁹⁶ The Hague Adoption Convention similarly 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.”⁹⁷

2. Domestic Law

In the past, the law and practice of most U.S. jurisdictions demonstrated a preference for culturally similar placements, but recently these policies have faced considerable constitutional challenge. The cultural preference has been construed in many jurisdictions as a racial classification. Upon challenge, some of these racial classifications have failed to meet strict scrutiny and thus been declared unconstitutional. For example, a Minnesota law previously required courts to consider a child’s race and ethnicity.⁹⁸ The law stated that if a relative could not be found, the next preference was to find a person with a similar background.⁹⁹ Only a revised law that limited its preference to families of the same religion survived constitutional challenge.¹⁰⁰ Along that line, Texas law specifically prohibits placements based on racial preference.¹⁰¹

California previously permitted consideration by courts of the racial background of a potential caregiver, as long as it did not amount to a categorical denial based on race, color, or natural origin. In 2003, the law was rephrased in solely prohibitive, rather than permissive, terms, simply stating that the state may not “[d]elay or deny the placement of a child into

⁹⁶ *Id.* art. 21(b). Although this rule argues for keeping a child in a country and this Note conversely tries to break down barriers preventing a child from being placed abroad, the rule nevertheless stands for the general principle that placing a child in his country of origin (regardless of where that child currently is located) is a priority.

⁹⁷ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, pmb1.

⁹⁸ See *In re H.L.K.*, No. C4-98-2353, 1999 Minn. App. LEXIS 673 (Minn. Ct. App. June 15, 1999).

⁹⁹ See *id.*

¹⁰⁰ MINN. STAT. § 259.29 (2003).

¹⁰¹ TEXAS FAM. CODE ANN. § 162.308(a) (Vernon 2004) (A state agent “may not make an adoption placement decision on the presumption that placing a child in a family of the same race or ethnicity as the race or ethnicity of the child is in the best interest of the child.”).

foster care on the basis of the race, color, or national origin of the foster parent or the child involved.¹⁰²

D. Asserting an Obligation

Internationally and domestically, the prevalent rule of law holds that placing a child with parents or relatives is generally in the child's best interests and is preferred over placement with a new family or institution. This seemingly implies that child welfare officials are under an obligation to first pursue placement with a parent or relative until it is evident that doing so would not serve the child's best interests. However, the existence of a preference for placing children with parents or relatives does not necessarily translate into an obligation on child welfare officials to work toward that goal. The express imposition of such an obligation is the next logical step in making certain the preference is implemented and legally enforced.

An obligation for states to attempt to place children with parents or relatives abroad does not replace or stand in conflict with the best interests standard. Rather, it is a sub-principle that gives contour and substance to the general principle of best interests. The obligation is a guideline defining the general conditions that best maximize child welfare. Asserting an obligation does not mean that reunification or placement ought to be the only purpose and concern of the state or that it should be pursued no matter how high the cost. There are many legitimate factors that can override the priority of reunification with a parent or placement with a relative. For example, placement with a relative living far away may be less viable the older the child gets and the more socially connected a child becomes to her current home. Another possible overriding factor may be a lack of cooperation by the parent or relative desiring custody. What this Note argues is that a state must consider reunification or relative placement as the first option for any dependent child because it is presumably in the child's best interests to be raised that way.

An example of case law supporting this position is *In re M.M.*¹⁰³ After declaring M.M. a dependent child, the Minnesota Supreme Court acknowledged that it would be best to place the

¹⁰² CAL. FAM. CODE § 7950 & note on 2003 amend. (Deering 2004).

¹⁰³ 452 N.W.2d 236 (Minn. 1990).

child with the grandmother, noting the statutory preference for relatives.¹⁰⁴ The court then derived an obligation from that preference.¹⁰⁵ The court held that before the child welfare agency could disregard the preference and work toward placement with another individual, it was required to demonstrate that giving custody to the grandmother would have a negative or detrimental effect on the child.¹⁰⁶

Most states recognize this obligation in one form or another when working with children and parental resources located within the same jurisdiction, as reflected in the preceding analysis. However, the obligation is quickly disregarded when the parental resource resides outside the jurisdiction.

IV. ASSERTING AN OBLIGATION EVEN WHEN THE PARENTAL RESOURCE LIVES ABROAD

Unless there are strong arguments showing that such a placement is practically impossible, a child whose parental resources are located abroad is just as entitled as every other child to be reunited with his or her family.

The California Supreme Court is one of the first courts to recognize an obligation in the special circumstances of a parental resource living abroad. The court decided in *In re B.G.* that a child welfare agency had failed to exercise reasonable efforts to return a child to his birth mother who resided in the Czech Republic.¹⁰⁷ While it acknowledged the complicating factors that her residence in another country presented, as well as how those complications may affect the child, the court afforded substantial weight to the fact that the petitioner was the natural mother and ordered the agency to work towards reunification.¹⁰⁸ The court held that this preference was enforceable as a matter of both the mother's and the child's rights.¹⁰⁹

Nonetheless, other jurisdictions are slow to recognize this obligation as an affirmative and enforceable duty. Without specific instructions to do otherwise, child welfare officials may avoid the added responsibility of working toward a placement

¹⁰⁴ *Id.* at 238.

¹⁰⁵ *Id.* at 239.

¹⁰⁶ *Id.*

¹⁰⁷ 523 P.2d 244 (Cal. 1974).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

in a foreign country because it requires significant resources and because they may feel that they can justify a decision not to pursue foreign placement in terms of the child's welfare. Claims that relocation will psychologically harm the child inevitably arise. Agencies may also exploit linguistic and cultural barriers to justify not working toward a foreign placement.

In most cases, these reasons are not good enough. Few excuses should weigh heavily enough to negate a state's obligation to respect a family's right to remain together, a child's right to be raised by her own parents or relatives, and a parent's right to custody.

A. *State Burden*

The main argument against asserting such an obligation appeals to the state's interests in avoiding the extra burdens involved with placing a child in another country. Local caseworkers are not trained to coordinate on the international level. International placements can involve considerable communication barriers. The information necessary to ascertain the fitness of parental resources is much more difficult to obtain and even more difficult to certify. Moreover and usually most relevantly, the financial costs of international placement are likely to be much higher than the costs associated with local cases.

The argument that the burden on a state may displace its obligation to reunite children with their families fails, however, because it disregards the best interests of the child. Moreover, countries spend a lot of time and money on reunification services for parents locally, especially when a respondent parent requires intensive psychological or medical services, such as drug rehabilitation. There are very few circumstances that would justify a state's interests overriding both the welfare rights of a child and the custodial rights of parents and relatives.

Granted, the state cannot be expected to run itself into bankruptcy in an effort to meet its obligations. There must be some limits. Qualification of the obligation is necessary. The U.S. federal government, for example, conditions the grant of federal funds for foster care to states on a showing that welfare agencies have made "reasonable efforts" to return removed

children to their families.¹¹⁰ The obligation in the United States, both on the federal and state level, is usually qualified in terms of a requirement to exercise "diligent" or "reasonable" efforts. By qualifying the obligation in such a way, the statutes make sure that child welfare officials pursue reunification in good faith while protecting the interests of a state to make sure it is not overburdened.

B. *Competing Best Interests Arguments*

An alternative argument against an obligation couches the complications of placement abroad in terms of the child's best interests rather than in terms of a burden the state will face. It is much easier to construct a best interests justification against reunification when the parent or relative is located abroad. The complexity involved in coordinating an international placement will be interpreted as an indication that such a placement is unrealistic and thus not in the best interests of the child. However, difficulties entailed by a process do not necessarily mean that the process should be abandoned. Nevertheless, because of the wide discretion they are granted, family court judges may freely exploit the flexibility inherent in the best interests calculus to justify keeping a child in their jurisdiction.¹¹¹ Such justifications rely on the potential negative effects placement abroad may have on the child, including a delay in permanence; psychological harm incurred in adjustment; lack of a bond with the relative or parent abroad; and relocation to an economically, culturally, or socially inferior country. In the end, these factors might very well override a preference for placing a child with a parent or relative, but decision makers must not preclude the option of placement abroad. They must objectively evaluate all factors

¹¹⁰ See 42 U.S.C. § 671(a)(15)(B) (2000). See also *supra* notes 76-77 and accompanying text. Minnesota further qualifies its reasonable efforts standard to include consideration of the state's limits in certain circumstances. "When determining whether reasonable efforts have been made, the court shall consider whether services to the child and family were . . . realistic under the circumstance." MINN. STAT. 260.012(c)(6) (2003).

¹¹¹ See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 45 n.13 (1981) (Blackmun, J., dissenting) (arguing that the best interests standard, which offers little guidance, encourages judges to rely on their own personal values); Timothy E. Lin, *Social Norms And Judicial Decisionmaking: Examining The Role Of Narratives In Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 770 ("The lack of quantifiable, objective standards in the child placement field exacerbates the problems created by wide judicial discretion by opening the door for personal prejudices to enter into the analysis.").

and properly assign preference to parents and relatives, even if they may have to dedicate more resources to work with a distant parental resource.

Of course, the above factors can be manipulated to achieve a contrary result. For example, the goal of achieving permanence for a child will sometimes be in tension with the goal of foreign placement. The push for permanency aims at getting a child in a stable and permanent home environment as soon as possible. If it would take four years to rehabilitate and reunify parent and child, but it would only take no more than a year for a new family to adopt that child, permanency dictates that the child should be adopted. Many jurisdictions accord the factor of permanency significant weight.¹¹²

A child welfare agency could argue that a foreign placement would take too much time and result in the child's prolonged stay in foster care. In addition to the psychological hardship this may impose, the agency would argue that pursuing a foreign placement deprives the child of stability. The agency would argue that permanence could be achieved much sooner if the child were adopted by a local family.

However, freeing a child for adoption does not always achieve permanence. Depending on the age and the mental and physical health of the child, finding a suitable adoptive placement could take just as long or even longer than it would take to place the child with a willing relative abroad.¹¹³ In the meantime, a child could languish in foster care, knowing that there is a relative willing to take care of him and suffering at the thought that child welfare officials think it better to keep him in an institution or with strangers. Moreover, child welfare officials do not know how long and difficult the process of placement abroad will take until they attempt it. Delay cannot be used as an excuse before efforts to act on the obligation have

¹¹² United States federal law calls for states to seek permanence. The Adoption and Safe Families Act of 1997 (ASFA), Pub L. No. 105-89, 111 Stat. 2115 (1997), imposes strict time constraints, requiring states to develop permanency plans and pursue those plans so as to minimize the amount of time that a dependent child remains in foster care. See also *infra* notes 115-16 and accompanying text.

¹¹³ Older and handicapped children are often considered undesirable candidates for adoption and many of these children will never leave the foster care system. See William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473, 490 n.64 (1990) ("[T]here is a rapidly growing number of hard-to-place children who will probably spend the rest of their childhood without a permanent home; minority, older and handicapped children are very unlikely to be adopted."); Lin, *supra* note 111, at 771.

even begun. If the parental resource is cooperative and the receiving state has a system that can provide the various information and services that are required, such as approval of the home and transitional visits, the process could be completed relatively quickly. Also, the length of the process could be greatly reduced when a proper mechanism to facilitate international placements exists in both the sending and receiving countries.¹¹⁴ Furthermore, an obligation to pursue placement with a parent or relative does not preclude child welfare officials from concurrently working on an alternative solution such as local adoption.¹¹⁵

United States federal law mandates that a child's custody status cannot remain needlessly in limbo without end. The Federal American Safe Families Act requires states to initiate proceedings to free a child for adoption if he or she has been in state care for fifteen of the most recent twenty-two months.¹¹⁶ In combination with requirements to exercise efforts to reunify, this law forces child welfare officials to work toward permanence quickly and in good faith. These statutorily imposed timeframes should be the ultimate judge of whether local adoption or placement abroad with relatives is the best way to give a child the permanence she needs, rather than an appeal to preconceptions about the impropriety of foreign placement and speculation about how long such a placement would take.

Apart from permanence, the psychological harm that children may face in relocating, including adjustment to a new caregiver and a new culture, is a valid concern.¹¹⁷ If child welfare officials present evidence by a licensed physician or psychiatrist that show the child will be traumatized by a move to another country, child welfare officials should first explore whether therapy can prepare the child for adjustment and minimize the harm. In the case where placement would cause

¹¹⁴ See *infra* Part VI.

¹¹⁵ ASFA allows states to implement "concurrent planning" in which child welfare agencies pursue both reunification and adoption at the same time. 42 U.S.C. § 671 (2000). See Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 454 (2002).

¹¹⁶ 42 U.S.C. § 675(5)(E) (2000).

¹¹⁷ See generally Jan Linowitz & Neil Boothby, *Cross-cultural Placements, in UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS* (Everett M. Ressler et al. eds., 1988); William G. Austin, *A Forensic Psychology Model of Risk Assessment for Child Custody Relocation Law*, 38 FAM. & CONCILIATION CTS. REV. 192, 197 (2000) ("relocation is a general risk factor for child psychopathology and adjustment").

clear and imminent debilitating harm, child welfare officials should rightly forgo any plan to place the child abroad. However, this option should only prevail when there is a clear showing of potential harm. A blanket general principle concluding that placement abroad psychologically harms children is unwarranted. Decision makers must look at the facts of each case, particularly the psychological health of the child, and make a reasoned determination regarding the risk of harm that relocation imposes. Psychiatric and legal expertise on this subject has developed enough so that courts possess the tools necessary to make informed determinations.¹¹⁸ While relocation is a risk factor, some children may be extremely resilient and able to adapt to their new language and culture.

In opposing an obligation, child welfare officials may also point to the child's lack of a bond with the distantly located parental resource as well as the conversely strong bond between child and foster parent.¹¹⁹ The strongest counterargument is that the lack of a bond between a child and a relative abroad often results from the child welfare system's resistance and delay in reuniting them. Because child welfare officials are so slow or unable to act upon the very obligation proposed in this Note, children end up remaining in care long enough to form bonds with other individuals. Allowing the symptom of a problem to justify the problem's continuation is nothing more than a circular and self-defeating argument. While the presence of a bond with a new caregiver may be used in a particularly compelling case to oppose reunification with a parent or relative,¹²⁰ it cannot be used as a general reason to oppose creating the obligation described above.¹²¹

¹¹⁸ While most of this work has been done in the context of relocation by a custodial parent subsequent to a divorce, the research is comparable and useful in making decisions about relocating dependent child. See, e.g., Austin, *supra* note 117, at 199-203 (providing a framework from which family court judges can assess risk of harm caused by relocation).

¹¹⁹ See, e.g., *In re DMH*, 736 A.2d 1261, 1271 (N.J. 1999) (according significant weight to the strong bond that existed between foster parent and child in denying reunification services and terminating parental rights).

¹²⁰ See, e.g., *In re Jasmon O.*, 878 P.2d 1297, 1305 (Cal. 1994) (affirming termination of father's rights where child developed a mental illness because of visits with father and separation from her foster parents); *McLaughlin v. Pernsley*, 693 F. Supp. 318, 327 (E.D. Pa. 1988) (requiring return of child to foster parents where child had developed severe depression as a result of being removed from foster home).

¹²¹ See *Smith v. Foster Families For Equality and Reform*, 431 U.S. 816, 842-47 (1977) (finding that bond with foster parent does not enjoy same protections as bonds within natural families since foster parents do not have justifiable expectations of an enduring companionship with their foster children because their emotional ties originate under state law).

Still, others may argue that placement abroad is not in the best interests of the child because social conditions in the child's current country of residence are better than social conditions in the country where the parent or relative resides. This position may seem biased and over-generalized, but the argument has been used many times before and it is most compelling when the difference between the two countries is stark.¹²² However, these considerations should rarely, if ever, be relevant in determining the custody of dependent children. "Juvenile dependency law does not codify the dominant culture or the regnant political system."¹²³ Just because a parent is located in a third-world country does not mean that parent will give third-world care. Any concerns an agency has about a placement abroad should be brought out only by reference to specific evidence regarding the parental resource's fitness as a guardian instead of through broad conclusions about the desirability of being raised in one country as opposed to another. The focus must be on whether the specific parental resource can assure the child will grow up in an adequate environment. Statistics about the general population only offer unwarranted generalizations about what kind of parent the relative or parent living abroad must be.

As noted before, best interests arguments are not a precise science.¹²⁴ Many factors, often of unspecified weight, must be considered and balanced against each other. One might easily manipulate the above factors within the best

¹²² The most infamous case is that of Elian Gonzalez, where Elian's Uncle petitioned on behalf of the Cuban-born child for asylum on the ground that the child's best interests would not be served by being forced to go back to live in Cuba where he would be persecuted and used as a propaganda tool for the communist government. *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000). See also *Nahid H. v. Sacramento Cty. Dep't of Health and Human Servs.*, 62 Cal. Rptr. 2d 281, 294 (Cal. Ct. App. 1997) (criticizing social worker who "reflexively conclude[d] the best interests of the minors [could] be served only within the cultural milieu of this society and the political system of this jurisdiction").

National bias may also motivate a judge's decision regarding a child's best interests. . . . Sweden is among the least compliant. Swedish courts favor . . . Swedes to non-Swedes through employment of the subjective best interest standard. Germany has also been accused of favoring the custody applications of its own citizens. The best interest standard allows biases to impede the rightful return of children.

Marisa Leto, *Whose Best Interest? International Child Abduction Under the Hague Convention*, 3 CHI. J. INT'L L. 247, 252-53 (2002).

¹²³ *Nahid H.*, 62 Cal. Rptr. 2d at 294.

¹²⁴ MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 107 (1991) (describing best interests standard as "amorphous, undirected, incomprehensible and indeterminate").

interests framework to shirk the obligation to return a child to a relative or parent, especially when they are located abroad. The state cannot say that it will try hard in some cases to reunify a child with a parent, but not in others. Allowing a transnational barrier to extinguish this obligation is not only inequitable, it often proves to be arbitrary. Returning a child living in California to grandparents in Mexico may be faster and less expensive than returning a child living in Florida to grandparents in Oregon. Family courts and child welfare officials should not rule out the possibility that placement abroad with a parental resource may be the option that best maximizes a child's well-being.¹²⁵ A child is entitled to have her best interests protected to the same extent in every situation.

V. CODIFICATION

A. *The Need for Explicit Codification*

International law contains a parental and relative preference, but there are no instruments of international law that unambiguously declare that these preferences call for a legally binding obligation on state welfare officials to exercise efforts to place children with parents or relatives regardless of their residence. Simple reliance on the parental and relative preferences, without having a specific provision asserting an obligation, leaves too much room for interpretation. As noted above, arguments against an obligation are easy to construct by manipulating the many other factors relevant to best interests. Specific codification, on the other hand, would be unambiguous and would compel child welfare officials to establish policies and procedures to discharge the duty specifically assigned to them. Under this framework, child welfare officials must show they reasonably tried to place a child with a parent or relative before the child can be freed for adoption or allowed to remain in long term foster care.

The obligation, in order to pass muster with both legislators and the judiciary, must be expressed directly in

¹²⁵ Analogously, courts have held that relocation in the context of divorce must not be ruled out as an option. *See, e.g., Tropea v. Tropea (In re Tropea)*, 665 N.E.2d 145 (N.Y. 1996) (objecting to a "bright line" rule opposing relocation in all cases and instead implementing a flexible fact-specific best interests test).

terms of the child's best interests instead of the rights of a parent, the family, or a relative.¹²⁶

B. *Resistance to Codification*

Attempts to codify an obligation will face significant resistance. Lawmakers are reluctant to codify principles that give content to the best interests standard, even when they are constructed in flexible terms. There is great debate about what in fact is in the best interests of a child.¹²⁷ In addition, the concept of best interests is difficult to pinpoint since every child welfare case is different from the next.¹²⁸ Courts would never say that a child ought *always* to remain with her natural parents, because there are clearly situations that warrant denying parents custody, such as when the child is being sexually abused or medically neglected by the parent seeking custody.

A complete lack of guidelines to delineate the best interests standard, though, can be a dangerous thing.¹²⁹ People have strong and varied opinions about what is in the best interests of a child. There must be an objective bare minimum that all people and cultures can agree upon. Without guiding principles, the best interests concept is empty and untestable.

¹²⁶ One English court explained how unconvincing and confusing arguments based on a parent's rights can be:

[T]he description of those familial rights and privileges enjoyed by parents in relation to their children as 'fundamental' or 'basic' does nothing, in my judgment, to clarify either the nature or the extent of the concept which it is sought to describe. . . . Whatever the position of the parent may be as a matter of law . . . it is perfectly clear that any 'right' vested in him or her must yield to the dictates of the welfare of the child.

Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 69-70 (1992) (quoting *In re K.D.*, 2 W.L.R. 398 (H.L. 1988)).

¹²⁷ Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 N.Y.U. REV. L. & SOC. CHANGE 557, 559 (1984) (expressing doubt as to whether a judge knows, or anyone knows, what precisely is in the best interests of a child).

¹²⁸ See Albert E. Hartmann, *Crafting an Advocate for a Child: In Support of Legislation Redefining the Role of the Guardian Ad Litem in Michigan Child Abuse and Neglect Cases*, 31 U. MICH. J.L. REFORM 237, 248 ("The best interests of the child client are not easy to define. A determination of the child's best interests tends to be very fact specific."); Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REFORM 341, 354-56 (1987) (admitting that best interests standard is nebulous but attempting to identify generalized goals that tend to maximize a child's welfare).

¹²⁹ See Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 943 (2000) (describing best interests standard as a "license for crude bias").

Unless there is a framework of principles defining what generally is in the best interests of a child, those who make crucial decisions regarding the fate of a dependent child possess unfettered discretion.

There is a natural tension between the need to provide principles specific enough to prevent discretionary abuse and the opposing need to be flexible in dealing with the vast array of different factual scenarios that may come up. Codifying principles that flesh out the best interests standard must therefore strike a fine balance. Codifying an obligation will likely meet resistance if it imposes an overwhelmingly strong and specified duty on child welfare officials. It cannot be so stringent that it turns nations away from signature and ratification, but it also must be strong enough to be effective.

C. Proposed Legislation

International lawmakers supporting an obligation must carefully codify the obligation. They must find a way to be precise enough to give the law some teeth. At the very least, the obligation must be a duty to act (to pursue placement) and not simply a duty to consider (assigning proper weight to the preference). It must be incorporated into a child welfare agency's protocol for every case it handles. It should specify that once a child comes into state care, child welfare officials must first consider placement with a parent or relative. If such a placement is viable and not harmful to the child, the child welfare agency must work diligently to pursue that goal. The obligation must be just strong enough and just detailed enough to compel child welfare officials to pursue placement even when parents and relatives are abroad.

As a suggestion, this Note proposes language such as the following:

As a guiding principle, it is generally in the best interests for a child to be raised by a natural parent or close relative. As such, in matters concerning the custody of dependent children, child welfare officials are under an obligation to exercise reasonable efforts to locate, contact, and work with a parent or close relative toward placement. Child welfare officials should make reasonable efforts to place a child with a parent or close relative in all situations, regardless of the culture, jurisdiction, or residence of such parental resource. Since no other concern can outweigh a child's best interests, this obligation cannot be derogated so long as such placement is otherwise determined to be in the best interests of the child.

D. Properly Adhering to the Obligation

Any law that asserts this obligation must also specify the conduct that satisfies the obligation. There is a danger that child welfare agencies may simply transfer a child to the parental resource without completing the same procedures it would in a domestic case. Child welfare agencies cannot simply transfer custody to a parental resource abroad the minute the parental resource is located or once a determination has been made that custody will inevitably be granted to the parent or relevant abroad. The agency must exercise all of the same caution that it would in a domestic case.¹³⁰ It must carefully develop a reunification plan, which includes the services and visitation schedule necessary to insure a healthy transition. It must also assess the appropriateness of the home and the fitness of the parental resource in order to make sure they can provide adequate food, clothing, and shelter. If child welfare officials fail to do this, the obligation will defeat the very purpose it was meant to fulfill.

VI. ENACTMENT ON THE INTERNATIONAL LEVEL

Imposing a legal obligation on the domestic level is not enough. It must be established as part of international law.¹³¹ An internationally imposed obligation will have the most effect on child welfare cases where the most effect is needed. It is already common practice for most child welfare agencies to

¹³⁰ Support for this rule can be implied from the CRC, which requires states to ensure that a child being adopted internationally enjoys all of the same safeguards and standards that a child being adopted locally would enjoy. Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 21(c).

¹³¹ This Note asserts the importance of codifying the principle of parental and relative preference regardless of geographic location into international law, but it does not address how such a principle would be enforced. Enforcement of international law, even with respect to the most widely accepted customary principles, is a complicated and, some think, problematic issue. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, intro. (1987) ("A principal weakness perceived in international law is the lack of effective police authority to enforce it . . . but there are other inducements to compliance . . . [L]aw is observed because of a combination of forces. . ."). While this Note discusses what needs to be done in order to logistically implement the asserted principle, such as establishing central authorities that can effectuate cross border placements, it does not address the problems inherent in making sure that States implement the obligations they undertake. For a general discussion on the implementation of children's rights principles in international law, mostly in the context of the CRC, see Alexandra Marvel, *The U.N. Convention on the Rights of the Child and the Hague Conference on Private International Law: The Dynamics of Children's Rights Through Legal Strata*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 309, 324-28 (1996).

comply with this obligation when the parental resource resides locally, regardless of whether an actual legal obligation exists. The existence of an obligation becomes most crucial when parental resources are located abroad – the situation when the obligation will least often be recognized.

Another reason why this obligation should exist at the international level is because adherence to the obligation requires great amounts of cooperation between nations. "International cooperation does not simply happen, it must be consciously nurtured."¹³² The cross-border interaction necessary to successfully place a child abroad is quite extensive. Most of the time, both judicial and social services will be essential. Without a specific international framework, cooperation will not happen on its own.

Also, domestic enactments only insure that an obligation is recognized domestically. Without law on the international level, nations are less able to put pressure on other nations to adhere to the obligation. These scenarios can work both ways for a country. It concerns both local children whose parental resources are abroad and also local parental resources who want custody of a child living in a foreign country. For example, a domestic obligation may benefit children living in the United States who will be placed with relatives living in another country; however, it cannot help American children that may be stuck in foster care in a country that does not likewise recognize such an obligation. Such situations do occur, as illustrated by the case of *L.H. v. Youth Welfare Office of Wiesbaden, Germany*.¹³³ The case concerned an American child who was placed in German foster care because of abuse by her father.¹³⁴ The child's father was an American serviceman on duty in Germany.¹³⁵ Because Germany adheres to a policy quick to disregard parental priority in custody, child welfare authorities refused to work with the mother toward reunification and the child was never returned to the United States.

The obligation must be a part of international law most importantly because it is a matter of universal human rights.

¹³² Adair Dyer, *The Internationalization of Family Law*, 30 U.C. DAVIS L. REV. 625, 643 (1997).

¹³³ *L.H. v. Youth Welfare Office of Wiesbaden, Germany*, 568 N.Y.S.2d 852 (N.Y. Fam. Ct. 1991).

¹³⁴ *Id.* at 853.

¹³⁵ *Id.*

The CRC and UDHR identify children's rights and familial rights as human rights. Human rights are entitlements to protection that should not vary depending on the jurisdiction. If we decide that children are entitled to have their best interests protected as a matter of international human rights, then preserving family integrity and observing parental and relative preferences are also international matters deserving universal protection.

Moreover, social trends suggest the number of transnational cases will increase. In the United States, the number of children of foreign-born parents continues to rise.¹³⁶ The number of American families living abroad is close to one million.¹³⁷ The increased mobility of families means an increased number of child dependency cases concerning children that have connections to more than one country. The need for international standards grows as these cases become a commonplace reality.

The ability of a legally codified obligation to truly motivate reunifications and placements depends upon the existence of a practical mechanism through which the obligation can be realized. Even if international law fails to assert an obligation (either through implication from principles or through explicit codification), it should at least provide a mechanism that will enable nations willing to take on the task of placing a child abroad. States need a framework within which they can cooperate with each other to secure the safe transfer of custody.

There are two existing international legal instruments that could prove to be useful frameworks in setting up such a mechanism – the Hague Adoption Convention¹³⁸ and the Hague Protection Convention.¹³⁹ The Hague Adoption Convention calls

¹³⁶ See *supra* notes 1-2.

¹³⁷ Karen M. Mills, U.S. Census Bureau, *Americans Overseas in U.S. Censuses*, at 7 (Nov. 1993), available at <http://www.census.gov/population/www/socdemo/overseas/twps0062.html>.

¹³⁸ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, pmbl [hereinafter Hague Adoption Convention].

¹³⁹ The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 35 I.L.M. 1396 [hereinafter Hague Protection Convention]. Although the United States and many other nations were actively involved in the drafting of the treaty, the Hague Protection Convention has only been signed and ratified by eight nations, including: Australia, the Czech Republic, Estonia, Latvia, Lithuania, Monaco, Morocco, and the Slovak Republic. Nevertheless, the influence of the Convention is spreading slowly. Eighteen nations have recently signed

for establishing a central authority in every country to assist in all matters concerning cross-border adoptions. In order for an international placement to succeed as a logistical matter, nations must establish a central entity to serve as a coordinating body. This entity can set standards of communication and serve as a go-between for the local family authorities involved on both sides. They can coordinate the vast amounts of information that must be exchanged before the sending state is satisfied that the parental resource abroad is fit to take custody. The central authorities already established under the Hague Adoption Convention can easily serve as central authorities for international placements with parents and relatives abroad. Since the issue of adoption and foster care overlap in many respects, these authorities should easily be able to adapt to the new responsibilities. For countries that are not parties to the Hague Adoption Convention, these central authorities provide a model for the types of entities that would need to be established in order to effectively monitor the implementation of international placements.

The Hague Protection Convention is the first international instrument to address cross-border child welfare issues in detail. The treaty specifically contemplates multi-jurisdictional child welfare cases and covers a wide variety of protection measures.¹⁴⁰ Thus, it is directly applicable to the situations contemplated by this Note – that is, cases where a child becomes a ward of the state because of parental death or parental abuse, but where the most viable parental resource is abroad.

The Hague Protection Convention is useful because it identifies a mechanism of jurisdictional transfer that could be used in cases where a dependent child is located in one country and the child's parental resource is located in another.¹⁴¹ This

the Convention, totaling twenty-eight signatories all together. In addition to those who ratified, signers include: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. The Convention has also been ratified by one nation that is not a member of the Hague Conference: Ecuador. See Hague Conference on Private International Law, Hague Protection Convention, at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=70 (last visited Aug. 25, 2004).

¹⁴⁰ Hague Protection Convention, Oct. 19, 1996, 35 I.L.M. 1396. The convention governs, among other things, (1) "the supervision by a public authority of the care of a child by any person having charge of the child", (2) "the attribution, exercise, termination or restriction of parental responsibility," and (3) "the placement of the child in a foster family . . . or an analogous institution." *Id.* art. 3(a),(e),(f).

¹⁴¹ *Id.* art. 8, 9.

would entail handing custody of the child over to the receiving country's child welfare officials (not the parental resource) so that they may handle the process of reunification. The Hague Protection Convention grants original jurisdiction to the country where the child habitually resides (where the child has been declared a dependent).¹⁴² The convention provides one mechanism for the receiving state to issue the request for a change of jurisdiction and another mechanism for the sending state to initiate the request. A child may be transferred to any jurisdiction of which the child is a national or to which the child has a substantial connection.¹⁴³ While the ultimate power to decide jurisdiction is with the sending country, the sending country is encouraged to consider whether another authority is better situated to assess the best interests of the child.

By basing solutions to cross-border situations on jurisdictional transfer, the convention minimizes the amount of interaction two countries must have with one another in order to fulfill their obligations. As such, this solution would likely be popular with the international community since it is efficient and respectful of jurisdiction, while also conforming to an obligation to place children with parents or relatives.

There will be many situations, however, where the issue of jurisdiction is not so clear-cut. In some cases, a sending country may feel the receiving country cannot sufficiently promote the welfare of a child. Sending countries may be reluctant to allow the fate of children to be decided by other jurisdictions with inadequate child protection laws. In other cases, it may be unclear which nation is the habitual residence of a child, thereby leaving the question of jurisdiction unsettled.

The Hague Protection Convention gives little guidance in cases of unclear jurisdiction. To address this common problem, it should provide a mechanism that allows for joint jurisdiction. While courts tend to disfavor sharing jurisdiction, doing so may be the only way to truly decide and implement the course of action that most reflects the best interests of a child. The information and services necessary to accomplish the best result for the child may be interspersed throughout both jurisdictions, making both jurisdictions indispensable to the

¹⁴² *Id.* art. 5.

¹⁴³ Also, but more relevant to cross-border divorce custody proceedings, the child may be transferred to a jurisdiction where the child's property is located or where an application for divorce has been made. *Id.* art. 8.

proceedings. Such a mechanism would have to insist that jurisdictions make a good faith effort to cooperate with each other in working toward placement, including a procedure to be followed when disputes arise.

While these conventions provide a starting point for designing a mechanism to address the obligation, much more must be specified. A mechanism for cooperation would have to cover many practical matters. It would have to identify the different ways to convey information, including such items as psychological and medical evaluations, school and medical records, home studies, and criminal background checks of potential caregivers. The international framework would also have to detail how services such as visitation and family therapy can be provided and who would pay for them. It would also have to identify how cross-border correspondence will proceed and at which level – it would have to address, for example, whether child welfare officials from both sides will communicate directly or whether contact will take place on another level, such as a court or consulate.

In the end, though, reluctance to trust another country's child welfare system poses a threat to the implementation of these mechanisms. Controversies will inevitably arise between countries concerning which course of action is in the best interests of the child. Every aspect of these cases is colored by the different slants that can be taken on what is in a child's best interests. Further complicating the matter, a few countries may not even operate on this widely accepted principle. The success of these mechanisms may therefore depend on international standardization of general child protection principles so that every state interested in cooperating in such an effort is confident that other states also adhere to the general standards. The CRC took a giant positive step in the direction of realizing this goal and has set the stage for the promulgation of treaties establishing mechanisms of cooperation and implementation.

In the interim, while international child welfare law continues to develop, the main factor determining the success of these mechanisms will be how widely implemented they become. The more they are recognized, the more they will become trusted and the more some of these concerns will diminish.

VII. CONCLUSION

Child protection law may seem superficially simple because custody determinations involve only one factor: the best interests of the child. In reality, though, this single overriding principle makes child protection law very complicated. The concept of a child's best interests is nebulous and involves a potential myriad of sub-factors. In order to make sure it is applied consistently and in good faith, general principles must be established to serve as guidelines. The international community has identified the parental preference and the relative preference as two of these general principles. These principles clearly imply that a state is obligated to try to reunify dependent children with their parents or to place them with relatives. Unfortunately, when parents and relatives are located far away, the state is less motivated to follow through on this obligation. This is why the obligation must be codified in a specific legal instrument, one that would operate most effectively on the international level. There must also be a legal mechanism through which this obligation can be practically acted upon, or else international law will demand something that is impossible to implement.

Child protection laws should follow the trend of internationalization that is occurring in many other legal fields. This Note focuses on just one example of a child protection issue that is forcing itself onto the international scene. As it becomes easier for families to shift national residence, international guardianship cases will become more common and the need for international child protection laws more critical. Some of the same questions come up in other contexts – especially immigration and international divorce disputes. These and all other legal fields affecting child welfare would benefit from the presence of specific international legal standards of child protection. In the end, and no matter what the context, the only way to truly promote the best interests of

the world's children is by ensuring that the principles designed to protect those interests gain universal recognition.

Amity R. Boye[†]

[†] J.D. Brooklyn Law School (2004); M.A. Philosophy, New York University (2003); B.A. Wellesley College (1997). The author would like to express her sincere appreciation to the staff of the *Brooklyn Law Review* and to her friends and family for their unwavering support throughout the past year, especially Billy Tirado. The author wishes next year's staff the best of luck in what will surely be a very successful and prolific year.