

International Adoptions and the Border Crisis: Do Sufficient Protections Exist for Children and their Natural Parents?

Alexandra Doner

I. FACTUAL BACKGROUND	99
II. FAMILY SEPARATION CASE STUDY.....	104
III. CURRENT MECHANISMS FOR INTERNATIONAL ADOPTION MATTERS AND CARE OF SEPARATED CHILDREN.....	106
A. The Hague Convention Adoption Process	106
B. ORR Care and Foster Care Programs.....	107
C. United Nations Guidance on Family Separation in the United States...	108
III. CURRENT PROTECTIONS FOR PARENTS AND CHILDREN	110
A. Constitutional Protections	110
B. Hague Convention Protections	110
C. The State/Federal Jurisdictional Divide	112
IV. CHILDREN ARE NOT BEING ADOPTED, BUT STILL ENCOUNTER MANY BARRIERS TO PERMANENCY AND SAFETY	113
A. A New Information Sharing Policy Causes Children to stay in ORR’s Care for Too Long.....	113
B. Children in ORR Custody for Long Periods of Time Have Difficulty Pursuing Immigration Relief.....	115
C. Right to Counsel for Children and/or Parents Separated	116
D. Anticipating Changes in Law and Policy	117
V. CONCLUSION	118

International Adoptions and the Border Crisis: Do Sufficient Protections Exist for Children and their Natural Parents?

I. FACTUAL BACKGROUND

Family separation is not a new problem, but only recently has attention seriously shifted to what some call “The Crisis at the Border.” After President Trump was elected in 2016, policies surrounding the treatment of families and children at the border changed dramatically.¹ As of October 2020, attorneys

¹ Jasmine Aguilera, *Here’s Everything to Know About the Status of Family Separation at the Border, Which Isn’t Nearly Over*, TIME (Sept. 21, 2019, 8:47 PM), <https://time.com/5678313/trump-administration-family-separation-lawsuits/>.

estimated that immigration officials separated around 2500 children from their families since the Trump Administration announced their family separation policy in June 2018.² They also estimate that between 2000 and 3000 more children were separated even before the policy was officially implemented.³ An Office of Refugee Resettlement report showed that nearly 34,000 unaccompanied children came into the agency's care during fiscal year 2015, though that number was a downward departure from the 57,496 children cared for in fiscal year 2014.⁴

This Note articulates a response to concerns about international adoption of children separated from their parents. It also highlights the fact that while adoption is not a means of providing a long-term or permanent home for separated children, the current mechanisms in place are insufficient and cause problems for children because of certain federal policies.

One reason for public concern about separated children is that news reports do not always articulate exactly what happens to children who are separated from their families. Perhaps that is why, in 2018, many people in the United States became shocked by the possibility of separated children becoming adopted. News reports began to circulate, speculating that separated children were at risk of being adopted by people they were not related to. A tweet of an article posted by The Hill gained traction when the article was originally posted, and the tweet continued to be circulated widely.⁵ Some Twitter users who replied to the tweet defined the problem as “human trafficking” and “abduction.”⁶ That led to more people asking other questions: Could children be adopted by people to whom they have no ties that come from very different cultural backgrounds than them? And, is that happening already, and if so, on what scale?

In October 2019, over a year after the original Associated Press investigative article about adoptions and the border crisis was published, Congressman Joaquin Castro (D-TX) offered a signal boost to the original article and tweet by The Hill, adding, “The Trump Administration intentionally separated kids from their parents and then put the kids up for adoption—permanently separating them. This is a human rights violation

² *Id.*

³ *Id.*

⁴ OFFICE OF REFUGEE RESETTLEMENT, ANNUAL REPORT TO CONGRESS FISCAL YEAR 2015 (2017), <https://www.acf.hhs.gov/orr/resource/office-of-refugee-resettlement-annual-report-to-congress-2015>. See also Ann Laquer Estin, *Child Migrants and Child Welfare: Toward a Best Interests Approach*, 17 WASH. U. GLOBAL STUD. L. REV. 589, 603–604 (2018).

⁵ The Hill (@thehill), TWITTER (Oct. 9, 2018, 7:13 PM), <https://twitter.com/thehill/status/1049815039526535168>.

⁶ *Id.*

committed by the United States government.”⁷ Around the same time, other advocates compared what was happening, or what could happen, to other adoption crises that had occurred in the United States. Some comparable events included the Haiti airlifts out of the island after its 2010 earthquake, or when Native American children were often removed from their homes in the mid 20th century.⁸ Other news reports echoed Congressman Castro’s sentiment: Children separated from their parents are at risk of being adopted.⁹

The investigative report that was widely circulated, conducted in 2018 by the Associated Press, demonstrated that families who cross the US-Mexico border with their children and become separated may have a basis to fear that they may never be reunited with their children. According to the report, one mother from El Salvador experienced this firsthand even before the Trump Administration’s family separation policies took effect. In November 2015, Araceli Ramos Bonilla fled a domestic violence situation in El Salvador, bringing her young daughter, Alexa, with her to the United States.¹⁰ Upon reaching the United States, Ramos became separated from her daughter, and eventually, a Michigan couple gained temporary guardianship of Alexa.¹¹ The couple was a foster family who was taking care of Alexa temporarily while she was separated from her mother. Neither Ramos nor her daughter’s immigration attorney were given notice of the family court proceeding, according to the original report.¹² Eventually, Ramos and her daughter were reunited with assistance from the government of El Salvador, child advocates,

⁷ Joaquin Castro (@Castro4Congress), TWITTER (Oct. 19, 2019, 12:19 PM), <https://twitter.com/Castro4Congress/status/1185606346663776256> (Commenting on a Hill’s article that includes a statement from a DHS spokeswoman under the Trump Administration who stated that all of the cases reviewed in the original AP report that The Hill’s article is based on originated under the Obama Administration, not the Trump Administration. Chris Mills Rodrigo, *AP: Migrant children may be adopted after parents are deported*, *THE HILL* (OCT. 9, 2018, 6:19 PM), <https://thehill.com/policy/international/americas/410653-ap-migrant-children-may-be-adopted-after-parents-are-deported>.

⁸ Kathryn Joyce, *The Threat of International Adoption for Migrant Children Separated from their Families*, *INTERCEPT* (JULY 1, 2018, 8:37 AM), <https://theintercept.com/2018/07/01/separated-children-adoption-immigration/>.

⁹ See Jorge Ribas, *Mother Reunited With Son: They Told Me They Would Put Him Up For Adoption*, *WASH. POST* (June 22, 2018, 12:36 PM), https://www.washingtonpost.com/video/national/segments/mother-reunited-with-son-they-told-me-they-would-put-him-up-for-adoption/2018/06/22/bbeb9b8e-7646-11e8-bda1-18e53a448a14_video.html; See also Dianna Nández, *Heard in Migrant Shelter: You’re Being Deported and Your Child Is Being Adopted*, *AZ CENTRAL* (June 26, 2018, 12:27 AM), <https://www.azcentral.com/story/news/politics/immigration/2018/06/26/migrant-mother-suing-trump-administration-after-family-separation/734874002/>.

¹⁰ Garance Burke & Martha Mendoza, *AP Investigation: Deported Parents Can Lose Custody of Kids*, *AP NEWS* (OCT. 8, 2018), <https://apnews.com/795a71655ebd4803b6742d1306555986>.

¹¹ *Id.*

¹² *Id.*

and viral videos that Ramos posted on Facebook.¹³ Even after her daughter was returned to her, Ramos continued to take to Facebook to encourage parents in similar situations to fight for their children.¹⁴

Though protections against adoption do exist, it is understandable that the public was upset and worried about the welfare of children separated from their families. The United States Office of the Inspector General (OIG) outlined evidence to support these concerns. The OIG's report confirmed what many news reports had already said: the U.S. government was unable to keep track of the children in their care.¹⁵ The report was completed partly in response to a class action suit, *Ms. L v. ICE*, which is discussed in depth later in this Note. The OIG set out to determine precisely how many children had been separated from their families.¹⁶ The OIG also conducted a separate investigation to look into the difficulties the Office of Refugee Resettlement faced in reunifying families. In its report, the OIG stated that a “[k]ey [t]akeaway” from the investigation was that “[t]he total number of children separated from a parent or guardian by immigration authorities is unknown.”¹⁷ These publicly released reports became cause for public concern.

In its report, the OIG also concluded that the Department of Health and Human Services faced “significant challenges in identifying separated children, including the lack of an existing, integrated data system to track separated families across HHS and DHS and the complexity of determining which children should be considered separated.”¹⁸ Without a sufficient tracking system in place, children probably stay in federal custody longer than necessary. An adequate tracking system would ensure that children, even if separated from their parents, could be reunited more quickly. Parents, families, and advocates would no longer need to wonder where their children were located and planning for reunification would be easier.

In the report, the OIG also discussed reasons why children were separated from their parents. The office stated that DHS sometimes separates children from their parents for “the child’s safety and well-being.”¹⁹ The OIG report stated that, based on their review of the ORR’s tracking data, roughly half of the children separated were separated because of a parent’s criminal history, while others were separated for reasons such as hospitalization, immigration

¹³ *Id.*

¹⁴ *Id.*

¹⁵ OFFICE OF INSPECTOR GEN., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (2019).

¹⁶ OFFICE OF INSPECTOR GEN., *supra* note 16.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ OFFICE OF INSPECTOR GEN., *supra* note 16.

history, or “other factors.”²⁰ DHS did not provide details of the criminal history in all cases.²¹

The Court in *Ms. L v. ICE* shed some light on what criteria may be used when choosing whether to separate children from their parents. In that case, the Court issued a temporary injunction, stating that children may only be separated from their parents for certain reasons, so the reason for family separation matters. The injunction required that the federal government reunify children with their parents unless it determined that the parents were a threat to the children’s well-being, or in other words, that they were unfit to care for the child.²² Before that injunction, those fitness determinations were not required.

The fitness requirement mentioned in the order is notable because one of the Administration’s official rationales for separating many children from their families is that their parents are dangerous.²³ Parents with a criminal history may have their children separated from them, despite the fact that the criminal offenses might be old or have little bearing on their ability to care for their children.²⁴

Yet another reason that child advocates became concerned about family separation and adoption was due to concerns about major players in the system and the underlying interests those individuals have. For example, Bethany Christian Services is a non-profit that contracts with the federal government to provide foster care for unaccompanied children. Bethany Christian Services has been criticized for its connections to and support from key figures in the Trump Administration such as Vice President Mike Pence and Secretary of Education Betsy DeVos, its “coercive” tactics, anti-LGBTQ stances, and use of federal funding for abstinence-only education programs.²⁵ Advocates for immigrant children stated that they distrusted Bethany and feared that the organization may mishandle children’s cases.²⁶ It was especially notable that

²⁰ *Id.*

²¹ *Id.*

²² *Ms. L. v. U.S. Immigr. & Customs Enft (“ICE”),* 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018)(order granting preliminary injunction), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019), and *enforcement granted in part, denied in part sub nom. Ms. L. v. U.S. Immigr. & Customs Enft*, 415 F. Supp. 3d 980 (S.D. Cal. 2020).

²³ Aguilera, *supra* note 1. See also OFFICE OF INSPECTOR GEN., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (2019) (discussing reported reasons for family separation identified by the Office of Inspector General’s report).

²⁴ Aguilera, *supra* note 1.

²⁵ Amy Littlefield & Tina Vasquez, *Bethany Christian Services Is Fostering Migrant Kids. It Also Has a History of Coercive Adoptions*, REWIRE.NEWS (June 27, 2018, 9:44 AM), <https://rewire.news/article/2018/06/27/christian-group-fostering-migrant-kids-history-coercive-adoptions/>.

²⁶ *Id.*

in addition to providing foster care for separated children, Bethany is an adoption services provider. One major cause for concern was that the organization placed an advertisement for a waiver of adoption fees around the time that family separation started becoming the subject of headlines.²⁷

II. FAMILY SEPARATION CASE STUDY

The case of *Ms. L v. ICE* illustrates the prevalence and risks of family separation. In *Ms. L v. ICE*, Plaintiff Ms. L, a Congolese woman, and her daughter appeared at the San Diego port of entry seeking asylum.²⁸ Ms. L was sent to Otay Mesa Detention Center near San Diego, but her daughter was sent to a separate facility in Chicago.²⁹ This meant that Ms. L and her daughter were separated for nearly four months. Pursuant to the law, Ms. L should have been eligible to be released from detention on parole so she could be reunited with her daughter, but that did not happen. The Otay Mesa detention center, as a practice, had a policy to not release asylum seekers like Ms. L despite an ICE Directive indicating that people in her situation should be released.³⁰ The American Civil Liberties Union (ACLU), which represented Ms. L., determined that many other people were in similar situations to Ms. L. and assembled a class to file a class action lawsuit against the federal government.

The ACLU brought a suit in federal court, where a large group of parents who had been separated from their children were certified as a class. The ACLU cited information from the American Association of Pediatrics, which denounced the government's practice of separating children from their parents, stating that the practice caused "psychological distress, anxiety, and depression" which would follow children long after they were reunited with their parents.³¹

The class of plaintiffs in *Ms. L* were able to benefit from an injunction granted by Judge Dana M. Sabow of the United States District Court for the Southern District of California.³² In his order, Judge Sabow highlighted many of the struggles separated families faced under the federal government and Otay Mesa Detention Center's new policies. He explained how, when a citizen

²⁷ Joyce, *supra* note 9.

²⁸ Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 1, *Ms. L v. ICE*, 310 F. Supp. 1133 (S.D. Cal. 2018)(No. 18CV0428 DMS MDD).

²⁹ *Id.*

³⁰ *Id.* at 7.

³¹ *Id.* at 6.

³² *Ms. L v. U.S. Immigr. & Customs Enft ("ICE")*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019), and *enforcement granted in part, denied in part sub nom. Ms. L v. U.S. Immigr. & Customs Enft*, 415 F. Supp. 3d 980 (S.D. Cal. 2020).

who is a parent is accused of a crime, an “established system” of social service agencies are prepared to care for the child.³³ Or in other situations, family members step in to take care of the child.³⁴ But in cases like Ms. L’s involving family separation, no such resources are readily available. The Court also acknowledged the fact that people like Ms. L and her fellow class members were separated from their children without any determination that they were “unfit parents or otherwise presented a danger to their children.”³⁵

A major concern about family separation is that children may never be reunited with their parents. This concern is only amplified by reports of separated children being adopted to people who are not their parents. People in the United States are interested in adopting children separated from their families at the border, so much so that the ORR addresses the issue in an FAQ on their official website.³⁶ They state that children are fostered in their communities and interested individuals can contact local foster care organizations for additional information. Notably, they do not state that unaccompanied migrant children cannot be adopted.³⁷

If the systems in place work correctly, a story like Araceli Ramos Bonilla’s should never be the subject of an investigative report. Ramos’ story of her separation from her daughter is an example of the system working improperly. Demonstrably, Ramos’ daughter got caught up in the state child welfare system when she probably should have remained in the care of the federal government while she was waiting to be reunified with her mother. In federal custody with adequate oversight, Alexa’s foster parents would never have been able to receive temporary guardianship over Alexa. But temporary guardianship is a state proceeding, where a state judge, perhaps unfamiliar with the complexities of federal law that govern family separation matters, granted temporary guardianship to a couple who were not Alexa’s parents.

While Ramos’ story is tragic, what occurred reflects a serious departure from what happens most often to children separated from their parents. It appears that the judge in Michigan who granted temporary guardianship of Ramos’ daughter to another family misunderstood that the court did not have jurisdiction to grant the petition. If anything, Ramos’ story illustrates the complexity of the immigration system and shows that many people, even state judges with years of experience, do not understand the nuances of how the

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 3.

³⁶ *Unaccompanied Alien Children Frequently Asked Questions*, OFFICE OF REFUGEE RESETTLEMENT (May 15, 2019), <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-frequently-asked-questions>.

³⁷ *Id.*

system works. Fortunately, many protections, such as the federal-state divide and the Hague Convention are currently in place to protect children like Alexa. Those protections made it possible for the court to remedy the mistake, but not before Ramos sought an attorney for assistance.

III. CURRENT MECHANISMS FOR INTERNATIONAL ADOPTION MATTERS AND CARE OF SEPARATED CHILDREN

Because families like Ms. L.'s and Araceli Ramos Bonilla's are being separated, it is expected that advocates are concerned about what, if any, legal protections exist to protect children. One place to look for guidance is international law and norms regarding family separation and adoption.

A. *The Hague Convention Adoption Process*

A primary protection for families and children comes from the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention).³⁸ The Hague Adoption Convention governs adoptions when the child and their prospective parents are "habitual residents" of different countries.³⁹ The Hague Adoption Convention is the first instance of "intergovernmental endorsement" of intercountry adoption (ICA).⁴⁰ The Hague Conference introduced the Convention in 1993, and the Convention establishes "minimum standards" with which participating countries must comply.⁴¹

Another requirement is that the agencies that facilitate adoptions under the Hague Convention must be accredited.⁴² These agencies carry out functions such as identifying a child for adoption and making the necessary arrangements for the adoption, securing consents and termination of parental rights, completing a background study on a child or home study on prospective adoptive parents, and monitoring a placement and arranging for care until the adoption is finalized.⁴³ Under the Hague Convention, these activities cannot be carried out legally without engaging with an accredited agency. Federal regulations also govern the standards accredited agencies must meet, such as

³⁸ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S 167 [hereinafter Hague Convention].

³⁹ See also ANN LAQUER ESTIN, INTERNATIONAL FAMILY LAW DESK BOOK 281 (2d ed. 2016).

⁴⁰ Shani M. King, *Immigration, Adoption, and our National Identity*, 26 DUKE J. GENDER L. & POL'Y 85, 101 (2019).

⁴¹ *Id.* at 100.

⁴² Hague Convention, *supra* note 39, ch. III, art. 6.

⁴³ ESTIN, *supra* note 40, at 274.

financial and risk management, corporate governance, information disclosure and quality control measures.⁴⁴

When parents begin the adoption process, the accredited adoption agency will conduct a home study and file a Form I-800A (Application for Determination of Suitability to Adopt a Child from a Convention Country).⁴⁵ The Convention also provides that participating states should prioritize “appropriate measures to enable the child to remain in the care of his or her family of origin,” but also acknowledges that “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.”⁴⁶ Moreover, state courts may not register an order declaring an adoption of a child from a Hague Convention country to be final unless it finds that the adoption was carried out pursuant to the Hague Convention’s requirements.⁴⁷

B. ORR Care and Foster Care Programs

The state adoption system is separate from the foster care system that children are generally placed into when the state is involved in a child welfare proceeding. This jurisdictional divide is discussed later in this Note. Most notably, for children placed in state foster care/custody because of a state child welfare proceeding, the Adoption and Safe Families Act of 1997 applies.⁴⁸ That Act requires states to apply for termination of parental rights in situations where a child has been in foster care for 15 out of 22 months.⁴⁹ Since children in federal custody are not part of the state system and are instead placed in settings like foster homes by the ORR, this Act does not apply in the same way.

Critics of the current system in which ORR cares for children have voiced concerns about the 1997 Act applying to separated children.⁵⁰ They worry that if children are placed into foster care, somehow, the 15 month mechanism in the Adoption and Safe Families Act would be triggered, forcing states to file for termination of parental rights for children separated from their parents.⁵¹ However, it is not clear on what basis this argument is made, because separated children should never be part of the state child welfare or foster care programs to which the Adoption and Safe Families Act applies.

⁴⁴ *Id.*

⁴⁵ *Id.* at 276.

⁴⁶ Hague Convention, *supra* note 39, pmb1.

⁴⁷ ESTIN, *supra* note 40, at 277.

⁴⁸ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103, 111 Stat. 2115 (1997).

⁴⁹ *Id.*

⁵⁰ Joyce, *supra* note 9.

⁵¹ *Id.*

Additionally, officials from the Obama Administration stated that under no circumstances should the Adoption and Safe Families Act of 1997 apply to children in ORR care. “In [regular] foster care, the kids are typically in state custody because the state has determined that parents are doing an inadequate job keeping the kids safe,” said Maria Cancian, former deputy assistant secretary for policy at Health and Human Services’ Administration for Children and Families.⁵² Cancian also stated that since the primary goal of ORR is to reunite families, not to separate them, there has generally not been a presumption that parents of separated children are unfit to parent.⁵³ This is in contrast to the state child welfare system, where children are generally removed from a parent’s care due to allegations that the parent is unfit to care for the child, and thus, the parent has to prove that they are fit to have custody of the child.⁵⁴ Cancian also highlighted another reason that children are not at a high risk of being transferred into a state system and later adopted. State systems are unlikely to want to take in additional children currently in federal care simply because of a lack of resources.⁵⁵ Moreover, Marrienne McMullen, the former deputy assistant secretary for policy and external affairs at the Administration for Children and Families, also stated that she was only aware of one occasion when a child was adopted to another family, and that was under “unusual circumstances.”⁵⁶ Though McMullen acknowledged that no adoptions have happened yet, she noted that “it’s worth playing out” what could happen if policies continue to change under the Trump administration.⁵⁷ She said that it’s possible to imagine a situation where parents would be scared to claim their children.⁵⁸ Parents may be afraid to claim their children for a variety of reasons. Perhaps they believe that they and their children would be treated more poorly if immigration officials find out information about them. Or, they may be afraid that other people, like family, friends, and community members could be put at higher risk of removal if they engage with the immigration system by claiming their children.

C. *United Nations Guidance on Family Separation in the United States*

Compared to some of its peer countries, the United States has not done as much as it can when it comes to protecting children from being separated from their families and ensuring they are treated fairly. One way the United States

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Joyce, *supra* note 9.

⁵⁵ Joyce, *supra* note 9.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Joyce, *supra* note 9.

could do more is by ratifying the United Nations Convention on the Rights of the Child. The United States signed, but did not ratify, the United Nations Convention on the Rights of the Child (CRC) in 1995.⁵⁹ The United States is one of only three countries that has not ratified the CRC.⁶⁰ Ratification of a United Nations treaty requires a two-thirds majority approval by the United States Senate, and significant political obstacles make any hope of ratification unrealistic.⁶¹

Importantly, the CRC prevents ratifying countries from separating children from their parents, “except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”⁶² Therefore, the United States is under no obligation to make a best interests determination when making decisions pertaining to separation of families at the border. Had the United States ratified the CRC, the Trump Administration’s current practice of separating parents from children without an authority making a best interests determination for the child would be considered impermissible. Though the United States’ choice not to ratify the CRC has been an issue since before the border crisis became a politically salient issue, the burden that ratifying the CRC would place on officials dealing with separated families may be yet another barrier to ratification of the CRC in the near future.

Other countries that have ratified the CRC have taken the directive of article 9 seriously.⁶³ The U.K. Supreme Court, for example, held in 2013 that courts must consider the best interests of United Kingdom-citizen children with non-citizen parents when deciding whether to deport the child’s parent.⁶⁴

The United Nations Committee on the Rights of the Child has had the opportunity to offer recommendations to the United States on further steps it should take to protect migrant children. In 2012, the U.N. welcomed recent policy developments from the U.S., such as the DACA program, but also recommended that the U.S. implement additional protections, like best

⁵⁹ Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?* WASH. POST (Nov. 21, 2014, 3:12 PM), <https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/> (The only other two countries which have not ratified the CRC, as of the writing of this Note, are Somalia and South Sudan. South Sudan is in the process of ratifying the CRC).

⁶⁰ *Migrant Children at US Border Have Right to Protection and 'Be with Their Families'*, UN NEWS (June 19, 2018), <https://news.un.org/en/story/2018/06/1012492>.

⁶¹ Attiah, *supra* note 60.

⁶² Convention on the Rights of the Child art. 9, Nov. 20, 1989, 1577 U.N.T.S. 43 [hereinafter CRC].

⁶³ Estin, *supra* note 4, at 594.

⁶⁴ *Id.*

interests determination requirements for unaccompanied migrant children.⁶⁵ Of yet, the United States still has more work to do to comply with U.N. recommendations.

III. CURRENT PROTECTIONS FOR PARENTS AND CHILDREN

A. *Constitutional Protections*

Migrant children's protections under the United States Constitution are quite limited. In *Plyler v. Doe*, the Court held that undocumented children do have the right to attend public schools.⁶⁶ However, the Court in that opinion and in cases since, has not expanded the holding to offer other protections.⁶⁷

Due process protections, however, do exist, pursuant to the 14th Amendment.⁶⁸ That right, in practice, includes the right to fair procedure, to notice of legal proceedings, and the right to be heard in those proceedings.⁶⁹ These extend to both children and parents.⁷⁰ However, as will be discussed later in this Note, the Supreme Court has yet declined to hold that immigrants have a right to an attorney in immigration proceedings, which are civil matters, as they would in criminal proceedings.

B. *Hague Convention Protections*

A child separated from their parents should never be placed in adoption proceedings because adoption matters are handled in state courts, which do not have jurisdiction to make decisions about children in federal custody. But even if we ignore that important distinction, it is notable that the Hague Convention still provides protections against adoption of separated children to people within the United States. The notice requirement within the Hague Convention provides an important protection for children. The notice requirement provides that if a child is to be adopted, the child's parents must be notified.⁷¹

Though the protection is strong, it is not immune to criticism. Even if a parent living in a Hague Convention country received notice that someone in the United States wishes to adopt their biological child, receiving competent legal assistance in order to object to the adoption may be unrealistic for many

⁶⁵ *Id.* at 597.

⁶⁶ *Id.* at 591.

⁶⁷ *Id.*

⁶⁸ Estin, *supra* note 4, at 591.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Hague Convention, *supra* note 39, art. 4.

parents, especially considering that many attempt to migrate to the United States due to poor economic conditions in their home country. Though the notice requirement alone would not be sufficient to combat international adoptions, the other protective provisions, such as the report and consent requirements, work in concert to ensure that parents and their children are adequately protected.

The Hague Convention provides that each Hague country designate a Central Authority for administrative purposes.⁷²⁷³ One duty of the Central Authority in a state where a child is being adopted is to prepare and transmit a report to authorities in the child's country of habitual residence.⁷⁴ That report must address details about the child's prospective adoptive parents.⁷⁵

After receiving that report, the Central Authority in the country where the child is habitually resident prepares a similar report, outlining details about the child, such as "background, social environment, family history, medical history including that of the child's family, and any special needs of the child."⁷⁶ The report must also include a recommendation on whether approval of the adoptive parents' request to adopt would be in the best interests of the child.⁷⁷ In making that determination, the Central Authority must also consider the ethnic, religious, and cultural background of the child.⁷⁸ The Central Authority in the child's home country then transmits their report, along with documentation that any necessary consents have been obtained, and their reasoning for the approval of the adoption.⁷⁹

It is difficult to imagine how an adoption of a child in ORR custody could occur under the radar, given this requirement. And, even if such an adoption was processed, it would not have been done legally. In order for an adoption of a child who is habitually resident in a Hague-participating country to stand, the report requirement must be met. It seems unlikely that both the Central Authority of a sending country and that of the receiving country would both sign off on a report, aware that the child had a parent who could care for them. Unless there was a severe breakdown in transfer of information when the reports were being compiled, the reports would reflect that the child had a

⁷² *Id.* at art. 6.

⁷³ *Id.*; See also ESTIN, *supra* note 40, at 266.

⁷⁴ Hague Convention, *supra* note 39, art. 16.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ ESTIN, *supra* note 40, at 268.

living parent and thus would be ineligible for adoption, assuming that the parent was willing to care for the child.

The Hague Adoption Convention's consent requirement is also important. Under the Convention, consent to adoption must be given "freely, in the required legal form, and expressed or evidenced in writing."⁸⁰ That consent "must not be induced by payment or compensation of any kind."⁸¹ This is another important protection. Without parental consent, an international adoption from a Hague country is not an option because it cannot be conducted legally.

C. *The State/Federal Jurisdictional Divide*

A facet of the system that at first seems like a pain point, but actually functions as a protection is highlighted in the story of Araceli Ramos Bonilla and her daughter. The federal system which cares for unaccompanied or separated children is completely distinct from the state child welfare system. While most people (and state judges) are most familiar with the state foster care system, the fact that the federal system that cares for children while they are waiting to be reunited with a parent or places with a sponsor does not closely mirror the state system can be a major cause of confusion for legal practitioners and laypeople alike.

The state and federal divide is actually one of the most significant protections against adoption of separated children. For example, in the case of Araceli Ramos Bonilla and her daughter, Alexa, the state court in Michigan never had jurisdiction to make any determination about guardianship of Alexa.⁸² If a similar situation were to occur in the future, a child's parent or family would have legal recourse to address the situation because, even if a family was granted guardianship or even permitted by a judge to process the adoption of a child in a state court, that measure could be undone with the help of an attorney. A temporary or permanent grant of guardianship or an adoption cannot be legally carried out in a state court because if a child comes to the country as an unaccompanied minor, the federal government, particularly ORR, has jurisdiction over the child.

As it stands currently, children under the care of ORR are often placed in foster homes. Refugee minors, asylee minors, Cuban/Haitian entrants, survivors of human trafficking, inaccurate age cases, special immigrant juvenile cases, and family breakdown cases are all eligible for placement in

⁸⁰ Hague Convention, *supra* note 39, art. 4.

⁸¹ *Id.*

⁸² Burke & Mendoza, *supra* note 11.

foster homes.⁸³ Those foster homes are administered by one of two nonprofit organizations: The United States Conference of Catholic Bishops (USCCB) and Lutheran Immigration and Refugee Service (LIRS).⁸⁴ Those organizations identify children in need of services, provide assistance in the reclassification process, and determine appropriate placements for children.⁸⁵ They also help connect children with specialized foster care agencies. Foster families are recruited through community organizations, such as churches, mosques, other houses of worship, community or civic organizations, and word of mouth.⁸⁶ Foster care programs also seek families from a variety of cultural backgrounds.⁸⁷ Currently, refugee foster care programs are located in fifteen states.⁸⁸

IV. CHILDREN ARE NOT BEING ADOPTED, BUT STILL ENCOUNTER MANY BARRIERS TO PERMANENCY AND SAFETY

Currently, sufficient protections against adoption are in place, but that does not mean that the system that cares for separated children is perfect. It turns out that serious problems more commonly arise when it comes to long-term care for children separated from their families. Many children experience difficulties in finding a suitable sponsor to whom they can be released to ORR custody. This occurs in part due to a handful of federal government policies that make it more difficult for children to stay with family members or other people close to them.

A. *A New Information Sharing Policy Causes Children to stay in ORR's Care for Too Long*

One reason that children may stay in ORR's care for longer than necessary is a result of a federal policy that took effect under the Trump Administration in April 2018. At that time, agencies within the United States Department of Health and Human Services (HHS) and the Department of Homeland Security (DHS) agreed to exchange information about unaccompanied children and

⁸³ *Foster Care for Unaccompanied Refugee and Immigrant Children: Frequently Asked Questions*, USCCB MIGRATION AND REFUGEE SERVICES & LUTHERAN IMMIGRATION AND REFUGEE SERVICE, <http://www.usccb.org/about/children-and-migration/upload/URM-FAQ-s.pdf> (last visited Sept. 28, 2020); see also *About Unaccompanied Refugee Minors Program* <https://www.acf.hhs.gov/orr/programs/urm/about>; see also *How Foster Care Works*, LUTHERAN IMMIGRATION AND REFUGEE SERVICE, <https://www.lirs.org/foster-care/process/> (last visited Sept. 28, 2020).

⁸⁴ *Foster Care for Unaccompanied Refugee and Immigrant Children: Frequently Asked Questions*, *supra* note 84.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

their prospective sponsors.⁸⁹ Sponsors are generally family members in the United States, either with or without authorization to reside in the United States, who wish to care for the unaccompanied child.⁹⁰ The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 requires that authorities make a best interest determination before placing a child with a family member or friend of the family, who assumes the role of a sponsor.⁹¹ Also, the Flores Settlement laid out a framework for what types of people may qualify as sponsors.⁹² The ORR states that it has “policies and procedures to ensure unaccompanied alien children in ORR care are released in a safe, efficient, and timely manner.”⁹³ However, the recent memorandum ultimately made it more difficult for the ORR to carry out its goal of releasing children from its care and to sponsors in a timely manner.

The recent Memorandum of Agreement (MOA) stated that Immigration and Customs Enforcement or Customs and Border Patrol must electronically transfer information about the separated child, such as biographical data, situational factors, human trafficking indicators, and known criminal or behavioral issues, including suspected gang affiliation, to the ORR.⁹⁴ However, that was not the only information sharing requirement set out in the MOA. It also provided that the ORR should, in turn, report broad information about the children it cares for to Immigration and Customs Enforcement (ICE) and

⁸⁹ Women’s Refugee Comm’n & Nat’l Immigrant. Just. Ctr., *Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement 1* (NAT’L IMMIGRANT. JUST. CTR. 2019).

⁹⁰ *Id.* at 2.

⁹¹ Center for Migration Studies, *Unaccompanied Minors from Central America: Keeping Them Safe in the United States*, <https://cmsny.org/keeping-uacs-safe/> (last visited Sept. 30, 2020).

⁹² Stipulated Settlement Agreement Plus Extension of Settlement at 9–10, *Flores v. Reno*, No. 85-cv-4544-RJK(Px), (C.D. Cal. Jan. 17, 1997), available at <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement> (last visited Mar. 10, 2020); See also *Reno v. Flores*, 507 U.S. 292 (1993). The Flores case addressed the detention of minors who were separated from their parents. The case settlement outlined various protections for children, including limitations on duration of detention. During his administration, President Trump attempted to enact a rule that would remove certain protections outlined in the Flores settlement agreement. One such challenged protection was a 20-day limit on detention of children. The administration wished to detain children beyond the 20-day limit. See Maria Sacchti, *Federal Judge Blocks Trump Administration From Detaining Migrant Children For Indefinite Periods*, WASH. POST (Sept. 27, 2019, 10:10 PM), https://www.washingtonpost.com/immigration/federal-judge-blocks-trump-administration-from-detaining-migrant-children-for-indefinite-periods/2019/09/27/49a39790-e15f-11e9-b199-f638bf2c340f_story.html.

⁹³ *Children Entering the United States Unaccompanied: Section 2*, OFFICE OF REFUGEE RESETTLEMENT (Jan. 30, 2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2>.

⁹⁴ Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters 2 (Apr. 13, 2018), <https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf>.

Customs and Border Protection (CBP).⁹⁵ ICE and CBP are two of the U.S. government departments that handle immigration enforcement matters; ICE primarily handles interior immigration enforcement and is often responsible for the high-profile raids seen in the news, while CBP handles enforcement near the country's borders.⁹⁶

Initially, the sponsor vetting process was mostly handled by the ORR. Hardly any information sharing between government agencies was required to process an application for sponsorship.⁹⁷ But now, sponsor information is shared widely among multiple governmental offices. Personally identifiable information that was before not shared with ICE officials was suddenly made readily available to them. Legal practitioners who work with separated children and their prospective sponsors reported that the new information-sharing agreement seriously impeded otherwise qualified sponsors' willingness to come forward and sponsor children due to their fear of deportation or other immigration-related repercussions.⁹⁸

Another effect of the MOA is that the policy puts children in the ORR's care at a higher risk of harm. As a result, ICE's pursuit of sponsors who may not be in the United States legally can lead to the loss of stability in the child's household, children experiencing a higher risk of trafficking, being placed in an unsafe environment, or running away, among other safety concerns.⁹⁹

B. Children in ORR Custody for Long Periods of Time Have Difficulty Pursuing Immigration Relief

Because of the new information-sharing provisions, the memorandum led to children staying in ORR custody for longer than they would have before, and it also became more difficult to find sponsors for children. Children's family members and friends no longer wanted to come forward to serve as sponsors.¹⁰⁰ Without suitable sponsors, children languish in ORR custody indefinitely since they cannot be released without a sponsor. And, the longer that children spend in ORR custody, the more difficult it becomes to pursue immigration relief that the children would otherwise be eligible for if they were released to the care of a sponsor in a timely manner.¹⁰¹ For example, the longer that children are

⁹⁵ *Id.* at 2-4.

⁹⁶ Sofie Werthan, *What ICE Really Does*, SLATE (July 3, 2018, 1:07 PM), <https://slate.com/news-and-politics/2018/07/difference-between-ice-and-cbp-the-role-of-each-agency-in-family-separations-and-immigration-enforcement.html>.

⁹⁷ Women's Refugee Comm'n & Nat'l Immigr. J. Ctr., *supra* note 90, at 1.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 3.

apart from their parents, the more difficult it becomes for them to access sources of support, such as necessary information or documents or access to family or attorneys, that would help them apply for and receive asylum. When children or adolescents are aware that the information they share about their parents or families may not be kept confidential and could be used against their families, they are less likely to share information that could help them receive immigration relief.

One survey respondent highlighted the difficulty that older teenagers face when they are unable to have a sponsor come forward for them. For example, one child had a potential sponsor, but the sponsor was unwilling to be fingerprinted so that the child could pursue Special Immigrant Juvenile Status as a legal remedy.¹⁰² In another case, a child who was about to turn 18 was unable to find a sponsor due to the new requirements of information sponsors had to provide. Instead of being released to a family member or family friend, ICE transferred the child to adult immigration detention when he turned 18.¹⁰³ Because the new information-sharing policies affect many potential sponsors, it is conceivable that many children and adolescents have been in that same situation.

Additionally, the new mandatory sponsor fingerprinting process required by the MOA caused significant delays in family reunification. Reports stated that some parents had to wait over six months to be reunited with their children, so their children spent more time in detention than they would have before the new fingerprinting requirement.¹⁰⁴

C. Right to Counsel for Children and/or Parents Separated

Another major problem with the system as it stands is that children do not have the right to legal counsel in immigration proceedings. Though some scholars argue that the Supreme Court might be moving closer to granting immigrants a right to counsel, that has not happened yet. Without counsel, children are not being heard, and their rights are not protected.¹⁰⁵ Many reporters have documented instances of young children, even toddlers, appearing in court by themselves because they do not have an attorney.¹⁰⁶

¹⁰² *Id.* at 7.

¹⁰³ Women's Refugee Comm'n & Nat'l Immigr. J. Ctr., *supra* note 90.

¹⁰⁴ *Id.*

¹⁰⁵ Misyrlena Egkolfopoulou, *The Thousands of Children Who Go to Immigration Court Alone*, ATLANTIC (Aug. 2, 2018), <https://www.theatlantic.com/politics/archive/2018/08/children-immigration-court/567490/>; Vivian Yee & Miriam Jordan, *Migrant Children in Search of Justice: A 2-Year-Old's Day in Immigration Court*, N.Y. TIMES (Oct. 8, 2018), <https://www.nytimes.com/2018/10/08/us/migrant-children-family-separation-court.html>.

¹⁰⁶ *Id.*

Currently, there is no constitutional right to legal counsel for children and their families, since immigration proceedings are civil matters.¹⁰⁷ The William Wilberforce Trafficking Act directs the ORR to provide counsel for children, but neither requires it nor provides funding for it.¹⁰⁸ Volunteer lawyers often represent children, but it is often impossible to secure legal representation for every child and parent who needs it.¹⁰⁹ Some scholars argue that the Supreme Court, in the future, might hold that people do have a right to counsel in proceedings because of its holding in *Turner v. Rogers* in 2011, but progress on that issue has yet to be seen.¹¹⁰

Some sources of legal representation for children and their parents, other than private attorneys, are legal aid organizations, law school clinics, and pro bono legal assistance. Though these sources of legal help are sometimes available, the need for representation is much greater than the supply.¹¹¹ When it comes to deportation, studies have demonstrated that the likelihood of removal is significantly higher for those who appear in immigration court without a lawyer.¹¹²

Since the current administration is separating parents from their children, it should also work toward supplying legal representation to those families. Because parents separated from their children are not guaranteed legal representation, it is easy to see why members of the public are so concerned about covert adoptions. It seems like there are not enough protections in place, or legal resources available, to ensure that parents can advocate for their children, or to make certain that parents know their rights at all.¹¹³

D. Anticipating Changes in Law and Policy

As it stands today, it appears that the risk of unaccompanied children in ORR care being adopted by people other than their natural families is almost nonexistent. However, we must not ignore the fact that government policies and procedures often change; as immigration practitioners and advocates

¹⁰⁷ See Benjamin Good, *A Child's Right to Counsel in Removal Proceedings*, 10 STAN. J. CIV. RTS. & CIV. LIBERTIES 109; see also Lewis Tandy, *Reevaluating the Path to a Constitutional Right to Appointed Counsel for Unaccompanied Alien Children*, 96 TEX. L. REV. 653.

¹⁰⁸ Estin, *supra* note 4, at 608.

¹⁰⁹ *Id.*

¹¹⁰ Tandy, *supra* note 108; see also *Turner v. Rogers*, 564 U.S. 431 (2011).

¹¹¹ Tandy, *supra* note 108, at 658.

¹¹² *Id.* at 659.

¹¹³ See generally Tandy, *supra* note 108, at 654-55 (elaborating on the lack of legal resources for immigrants and their families).

know well, policies have changed dramatically during the Trump Administration.

One example of a policy change that was rolled out quickly without notice to government departments and immigration attorneys was Trump's first Executive Order banning immigrants from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen from coming to the United States.¹¹⁴ That Executive Order, released on a Friday afternoon, found many travelers from banned countries and their attorneys without warning.¹¹⁵ The Executive Order included a ban on travelers with visas and dual nationals, many of whom had left their home countries expecting to enter the United States only to be turned away upon arriving at their destinations."

Because the President and the Executive branch have extensive power over immigration proceedings, it is conceivable that some type of policy could be concocted that could chip away at the protections in place for children. While such an executive order might be challenged in court,¹¹⁶ like the above-mentioned travel ban was, the order could be a source of confusion for many until the matter is settled. Certainly, immigration and child advocates will continue to closely monitor policy changes that might put children at higher risk of adoption.

V. CONCLUSION

As long as they are enforced, the protections currently in place to protect migrant children and parents from being permanently separated are adequate. The most important protection is the federal-state jurisdictional divide, but even those who are skeptical can look to the Hague Convention for reassurance. The protections specifically set out in the Hague Convention ensure that no parent's child is put up for adoption without them knowing. Because the Hague Convention requires notice to and consent from the child's parent, the argument that children are being adopted without their parents' knowledge or consent is not as strong as some might think after reading articles spread widely on social media sites like Twitter and were published by reputable news organizations. The problem is that the systems put in place to care for and protect separated children do not always work perfectly. Having systems in

¹¹⁴ *Trump Executive Order: Refugees Detained at US Airports*, BBC NEWS (Jan. 29, 2017), <https://www.bbc.com/news/world-us-canada-38783512>. After the original Executive Order was signed the Administration added restrictions on additional nations: Eritrea, Kyrgyzstan, Myanmar, and Nigeria. *US Travel Ban: Trump Restricts Immigration from Nigeria and Five Other Countries*, BBC NEWS (Jan. 31, 2020), <https://www.bbc.com/news/world-us-canada-51335011>.

¹¹⁵ *Trump Executive Order: Refugees Detained at US Airports*, *supra* note 115.

¹¹⁶ The above-mentioned executive order was swiftly challenged in court. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

place is important, but what is more important is that those systems work correctly all the time.

Additionally, one of the most meaningful protections against international adoption of separated children is the jurisdictional divide between the state and federal courts. Because adoptions only happen in state court, not federal court, and state courts do not have jurisdiction over children in federal custody, adoptions of children in ORR care cannot occur legally without parental involvement.

Fortunately, the many protections already in place to guard against adoptions of separated children, such as the Hague Convention requirements, mandating notice to parents and reports and cooperation from both countries involved, and the divide between the federal and state systems, would be nearly impossible to overturn overnight. At this point, it seems that the safeguards against adoption of separated children are mostly secure. However, much more can and must still be done to improve the lives of children separated from their families.