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Giving Every Child a Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy

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Intercountry Adoption Policy

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Introduction

Currently, there are approximately 9.5 million children living in orphanages in the developing world, and this figure is expected to increase dramatically to 25 million by 2010 due to the HIV/AIDS pandemic.\(^1\) Intercountry adoption,\(^2\) the “process by which a married couple or single individual of one country adopts a child from another country,”\(^3\) took hold following World War II when many members of Western nations learned of the plight of homeless children as a result of the conflict. The popularity of intercountry adoption steadily increased over the course of the Twentieth Century, with a significant jump immediately following the Korean War.\(^4\) In the 1980s, it was estimated that more than one million families were interested in adoption in the U.S. alone.\(^5\) In addition to sympathy for displaced children, this phenomenon has coincided with decreasing numbers of domestic children available for adoption in industrialized nations due to increased access to contraception and abortion, a lessening of the stigma associated with single parenthood,\(^6\) and an increase in infertility. Infertility rates have increased because


\(^{2}\) Also called international adoption, transnational adoption, and cross-country adoption.


\(^{4}\) Notesong Srisopark Thompson, supra note 3, at 446.


\(^{6}\) Id.
of a tendency to attempt childbearing at later ages\(^7\) and environmental contaminants such as PCBs in food, air, and water that have led to significant decreases in sperm count.\(^8\)

However, in recent years, the number of children adopted from abroad into U.S. families has dropped significantly.\(^9\) In 2007, the number of foreign adoptions to the U.S. was 19,411, which represents a fifteen percent drop over the previous two years.\(^10\) Currently, Americans are adopting fewer than 18,000 foreign-born orphans a year,\(^11\) which is the lowest number since 1999.\(^12\) If this trend reflected a decrease in the number of abandoned children worldwide, it would be an extremely positive development.

Unfortunately, this is not the case. The major reasons for the reduction in international adoptions are stricter policies on the part of both sending\(^13\) and receiving nations.\(^14\) For example, in 2007, China enacted regulations disqualifying foreign adoption applicants who were single, overweight, over the age of fifty,\(^15\) or recently divorced.\(^16\) Even more extreme, Romania adopted a ban on virtually all international adoptions in January of 2008.\(^17\)

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\(^{7}\) Ethan B. Kapstein, *supra* note 1, at 117.


\(^{10}\) *Id.*


\(^{13}\) *Adoptions of Foreign Kids Decline in U.S.*, *supra* note 9; Bridget M. Hubing, *supra* note 5, at nn.28 &29.

Sending nations are adoptees’ native countries. Conversely, receiving nations are the prospective parents’ home countries.


\(^{15}\) Calum MacLeod, *Foreign Adoptions from China Fall: More Chinese Adopting; Fewer Children Available*, USA TODAY, Nov. 21, 2007, at A1.

This prohibition is not in the best interests of Romania’s many children living in institutions, but rather is a self-serving political policy enacted in an attempt to gain EU membership. Sending countries’ restrictions cannot be entirely attributed to their own governments; receiving nations have played a role in many of these policy decisions. For example, the EU pushed for the Romanian aforementioned ban on intercountry adoption, and EU experts even helped Romania craft the law. Also, receiving countries have blocked their citizens from adopting from certain sending countries, such as when the U.S. declared in December 2002 that it would not grant visas to Cambodian children that American parents were seeking to adopt.

The result of hindering or halting the intercountry adoption process is increased suffering of institutionalized and homeless children who are not having many of their basic needs met. Although corruption and other problems that tend to occur in the intercountry adoption process are far from ideal, they are arguably the lesser of the two evils when compared with the conditions that orphaned and homeless children must endure in their own countries. Moreover, the resilience of children living in institutional care or on the streets further tips the scale in favor of international adoption.

Longitudinal research studies have determined that intercountry adoptees function just as well as most domestic adoptees and biological children of the same socioeconomic status, even if the foreign-born children suffered from untreated illnesses and severe neglect at a

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18 Id. at 389.
young age. Over the years, intercountry adoption has proven to be an effective solution to the chronic problem of orphaned children, and it is time for the international community to increase both the efficiency of and supervision over this process.

This essay is both descriptive and normative in nature. Its purpose is to describe the current intercountry adoption regime along with its problems, and to propose a much-needed solution. At the outset, the paper explains the great need for intercountry adoption, highlighting empirical research on child development. Secondly, it gives an overview of past and present international adoption policy. Thirdly, the essay describes the problems in the current policy regime. Finally, it proposes an international agency and Family Court as a new approach to intercountry adoption that will solve many of the failures of the current system.

I. Need for Intercountry Adoption

There is a tremendous need for intercountry adoption in order to help the millions of children living on the streets and in institutions and the numerous families that long for children. This section of the essay first examines the statistics supporting the contention that the supply of adoptable children and demand for them on the part of prospective adoptive parents can fulfill each other if united through the process of intercountry adoption. The second part of this section highlights empirical research demonstrating the negative effects of living in an institution upon children’s development. Together, these parts lend strong support for an international effort to improve upon the intercountry adoption system and to promote its ends.

A. Supply and Demand

Each year, millions of children find themselves families, homes, or care. Most of these children are in developing countries wrought with poverty, war, political turmoil, and/or natural disasters, and as a result, these nations do not have adequate resources to care for them. For example, in China alone, there are upwards of 150,000 street children, a figure which is on the rise. This number was estimated at 100 million for children worldwide in the mid-1990s, which is the most recent statistic. As previously mentioned, there are currently approximately 9.5 million children living in orphanages in the developing world, and this figure is expected to jump to 25 million by 2010 due to the HIV/AIDS pandemic.

At the same time, certain developments in industrialized nations, such as the availability of birth control legal abortions and the erosion of the social stigma associated with single parenthood, has led to a decrease in the supply of domestic children available for adoption. One significant trend is the decrease in the pregnancy rate for women under the age of twenty-five in the U.S. between 1990 and 2004. This includes a decline in the teenage pregnancy rate from fifteen percent of pregnancies in 1990 to twelve percent in 2004, which is a contributing factor in the falling number of available

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23 Id.; Molly S. Marx, supra note 17, at 373; Jim L. Roby, *Understanding Sending Country’s Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J. L. & FAM. STUD. 303, 317 (2004) (stating that national crises such as civil war, natural disaster, or political turmoil often exacerbate a country’s inability to aid its children in need).
27 Id. at 373-75.
29 Id.
domestic children, since teenaged women are the group most likely to put their children up for adoption.\textsuperscript{30} There has been a corresponding rise in the demand for adoptable children in developed nations due to an increase in infertility rates and an increasingly wider definition of ‘family’ to include homosexual couples and blended relationships.\textsuperscript{31} Currently in the U.S., the demand for healthy infants to adopt outstrips the supply.\textsuperscript{32} In 2003, fewer than 14,000 children were given up for adoption in the U.S.\textsuperscript{33} The ratio of prospective adopters to Caucasian, American infants is approximately six to one.\textsuperscript{34} This proportion is probably even higher than estimated because many Americans who would like to adopt do not even try to do so because they are intimidated by the process and fear high costs.\textsuperscript{35} International adoption provides a logical solution to remedy both problems: the large number of abandoned children in many countries and the great demand for adoptable children in other nations.\textsuperscript{36}

**B. Effects of Living in An Orphanage on Children’s Well-being**

A major reason for the necessity of intercountry adoption is the extensive research concluding that the institutional environment, particularly with prolonged exposure, has

\textsuperscript{31}Ethan B. Kapstein, supra note 1, at 117.
\textsuperscript{33}Id. at 521.
\textsuperscript{34}Elizabeth J. Samuels, Time to Decide? The Laws Governing Mothers’ Consents to the Adoption of Their Newborn Infants, 72 TENN. L. REV. 509, 521 (2005); David Ray Papke, supra note 30, at 474 (stating that there are too few healthy, white infants to accommodate the great demand).
\textsuperscript{35}Id., citing ADAM PERTMAN, ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA 34 (Basic Books 2000).
detrimental effects on children’s intellectual and socio-emotional development.\textsuperscript{37} Perhaps even more worrisome than a failure to fully meet children’s physical needs, many orphanages do not have the resources to address children’s intellectual, social, and emotional needs. It is common for children living in orphanages, particularly those in “sending” countries, to lack consistent caregiver contact, emotional involvement from their caregivers, and experiences outside of the institution.\textsuperscript{38} These conditions, which fail to provide children with the stability, sensitivity, and stimulation necessary for normative development, are a key contributor to the developmental delays and deficits that researchers have found among children living in orphanages.

There is a multitude of empirical research asserting the negative effects of orphanages with low-quality and/or unstable care on children’s development in a variety of areas. The severity of the developmental problems that many children living in orphanages experience is indirectly related to the quality of the social environment.\textsuperscript{39} The developmental deficits found in children who have been institutionalized in orphanages in the developing world can be more readily attributed to the lack of appropriate social interactions than to material or physical deprivation.\textsuperscript{40}


\textsuperscript{39}Id. at 4.

During the first year of life, the presence or absence of sensitive and responsive
caregiving becomes a powerful regulator of emotional behavior and neuroendocrine
stress hormone activity in young children. The fear-anxiety system has a high degree of
plasticity, and therefore changes with experience. This system affects almost every organ
in the body, including the brain, and is triggered by stressors, which are external threats.
The social environment of orphanages, particularly of those in developing nations,
typically contains numerous stressors resulting from competition among children for
scarce resources. When stressors activate the fear-anxiety system, bodily resources
normally invested in processes for long-term survival, such as digestion, growth, and
energy storage, are redirected to the immediate problem by metabolizing fats and proteins
in an attempt to increase available energy. Although the activation of the fear-anxiety
system can be useful in coping with immediate stressors, prolonged suspension of future-
oriented functions can have significant consequences, particularly during development.
One possible consequence of this extended activation is an increased risk for
psychopathology, which research demonstrating that both clinical depression and post-
traumatic stress disorder are associated with disturbances in basal and stress activity of
the hypothalamic-pituitary-adrenocortical (HPA) system (the core of the mammalian

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Tizard & Rees, Comparison]; René Spitz, Hospitalism—An Inquiry Into the Genesis of Psychiatric
41 Megan R. Gunnar & Carol L. Cheatham, Brain and Behavior Interface: Stress and the Developing Brain,
42 Allan Munck, Paul M. Guyre & Nikki J. Holbrook, Physiological Functions of Glucocorticoids in Stress
43 Megan R. Gunnar & Carol L. Cheatham, supra note 41.
44 Lotta Arborelius, Brian W. Hawks, Michael J. Owens, Paul M. Plotsky & Charles B. Nemeroff,
Increased Responsiveness Of Presumed 5-HT Cells to Citalopram in Adult Rats Subjected to Prolonged
stress system\textsuperscript{45}) supports. Furthermore, research comparing glucocorticoid (CORT) (steroid hormones the HPA releases in response to stress) levels of children in a Romanian infant home to those of home-reared children found that the latter group exhibited normal CORT circadian rhythms, while not one member of the former group had a normal rhythm.\textsuperscript{46} Significantly, the atypical noon peak of CORT levels found in the institutionalized children was positively correlated with physical and developmental delays.\textsuperscript{47}

Growing up in an orphanage has been associated with attachment problems and poor-quality attachment relationships. Attachment disorders are particularly worrisome psychological problems because they are known to prevent affected children from becoming capable and well-adjusted adults.\textsuperscript{48} Attachments are patterns of interaction, or bonds, children have with their primary caregivers. Early attachments between a child and caretaker are crucial to normative development,\textsuperscript{49} and these bonds are often stable characteristics of individuals' relationships throughout their lifetime.\textsuperscript{50} According to attachment theory, bonds can take several forms:\textsuperscript{51} secure attachment, insecure avoidant attachment, and insecure resistant attachment.\textsuperscript{52} Securely attached infants consider their

\textsuperscript{47} Id.
\textsuperscript{48} Sara Dillon, \textit{supra} note 14, at 237.
\textsuperscript{49} Shannah Tharp-Taylor, \textit{supra} note 38, at 3.
\textsuperscript{51} MARY D. AINSWORTH, MARY C. BLEHAR, EVERETT WATERS, E. & SALLY WALL, PATTERNS OF ATTACHMENT (Erlbaum 1978); 1 JOHN BOWLBY, ATTACHMENT AND LOSS (Basic Books 1969).
\textsuperscript{52} Mary D. Salter Ainsworth & Barbara A. Wittig, \textit{Attachment And The Exploratory Behaviour Of One-Year-Olds In A Strange Situation}, in 4 DETERMINANTS OF INFANT BEHAVIOUR 113-136 (Brian M. Foss ed., Methuen 1969).
primary caregiver a safe base from which to explore and are distressed when the caregiver is out of sight, insecure avoidant babies do not seek the primary caregiver specifically and can be comforted by a stranger, and insecure resistant infants are ambivalent in their actions towards the primary caregiver. A fourth attachment pattern, disorganized attachment, was later developed to describe infants who behave oddly and lack an organized strategy with respect to the attachment figure. This type of attachment is associated with child maltreatment, maternal alcoholism and depression, high marital conflict, and prolonged or repeated separation from the primary caregiver.

The type of bond between infant and caregiver depends upon the degree to which the caregiver is sensitive and responsive to infant needs and desires. A high level of sensitivity is associated with a secure attachment, and the latter three patterns are the result of a lack or disruption of this type of caregiving. Since children living in orphanages are typically exposed to a number of different caregivers and inconsistent or unresponsive caregiving, it is difficult for them to form a secure attachment to one primary caregiver. The results are poor mental health consequences, undesirable

57 Theresa Jacobsen. & Laura J. Miller, The Caregiving Contexts of Young Children Who Have Been Removed from the Care of a Mentally Ill Mother: Relations to Mother-Child Attachment Quality, in ATTACHMENT DISORGANIZATION 347-78 (Judith Solomon & Carol C. George eds., Guilford Press 1999).
behavioral outcomes,\textsuperscript{58} and delays in cognitive and socio-emotional development.\textsuperscript{59} For example, in a comparison of infants in residential care and infants in two-parent families who attended a day-care center with an environment similar to that of the orphanage, the institutionalized children had a significantly higher rate of disorganized attachment patterns as compared to the control group.\textsuperscript{60} In another comparison study, the rate of secure attachment among Romanian adoptees was lower than the normative rate, regardless of age at adoption or time spent in an orphanage.\textsuperscript{61} These attachment difficulties are likely related to the high number of caregivers children are exposed to while in an orphanage, high staff turnover rates, and a lack of emotional involvement on the part of the caregivers. In one study of high-quality orphanages, the children had been exposed to an average of twenty-four different caregivers by the age of two, and an average of fifty by the age of four-and-a-half.\textsuperscript{62} In these same institutions, like in many orphanages, close personal relationships were discouraged in order to avoid painful separations for both the children and the staff. It is therefore not surprising that the children reared in this environment had not formed close attachments with any of the caregivers.\textsuperscript{63}

\begin{itemize}
\item \textsuperscript{58} Peter Fonagy & Mary Target, \textit{Attachment and Reflective Function: Their Role in Self-Organization}, \textit{9 Development and Psychopathology} 679, 679-700 (1997); Peter Fonagy, Miriam Steele, Howard Steele, Tom Leigh, Roger Kennedy, Greta Mattoon, & Mary Target, \textit{Attachment, the Reflective Self, and Borderline States: The Predictive Specificity of the Adult Attachment Interview and Pathological Emotional Development, in Attachment Theory: Social, Developmental and Clinical Perspectives} 233-278 (Susan Goldberg, Roy Muir, & John Kerr eds., Analytic Press 1995).
\item \textsuperscript{59} Shannah Tharp-Taylor, \textit{supra} note 38, at 28, 30-31.
\item \textsuperscript{60} Panayioti Verria, Zaira Papaligoura, Judy Dunn, Marinus H. van IJzendoorn, Howard Steele & Antigoni Kontopoulou et al., \textit{Early Experiences and Attachment Relationships of Greek Infants Raised in Residential Group Care}, \textit{44 J. of Child Psychology and Psychiatry and Allied Disciplines} 1208, 1208-20 (2003).
\item \textsuperscript{62} Tizard & Rees, \textit{Institutional Rearing, supra} note 40; Tizard & Rees, \textit{Comparison, supra} note 40.
\item \textsuperscript{63} Tizard & Rees, \textit{Institutional Rearing, supra} note 40.
\end{itemize}
Atypical behavior has also been identified among children living in orphanages, including aggression, hyperactivity, attention-seeking, emotional withdrawal and inhibition, and indiscriminate friendliness. The severity of conduct problems has been found to be directly related to the level of deprivation in the social environment.\textsuperscript{64} Furthermore, the longer the duration of institutionalization, the more frequent the behavior problems tend to occur.\textsuperscript{65} In a research study comparing children who had been reared in institutions until being placed in foster care at approximately three years old and children who had mainly lived with foster families, the researchers discovered that the former group displayed more frequent problem behaviors than the latter group, including restlessness, hyperactivity, aggression, and affective impoverishment.\textsuperscript{66} One possible explanation for the behavior problems identified in institutionalized children is that, although atypical in a mainstream sample, they are adaptive for that particular context.\textsuperscript{67} Institutionalized children may learn these atypical behaviors from older peers after observing their successes in having their needs met.\textsuperscript{68}

In addition to physical and socio-emotional problems, cognitive delays are commonly found among children who experience institutional care.\textsuperscript{69} One research study found that six- and seven-year-old orphans had lower IQ scores, lower levels of empathy, and were more likely to conform to adult opinions under pressure than home-reared

\textsuperscript{64} Shannah Tharp-Taylor, \textit{supra} note 38, at 25-26.
\textsuperscript{65} Sharon Marcovitch, Susan Goldberg, Amanda Gold, Jane Washington, Christine Wasson \& Karla Krekewich et al., \textit{supra} note 61.
\textsuperscript{66} William Goldfarb, \textit{The Effects of Early Institutional Care on Adolescent Personality}, 12 JOURNAL OF EXPERIMENTAL EDUCATION 106, 106-129 (1943).
\textsuperscript{67} Shannah Tharp-Taylor, \textit{supra} note 38 at 26.
\textsuperscript{68} Id.
controls.\textsuperscript{70} Lower IQ scores tend to be both positively correlated with duration of institutionalization and negatively correlated with age at institutionalization.\textsuperscript{71} One hypothesized reason for these deficits is that orphanages often restrict children’s play and exploration in order to avoid injury, since it is difficult for caregivers to supervise multiple children at once.\textsuperscript{72} These restrictions, however, can block cognitive activity and development.\textsuperscript{73}

C. Arguments in Favor of and Against Intercountry Adoption

Opponents of intercountry adoption focus on cultural concerns, the interests of the sending countries, and the exploitative and unethical practices that tend to accompany the international adoption process. They argue that international adoptees lose their cultural and national identities when raised outside of their birth countries by families who do not share the children’s ethnicity and heritage.\textsuperscript{74} Though the difference between intercountry adoptees’ backgrounds and that of their adoptive families is a legitimate issue of concern, it certainly does not outweigh the benefit they receive from being adopted into a loving home, where their physical and emotional needs are met. “[I]n no sense could the right of a child to enjoy a particular culture be said to trump the more fundamental right to be loved and protected as an individual.”\textsuperscript{75} There is also no scientific evidence of harm to adoptees or their adoptive families from a multicultural upbringing. In contrast, as can be seen from the previous section of this essay, there is a multitude of research finding

\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Joan Heifetz Hollinger, supra note 21, at 217.
\textsuperscript{75} Sara Dillon, supra note 14, at 200.
harmful effects upon children as a result of living in an orphanage. Furthermore, there is a plethora of resources, ranging from support groups to education tours of adoptees’ birth countries, available to address the complex issue of adoptees’ cultural identities.\textsuperscript{76}

On a broader scale, opponents to intercountry adoption often contend that the practice has negative consequences for sending countries. Many political leaders and officials of sending nations contend that international adoption negatively affects their country’s morale because it is the public admission that the government cannot care for its own children.\textsuperscript{77} For example, unfavorable publicity about the large number of South Korean babies “exported” to families in other countries prompted the South Korean government to phase out its international adoption program due to embarrassment over its inability to care for parentless Korean children.\textsuperscript{78} As a result of this attempt to eliminate foreign adoption, approximately 17,000 children are languishing in public orphanages throughout South Korea.\textsuperscript{79} In addition to reasons of embarrassment or shame, sending countries often view intercountry adoption as a form of imperialism on the part of receiving countries, which tend to be wealthier and have a long history of exploiting sending countries for their natural resources and labor.\textsuperscript{80} In a continuation of developed nations’ exercise of power over developing nations, the latter perceive the former to use international adoption as a means of satisfying their own citizens’ desires for children

\textsuperscript{76} Joan Heifetz Hollinger, supra note 21, at 217.
\textsuperscript{78} Tamar Lewin, South Korea Slows Export of Babies for Adoption, N.Y. TIMES, Feb. 12, 1990, at B10.
\textsuperscript{79} Crystal J. Gates, China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?, 7 IND. J. GLOBAL LEGAL STUD. 369, 392 (1999).
while confirming sending countries’ inadequacy and inferiority.\textsuperscript{81} Also, opponents argue that intercountry adoption is simply used to treat a symptom of social and economic issues in sending countries, and prevents these countries from having to address the underlying problem that results in a multitude of homeless children.\textsuperscript{82}

Another argument opponents typically assert is that international adoption is normally accompanied by illegal practices such as baby-selling, kidnapping, and financial exploitation by adoption “facilitators.”\textsuperscript{83} Due to the high prices individuals and couples from developed countries are willing to pay for a child, many are skeptical that even increased regulations can eliminate the thriving black market for babies. This argument against intercountry adoption is flawed for two reasons: one, it does not acknowledge the increase in financial incentives for illegal adoptions that would result from a dramatic decrease in the supply of children and fewer choices for families desperate for a child; and two, it overlooks the possibility for creative regulatory solutions to the problem of corruption in intercountry adoption that would allow the process to thrive without being tainted by unethical and illegal practices. As to the second point, this essay proposes the solution of an international adoption agency and Family Court to handle all intercountry adoptions efficiently and transparently, which would greatly reduce the corruption problem.

\textsuperscript{81} Id. at 325-26 (citing John Triseliotis, Inter-country Adoption: In Whose Best Interest?, in INTER-COUNTRY ADOPTION: PRACTICAL EXPERIENCES 119, 131 (Michael Humphrey & Heather Humphrey eds., 1993); Jim L. Roby, Understanding Sending Country’s Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls, 6 J. L. & FAM. STUD. 303, 316 (2004) (stating that some scholars view intercountry adoptions as a form of economic exploitation that wealthy nations commit against poverty-stricken nations).

\textsuperscript{82} Lisa M. Katz, supra note 77 (citing Elizabeth Bartholet, International Adoption: Overview, in ADOPTION LAW AND POLICY 10.04 [1] (Joan Hollinger ed., 1988)).

\textsuperscript{83} Curtis Kleem, supra note 80.
In contrast to opponents of intercountry adoption, supporters prioritize “the children, their individual situations, and what is best for their needs.”\textsuperscript{84} Although all of the issues that opponents of the practice note are important concerns, such as national pride and cultural heritage, they blanch in comparison to the sheer amount of suffering that homeless and institutionalized children endure as a consequence of having their basic physical and emotional needs go unmet. Opposing intercountry adoption in many cases is the equivalent of condemning children without families to an institutional life.\textsuperscript{85}

Through intercountry adoption, children receive, among other things, shelter, food, clothing, education, and affection, which are often not adequately available to them in their home countries, particularly in institutional settings. As an additional benefit, international adoption allows individuals and families who desire a child but are incapable of having a biological one fill that void in their lives. Although, as both supporters and opponents of the practice acknowledge, the intercountry adoption system is far from perfect, there is much potential for improvement through the implementation of new regulations and infrastructure.

\textbf{II. The Evolution of International Intercountry Adoption Regulations}

Currently, the governments of both sending and receiving nations set intercountry adoption policy, which has resulted in great variation among countries, despite the principles embodied in international agreements to which many states have become parties. One reason for the variation in policy is that the international treaties, though increasingly specific, lengthy, and authoritative over the years, are still too vague to

\textsuperscript{84} Lisa M. Katz, \textit{supra} note 77, at 292.
\textsuperscript{85} Sara Dillon, \textit{supra} note 14, at 198.
produce standardized outcomes. In spite of significant progress towards setting out explicit and cognizable procedures for intercountry adoptions, the current international regulations do not provide sufficiently detailed procedures and even more importantly, do not provide a mechanism for implementing the existing standards. The remainder of this section will cover the relevant international treaties and enumerate their shortcomings.

A. Geneva Declaration on the Rights of the Child (1924)

The Geneva Declaration on the Rights of the Child, created by the League of Nations, was the first attempt at an international agreement addressing the special needs and vulnerabilities of children. The drafters did not intend for the agreement to be binding upon states because they did not include any mechanisms for enforcement.86 This very brief and simple document entitles children to five rights, stated in general terms as: the right to be provided with the physical and spiritual means for normal development, the right to be helped and protected by adults when needed, the right to priority in the receipt of aid during times of distress, the right to be put in a position to earn a livelihood and to be protected from exploitation, and the right to be taught the value of helping others.87 The text of the declaration that is relevant intercountry adoption states that “the orphan . . . must be sheltered and succored.”88 Adoption into a healthy and loving home satisfies this right, regardless of the adoptive family’s location, because it is a practice that can rescue orphans from unhealthy environments and provide them with shelter and other protections.

88 Id.
B. UN Declaration of the Rights of the Child (1959)

The UN Declaration of the Rights of the Child is a brief, ten-principle resolution that the General Assembly (GA) passed on November 20, 1959. It cites the Geneva Declaration on the Rights of the Child for the principle that there is a need to create special safeguards for children. This UN Declaration sets forth general rights that all children are entitled to, including the right to free basic education, social security, and opportunities “to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.”

While not mentioning intercountry adoption explicitly, Principle 6 acknowledges a state’s responsibility to provide care to “children without a family and to those without adequate means of support.” Intercountry adoption is one of the means a state can utilize to satisfy this responsibility, particularly in countries where the number of orphans and homeless children far exceeds the amount of prospective domestic adoptive families and state resources.

C. The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption (1965)

The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption was the first international effort to standardize intercountry adoption procedures. The agreement distributes authority between the states of the

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90 Id.
91 Id.
92 Lisa M. Katz, supra note 77, at 288.
adopter and adoptee, and therefore is relevant to intercountry adoption. The drafters vest the power to grant adoptions in the adopter’s state, but the adoptee’s state has authority over “consents and consultations,” other than those relating to the adopter and his family. Both the adopter and adoptee’s states can annul or revoke an adoption in accordance with their internal law. However, the Convention was a failed attempt to establish common procedures, as it only had three signatories—Austria, Sweden, and the United Kingdom. Perhaps the Convention’s vagueness led to its lack of acceptance: it fails to define “consent” and abandonment” in relation to orphan status. Another issue could have been skepticism about whether a unified jurisdictional scheme could actually be implemented. This concern likely stems in part from Article 15 of the Convention, which allows contracting parties to disregard the agreement when observance with its provisions would be contrary to that state’s public policy.

**D. European Convention on the Adoption of Children (1967)**

The European Convention on the Adoption of Children (European Convention) is a regional agreement that the Council of Europe developed to set uniform rules for adoption. States that are not members of the Council of Europe may be invited to

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94 Id. at art. 5.
95 Id. at art. 7.
96 JOHN MURPHY, INTERNATIONAL DIMENSIONS IN FAMILY LAW 185 (Manchester University Press, 2005).
99 Id.
100 Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, supra note 93, at art. 15.
become parties to the European Convention, though there are no non-members among the eighteen states that ratified or acceded to the treaty. The majority of the text refers to adoption in general, with only two articles specifically applying to intercountry adoption: Article 11, which addresses nationality differences between a child and his adoptive parents, and Article 14, which deals with communication of adoption information between the competent authorities of different nations when the child and prospective adoptive parents do not live in the same state. However, the treaty can be seen as more favorable towards intercountry adoption as compared to various other international agreements that contain a presumption in favor of domestic as opposed to intercountry adoption, as the European Convention does not have such a provision. More generally, the treaty is pro-adoption because it includes a prohibition on restricting the number of children that any one person or family can adopt, regardless of capacity for biological children.

The European Convention is paradoxically progressive and outdated at the same time. It is pioneering in that it lists specific enquiry requirements for the adoption process, unlike previous instruments, including a consideration of the “child’s viewpoint with respect to the proposed adoption,” but it is notably traditional in its assertion that a state’s laws may require biological parents to provide a dowry for the child. The inclusion of a dowry provision, particularly in light of the treaty’s exclusion of childhood necessities, such as recreational and educational opportunities, perpetuates the belief that

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101 Id. at art. 22.
103 European Convention on the Adoption of Children, arts. 11, 14, Apr. 24, 1967, E.T.S. No. 58, 7 I.L.M. 211.
104 Id. at art. 12.
105 Id. at art. 9.
106 Id. at art. 10.
a dowry is essential for a woman to attract marriage proposals. Despite this questionable section and its relatively narrow reach (only European nations have signed onto it\textsuperscript{107}), the European Convention represents progress towards providing more protections for children who are adopted internationally, particularly because of the requirements that states investigate the abilities and characteristics of the prospective adopter(s) and the child’s viewpoint about the adoption. By providing for specific enquiry prerequisites to the approval of adoptions, children are less likely to be subject to exploitation and abuse and are more likely to be compatible with their adoptive families.

\textbf{E. Inter-American Convention on the Conflict of Laws Concerning the Adoption of Minors (1984)}

The Inter-American Convention on the Conflict of Laws Concerning the Adoption of Minors (Inter-American Convention) is a regional treaty primarily stating whether the law of the sending or receiving country governs different parts of the international adoption process.\textsuperscript{108} Twelve countries in the Western hemisphere signed the agreement, but only half of them ratified it.\textsuperscript{109} Though conflict of laws is the treaty’s main focus, it does provide various substantive protections to adoptees. Article 8 allows national adoption authorities to require a prospective adopter “to provide evidence of his physical, moral, psychological and economic capacity, through public or private institutions,” with the express purpose of protecting minors.\textsuperscript{110} Furthermore, states must

\begin{itemize}
\item \textsuperscript{107} Council of Europe, \textit{supra} note 102.
\item \textsuperscript{108} Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors art. 8, May 24, 1984, O.A.S.T.S. No. 62, 24 I.L.M. 460.
\item \textsuperscript{110} Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, \textit{supra} note 108.
\end{itemize}
interpret the Convention in favor of the child’s best interests pursuant to Article 19, and Article 13 requires an adoptee’s consent to convert a simple adoption into “full adoption, adoptive legitimation, or similar institutions” if he is above the age of fourteen. Like the European Convention, the Inter-American Convention allows for states who are not OAS members to become parties to the treaty (Article 23), but none have done so.

F. UN 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 (1986)

The UN 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 (UN Declaration on Adoption) is an attempt to protect “the large number of children who are abandoned or become orphans” globally. The resolution recalls the UN Declaration on the Rights of the Child and reaffirms its statements that children’s natural parents should raise them whenever possible, but even if this is not possible, all children should be raised in an emotionally, morally, and materially secure environment. Articles 17 to 24 specifically address intercountry adoption, with Article 17 embodying a preference for placement in a domestic foster or adoptive family over a foreign one. It is strange that the UN favors a temporary foster situation for homeless and orphaned children in this Declaration over a permanent, stable adoption simply

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111 Id. at arts. 13, 19.
112 Id. at art. 23; Organization of American States, supra note 109.
113 UN 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, GA Res. 41/85, 41st Sess. (Dec. 3, 1986).
114 Id.
because the latter is in another country. Although it is ideal for a child to have continuity in his environment, he would most likely benefit more from gaining a permanent family through intercountry adoption than from having his attachments interrupted at the end of the foster period in his birth country.

The UN Declaration on Adoption addresses important issues such as child safety, corruption, and consent, but only calls for rules without fully defining the problems or identifying specific measures to solve them. For example, Article 21 states, “[i]n intercountry adoption through persons acting as agents for prospective adoptive parents, special precautions should be taken in order to protect the child’s legal and social interests.”\textsuperscript{115} The Declaration neither defines the legal and social interests at stake nor identifies any “special precautions” that can be taken to protect them. Another example of the Declaration’s lack of specificity is Article 20, which prohibits intercountry adoption placements from resulting in “improper financial gain,” without distinguishing between legitimate costs and reasonable fee amounts in the intercountry adoption process and those that are unacceptable. Overall, the UN Declaration on Adoption usefully highlights significant issues in intercountry adoption, but fails to take any real steps towards improving them.


The UN Convention on the Rights of the Child cites previous international agreements on children’s rights in recognizing that the Geneva Declaration on the Rights of the Child and the UN Declaration of the Rights of the Child stated “the need to extend \textsuperscript{115} Id.
particular care to the child.”¹¹⁶ As the first Convention relating to intercountry adoption, it presumptively carries more weight than the previous UN instruments that were mere Declarations, which simply declare existing law and do not have the legal status of a treaty,¹¹⁷ (as opposed to Conventions, which have the characteristics of treaties¹¹⁸).

However, in practice, neither the UN Conventions nor Declarations relating to intercountry adoption are binding law because the GA promulgated them, and according to Article 10 of the UN Charter, GA resolutions are only “recommendations.”¹¹⁹ Yet, a country can bind itself to UN Conventions if it signs and ratifies them in its domestic legal system.¹²⁰

Article 21(b)-(e) of the UN Convention sets forth several basic guidelines for intercountry adoption. Article 21(b) identifies intercountry adoption as an acceptable form of caring for children, but asserts that it should only be utilized if the child cannot be suitably cared for in his birth country.¹²¹ This is a somewhat negative approach to international adoption because the Convention treats it as a last resort, particularly taken in context with the Article 20(3) requirement that states pay “due regard” to the “desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”¹²² Moreover, since there is no provision requiring the available options in a particular case to be weighed against one another, a child could

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¹¹⁸ Id.
¹¹⁹ Id.
¹²² Id.
end up with much lower-quality care than would have been provided to him outside of his birth country. Thus, while continuity in ethnic and cultural environment is important, the presumption in favor of a child’s birth nation could result in a child growing up in an institution rather than in a stable family setting, which is a situation that would not best serve the child’s interests. Accordingly, this result may violate both the Article 21 preamble, which states that the adoption system “shall ensure that the best interests of the child shall be the paramount consideration,” and the Article 3(1) mandate that all actions concerning children should have “the best interests of the child” as “a primary consideration.”

Furthermore, the UN Convention’s preference for national solutions over intercountry adoption burdens sending countries with the onerous task of reforming their domestic adoption and orphanage systems, which is beyond the capabilities of most developing nations. Even if states are capable of accomplishing this task, they have little incentive to do so in light of cross-border adoption’s profitability.

Article 21(c) underscores the importance of ensuring that the quality of care children will receive within foreign families is sufficiently high and protecting against exploitation in the intercountry adoption process. This provision states that a child adopted internationally must be provided with “safeguards and standards equivalent to those existing in the case of national adoption,” which would actually only have a beneficial effect if the standards and protections that apply to domestic adoptions are adequate. For children living in countries whose national adoption systems are rife with corruption and inefficiency, provision 21(c) does not help them if they are adopted

123 Id.
124 Ethan B. Kapstein, supra note 1, at 121.
125 Id.
internationally. A better way for the UN to have ensured that the intercountry adoption process embodied strong safeguards and high standards for children would be to have articulated precisely what those safeguards and standards should entail, rather than simply linking them to a nation’s domestic adoption system.

Importantly, Article 21(d) addresses the problem of corruption in the intercountry adoption process by maintaining that states must take all appropriate measures to ensure that placing children through intercountry adoption “does not result in improper financial gain” for the parties involved.127 Like the UN Declaration on Adoption, the Convention does not define what types or amounts of financial gain would be considered “improper,” which is relevant because even good-faith intercountry adoptions typically implicate large sums for administrative, legal, immigration work, and travel.

The final provision under Article 21 is administrative in nature and encourages states to enter into agreements with each other to facilitate compliance with the other sections of the Article.128 Although far from fully developed, the Convention does set forth important principles protecting children in the intercountry adoption process. The instrument was widely adopted, and interestingly, the U.S. and Somalia are the only nations who have not ratified it.129


The Organization of African Unity (OAU) developed the African Charter on the Rights and Welfare of the Child (African Charter), which is a regional instrument that

127 Id.
128 Id.
entered into force in 1999.\textsuperscript{130} Currently, twenty-one African nations have ratified the document.\textsuperscript{131} The African Charter takes a somewhat unfavorable approach to intercountry adoption, as Article 24 states that it should only be used as a last resort if the child cannot be placed in a foster or adoptive home in his birth country.\textsuperscript{132} It also limits intercountry adoptions to nations which have ratified the International Convention on the Rights of the Child or the African Charter,\textsuperscript{133} but most countries have signed onto the former.\textsuperscript{134} Yet, the U.S. is party to neither instrument, which could deprive African orphans of the opportunity for a loving home, since the U.S. is a major receiving country.\textsuperscript{135}

The African Charter prioritizes the best interests of the child,\textsuperscript{136} though the term “best interests” is not defined, as is the case with other international instruments. Also notable is the requirement that a child’s views, if he is capable of expressing them, be taken into account in judicial and administrative proceedings.\textsuperscript{137} This is a progressive feature of the African Charter because, unlike various other instruments, the child is empowered with influence over his own fate.


\textsuperscript{132} \textit{Id.} at art. 24.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} Kurtis A. Kemper, \textit{supra} note 129.
\textsuperscript{136} African Charter on the Rights and Welfare of the Child, \textit{supra} note 130, at art. 4.
\textsuperscript{137} \textit{Id.}
The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Convention") is a multilateral treaty that sets a framework of the norms and procedures governing intercountry adoptions, with the purposes of unifying the diverse adoption procedures across the globe and safeguarding children’s fundamental rights, including the prevention of child abduction, sale, and trafficking. The Hague Convention governs all intercountry adoptions between the seventy-six nations that have signed onto it, regardless of whether public or private agencies or individuals facilitate the adoptions. The agreement promotes international adoption for abandoned children whose domestic placement options have been exhausted. A key feature of the Hague Convention is the requirement that each state designate a Central Authority (CA) to implement the agreement’s directives, oversee the aspects of the intercountry adoption process taking place within its borders, and communicate with other states’ CAs to facilitate the intercountry adoption process and further the treaty’s objectives.

The Hague Convention is much more specific and comprehensive in its approach to intercountry adoption than earlier germane agreements, which is a sign of progress towards guaranteeing all internationally adopted children minimum standards of care and safeguards. For example, the Hague Convention specifies procedural steps in the

139 JEREMY ROSENBLATT, INT’L CONVENTIONS AFFECTING CHILDREN 87 (Kluwer Law Int’l 2000).
142 Molly S. Marx, supra note 17, at 388.
143 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption supra note 140, at art. 6, 14-20.; Ethan B. Kapstein, supra note 1, at 123.
intercountry adoption process, down to the content of reports that the sending and receiving countries compile and exchange. This procedural framework sets the Hague Convention apart from previous instruments, which simply stated rights or goals without specifying the means by which to accomplish them.

The Hague Convention also tackles the problem of corruption in intercountry adoption more fully than previous global instruments. Firstly, the Hague Convention corrects the ambiguity of the term “improper financial gain” in Article 21(d) of the UN Convention by clarifying that reasonable professional fees and reasonable remuneration to the directors, administrators, and employees of bodies involved in an adoption do not constitute “improper financial or other gain.” Secondly, the Hague Convention addresses the problem of corruption associated with consent in the intercountry adoption process. Article 4 states that the consent of the necessary “persons, institutions and authorities,” as well as that of the child (with regard to his “age and degree of maturity”), shall not be “induced by payment or compensation of any kind.”

Another progressive feature of the Hague Convention is that it specifically takes the child’s preferences into account. The instrument does this in two places, noting the importance of first considering the child’s age and maturity in both: in Article 4, concerning consent to the adoption in the first place; and in Article 21, regarding consent to alternative arrangements when the CA determines that the continued placement of the child with the prospective adoptive parents is not in the child’s best interests.

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144 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption supra note 140, at art. 4.
145 Id. at art. 32.
146 Id. at art. 4.
147 Id.
Despite the progress it embodies, the Hague Convention has been the subject of great criticism. One major problem is that its requirements are too costly for poor, young, and developing countries to implement, which is a serious issue because these nations tend to have both the highest number of orphans and the greatest amount of corruption.\textsuperscript{148} These countries cannot handle the administrative burdens because many lack monetary resources and a functioning government bureaucracy.\textsuperscript{149} The circumstances in these nations tend to result in many unregulated adoptions, corruption, and exploitation of children and families for a profit, or a great number of children in limbo without families due to the time it takes the small number of officials that a poor country can afford to oversee numerous adoption cases. Neither state of affairs serves the best interests of children. For example, Guatemala recently switched from the former situation to the latter in recent years.\textsuperscript{150} Prior to governmental regulation, intercountry adoptions were a $100 million-a-year business for Guatemalan notaries, who charged an average of $30,000 per child.\textsuperscript{151} Recently, however, the country agreed to abide by the Hague Convention, which will reduce the number of intercountry adoptions from Guatemala because the government does not possess the resources to handle the great amount of cases the notary industry managed and the treaty’s requirements for inspection of each adoption case take time and effort.\textsuperscript{152} The Guatemalan government only has

\begin{footnotesize}
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\item\textsuperscript{151} \textit{Id.}
\item\textsuperscript{152} \textit{Id.}
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seven inspectors that deal not only with adoption approval, but also family issues such as domestic violence and child neglect.\textsuperscript{153}

Ethiopia is another impoverished country that has been popular amongst Americans seeking to adopt in recent years but has extremely limited resources to monitor intercountry adoptions.\textsuperscript{154} The nation’s Ministry of Women’s Affairs, which oversees adoptions, expressed its prediction that it does not have the resources to manage the increasing amount of adoption requests.\textsuperscript{155}

The Hague Convention actually places heavier burdens upon impoverished, struggling sending states than upon receiving states, which tend to be wealthier in comparison, by requiring the former to regulate the process of matching children with adoptive parents, protect the rights of the child and his biological parents, investigate ways for the child to remain in his birth country, and combat illegal adoption practices.\textsuperscript{156} Thus, financial and institutional barriers make it difficult for the Hague Convention to solve the problems it was developed to address.

Another major criticism of the Hague Convention is the lack of an international supervisory body to ensure the compliance of contracting states.\textsuperscript{157} The agreement leaves enforcement to each nation’s CA, and each country has the sole authority to accredit its CA.\textsuperscript{158} As a result, the system under the Hague Convention allows each country to police its own intercountry adoptions, as was the case prior to the treaty.\textsuperscript{159} Therefore, it

\textsuperscript{153} Id.
\textsuperscript{154} Jane Gross & Will Connors, supra note x.
\textsuperscript{155} Id.
\textsuperscript{157} Curtis Kleem, supra note 80, at 138.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
is doubtful that the parties to the treaty are complying fully with its requirements, particularly since the lack of regulation and consequences for violations provide little motivation for them to do so.

A third issue is the Hague Convention’s silence and lack of specificity on important aspects of intercountry adoption. For example, the Convention does not specify characteristics that potential adopters must possess in order to qualify for intercountry adoption. Furthermore, the Convention fails to define criteria for determining the “best interests of the child,” a phrase that appears numerous times in the treaty.

In light of these criticisms, the Hague Convention is merely a small step towards an intercountry adoption regime that truly protects the best interests of children. As can be seen in the following section, a great deal of reform and infrastructure is needed to address the numerous, complex problems that plague the current system governing intercountry adoptions.

III. Problems with the Current Intercountry Adoption System

The current intercountry adoption process is extraordinarily complex, time-consuming, and entails great personal and financial costs to parents seeking to adopt.160 Furthermore, it has proven itself prone to corruption and inefficiency, partially because prospective parents must rely on domestic and foreign agencies, lawyers, and facilitators whose competence and trustworthiness may not be ascertainable and who have generally been able to shield themselves from liability.161 The process of adopting internationally

160 Joan Heifetz Hollinger, supra note 21, at 215.
161 Id. at 216.
is also becoming increasingly difficult as sender country regulations tighten and the costs
of adoption rise.\textsuperscript{162} Ethiopia is one of the new preferred countries for adoption, partially
because of its relatively cheap adoption cost of $20,000, which is affordable compared to
the prices of adopting from other nations.\textsuperscript{163} The combination of the many problems in
the current intercountry adoption system presents seemingly insurmountable obstacles to
fulfilling the best interests of the world’s homeless and orphaned children.

A. Discrimination in International Adoption

Many high-quality families desiring to adopt are precluded from doing so because
of the prohibitive costs of intercountry adoption. The average cost of adopting an infant
from another country is between $18,000 and $30,000 in up-front fees, excluding other
costs such as travel and medical expenses.\textsuperscript{164} The money is typically paid to
“intermediaries, lawyers, facilitators, bureaucrats, notaries, nondescript officials of all
kinds, and the natural mother.”\textsuperscript{165} Another issue is the typical requirement that parents
seeking to adopt internationally spend a significant amount of time in the foreign country
from which they wish to adopt. Not only is this an expensive requirement, but many
individuals have job obligations that would preclude them from satisfying it. Despite
deferral tax credits of approximately $10,000 per intercountry adoption, the costs, which
not only include agency and administrative fees but home studies, background

\textsuperscript{162} Eisenberg at 13.
\textsuperscript{164} Letter from Jeanne Ketola, Executive Director of Special Connections International, to the U.S. Dep’t of State, Adoption Regulation Docket Room (Feb. 24, 2005), \textit{available at travel.state.gov/family/adopt_comments/word/special_connections_international_comments.doc}.
investigations, and travel, continue to block middle- and lower-income families from adopting internationally.\textsuperscript{166}

\textbf{B. Inefficiency}

Intercountry adoption is very lengthy and often frustrating process. One of the reasons for the considerable amount of time the process takes is inefficiency. There are typically very long waiting periods during the adoption process\textsuperscript{167} and various sending nations require one or both prospective adoptive parents to reside in their countries for a period of time before allowing the adoption to take place.\textsuperscript{168} Correspondingly, a great deal of the inefficiency in the intercountry adoption process can be attributed to the many, often duplicative requirements of both the sending and receiving countries for the adoption to take place. For example, Americans who have adopted children abroad must also complete the U.S. adoption process because foreign adoption decrees are not entitled to the same “full faith and credit” as American decrees are, and a U.S. adoption decree is generally required in order to obtain a U.S. birth certificate.\textsuperscript{169} An example of a duplicative requirement on the part of sending nations is that Vietnam, Russia, and Bulgaria require prospective adoptive parents to travel to their country on two separate occasions in order to adopt a one of their orphans.\textsuperscript{170}

Moreover, conflicts between the laws of sending and receiving countries can cause lengthy delays and at times, render the attempted adoption impossible. This

\begin{footnotesize}
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\item \textsuperscript{166} Joan Heifetz Hollinger, \textit{supra} note 21, at 218.
\item \textsuperscript{167} Marx at p. 380 (\textsuperscript{?})
\item \textsuperscript{168} Bridget M. Hubing, \textit{supra} note 5, at 685.
\end{itemize}
\end{footnotesize}
problem commonly occurs when the receiving nation in a particular adoption has stricter adoption eligibility standards than the sending country.\textsuperscript{171} Even when there is no conflict of law, the average waiting time for intercountry adoptions is between one and three years.\textsuperscript{172} During this period when the adoption is pending approval, the child misses out on the opportunity to form secure attachments with caregivers at an earlier age, which could have long-term negative consequences.

C. Corruption

A major problem with the current international adoption system is widespread corruption. “Baby-selling,” “baby-snatching” (child abduction), child trafficking, and bribery are very common under the existing regime.\textsuperscript{173} As the price of intercountry adoption rises, so does the economic incentive of theft and other forms of corruption.\textsuperscript{174} Child traffickers typically earn between $5,000 and $25,000 per infant,\textsuperscript{175} which is a high enough incentive to foster a black market for babies even where moderate regulations do exist. This type of corruption has been uncovered in many developing countries. For instance, a 1996 investigation into Paraguan adoption procedures suggested that many of the country’s infants that foreigners adopted were either sold or stolen.\textsuperscript{176} Another example is a child trafficking ring in China that was uncovered in 2008, which had

\begin{footnotes}
\item[173] Molly S. Marx \textit{supra} note 17, at 378.
\item[174] Anothony D’Amato, \textit{supra} note 23, at 1247.
\item[175] Ethan B. Kapstein, \textit{supra} note 1, at 119.
\end{footnotes}
abducted or purchased approximately one thousand children. The traffickers had sold the babies to Chinese orphanages for amounts ranging from $400 to $538, and in turn the orphanages placed most of the children with foreign families in exchange for mandatory contributions of $3000 per child. In February 2006, nine individuals were convicted for trafficking and twenty-three local government officials were fired for their involvement.

Sending countries’ agencies, officials, and citizens are not the only parties who have run corrupt intercountry adoption schemes. Rather, individuals from receiving countries have been involved in corruption as well. One example is a child trafficking enterprise discovered in Cambodia in 2002. Two American owners of a U.S. adoption agency led the enterprise, through which they collected approximately eight million dollars from American adoptive parents. In this scheme, children were taken from their birth parents under false pretenses. Many were told that they could have their child back at any time, that they would be sent money and photos of their child for the rest of their lives or that their child could petition for them to immigrate to the U.S. when he became an adult. The two Americans leading the enterprise were prosecuted for conspiracy to commit visa fraud, conspiracy to launder money, and structuring.

177 Peter S. Goodman, Stealing Babies for Adoption; With U.S. Couples Eager to Adopt, Some Infants Are Abducted and Sold in China, WASH. POST, Mar. 12, 2006, at A01.
178 Id.
179 Id.
However, they were not charged for child trafficking because U.S. law does not prohibit child trafficking for the purposes of adoption.\footnote{Trish Maskew, \textit{Child Trafficking and Intercountry Adoption: The Cambodian Experience}, 35 CUMB. L. REV. 619, 634 (2005).}

If the biological parents have sold their infant to a child trafficker, they usually only receive a tiny fraction of the price that the adoptive parents pay, but this amount is adequate motivation for baby-selling for desperate parents in impoverished countries. For example, a baby-selling racket in a poor Indian village involved women selling their infant daughters, who were less useful to families than sons, for about twenty dollars each.\footnote{Raymond Conner, \textit{For Poor Families, Selling Baby Girls was Economic Boon}, N.Y. TIMES, June 23, 2003, at A3.} Another example is the aforementioned child trafficking enterprise uncovered in Cambodia, which paid birth parents between twenty and two-hundred dollars and a fifty-kilogram bag of rice for their child,\footnote{Trish Maskew, \textit{Child Trafficking and Intercountry Adoption: The Cambodian Experience}, 35 CUMB. L. REV. 619, 634 (2005).} an amount that is just a small percentage of the adoption fees that adoptive parents in receiving countries are willing to pay. As a result of the large returns of illegal “baby-selling,” there is great motivation for individuals to participate in this black market, despite the risks of prosecution.

As a result of corruption problems, seventeen of the forty sending countries from which Americans adopt have instituted temporary or permanent moratoriums on private adoptions of their orphans,\footnote{Pamela Anne Quiroz, \textit{Color-blind Individualism, Intercountry Adoption and Public Policy}, 34 J. SOC. & WELFARE 57 (2007).} leaving many to languish in institutions.\footnote{Crystal J. Gates, supra note 79, at 369-70.} For example, in Romania, the government declared an official moratorium on intercountry adoption in June 2001\footnote{MEPs Call for International Adoptions from Romania, U.S. FEDERAL NEWS, July 11, 2006, available at 2006 WLNR 12001941.} in response to European Union concerns about corruption and child...
The freeze on international adoptions was made retroactive to December 1, 2000, abruptly ending international adoptions planned during this time, despite the fact that many children had already established contacts with families seeking to adopt them. The moratorium was replaced on January 1, 2005 with Law 272, which essentially forbids intercountry adoptions of Romanian children. Specifically, the only foreigners that the law allows to adopt Romanian children are their biological grandparents, and even this is not permitted until every attempt to reunite children with their families or place them with another Romanian family has been made and has failed. Furthermore, the law prohibits all intercountry adoptions of children under the age of two. As a result, the vast majority of the 10,000 Romanian children abandoned in hospitals annually and approximately 40,000 orphans in the country are not eligible for the opportunity to have a stable family life through intercountry adoption. Rather, many are left to suffer indefinitely in government-run institutions, where the

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192 Id.
staff commonly abuse and neglect them, according to an investigation that Mental Disability Rights International recently conducted.  

Like Romania, Georgia instituted a moratorium on foreign adoptions that had dire consequences. The Georgian President declared the adoption freeze in January 1997 both for reasons of nationalism and suspected corruption in the intercountry adoption process. As a consequence of this policy, several orphans who had been approved for international adoption prior to the moratorium died of treatable illnesses while enduring miserable conditions in Georgian orphanages.  

In addition to moratoriums on the part of various sending nations, the U.S. has responded to corruption problems in intercountry adoption by suspending the process with respect to certain countries. In December 2002, the U.S. instituted the aforementioned ban on visas for Cambodian children that Americans were seeking to adopt due to suspicions of child trafficking. Similarly, the U.S. State Department has refused to process new adoptions from Guatemala as of April 1, 2008 because this sending country had not yet implemented all of the safeguards required under the Hague Convention.  

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D. Wide Degree of Variation Amongst Nations

The adoption laws of different sending countries vary widely, and as a result, some intercountry adoptions can be completed in the sending country while other must be completed in the receiving country. In addition to the complexities associated with deciphering the varying procedural requirements for different countries, a consequence of this variation is that factors such as cost and convenience drive the location of international adoptions rather than considerations such as the sending country’s resource level and the need for adoptive parents. For example, before its government recently intervened, Guatemala had a largely unregulated system that allowed for relatively quick adoptions of about nine months from start to finish. When a country offers a reduced waiting time, the number of intercountry adoptions from that nation will likely skyrocket, while other states with fewer resources and a greater number of children living in orphanages will experience lower interest from prospective foreign adopters as a result.

E. Lack of Enforcement of Current Regulations

Achieving compliance with international law is substantial challenge because of the lack of enforcement authority and appropriate enforcement mechanisms. The GA does not have the ability to create binding law, and therefore its resolutions providing for child protections in intercountry adoption are little more than gestures with questionable impacts in practice because there is no authoritative basis upon which to prevent countries from violating them. Even when international agreements attempt to create accountability, enforcement is difficult to achieve. For instance, the Hague Convention

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206 Joan Heifitz Hollinger, supra note 21, at 217.
207 Olga R. Rodriguez, supra note 150.
208 Bridget M. Hubing, supra note 5, at 679.
requires the identification of a CA to implement the Convention’s regulations, but enforcement is nearly impossible in poor nations where the CA’s resources are likely to be low and the CA was the body in charge of overseeing international adoptions in the first place.

In addition, the International Court of Justice (ICJ) is the UN’s principal judicial organ, but only states, not private parties, have standing before this court.\textsuperscript{209} Therefore, families involved in intercountry adoption disputes cannot seek relief through the ICJ, even against nations that violate treaties that they have ratified. Even in the improbable event that a state chooses to represent a private party against another state, the latter state must consent to the ICJ’s jurisdiction in order for the case to be heard, which is unlikely because states tend to prefer to settle disputes through diplomatic means rather than more formally through the ICJ.\textsuperscript{210}

\textbf{IV. Proposed Solution: International Agency & International Family Court}

Although the international attempts at establishing rights for abandoned or orphaned children and promoting intercountry adoption are laudable, they are not enough. A greater step is needed to combat the corruption, discrimination, and inefficiencies that pervade the current international adoption system. Although the Hague Convention represents progress for child protections in intercountry adoption, the infrastructure for implementing the Convention’s directives, particularly for poor and less-developed nations, is lacking. The pervasive problems present in intercountry

\textsuperscript{209} Id.
\textsuperscript{210} Bridget M. Hubing, \textit{supra} note 5, at 679 (citing Linda Malone, International Law: The Professor Series 110 (1998)).
adoption today, thirteen years after the Convention entered into force,\textsuperscript{211} are evidence that a greater step is needed to monitor and facilitate the intercountry adoption process.

A solution to the problems of the current system would be the creation of an international agency on intercountry adoption and an international Family Court. The international agency would be much more than a global surveillance body; it would be the sole coordinator of international adoptions. The agency would be responsible for handling applications from prospective adoptive parents, investigating applicants to ensure that they will provide a healthy home environment for adoptees, keeping data on orphans worldwide, investigating children’s backgrounds to make certain that they are truly available for adoption, and developing rules governing the intercountry adoption process. The agency’s decision-making body would consist of representatives from every country that has entrusted its intercountry adoptions to the agency, similar to that of the World Trade Organization (WTO), in which member governments take decisions rather than a board of directors.\textsuperscript{212} By involving representatives from numerous nations in the agency’s decision-making process, the needs and values of the many countries that engage in international adoptions will be considered. However, unlike to WTO, not all decisions should require a consensus because one nation’s representative could be a “holdout” and prevent the adoption of a rule that every other representative supports. Whether the drafters of the agency’s charter conclude that decisions should be taken by a simple majority or a two-thirds majority, each nation’s representative on the decision-making body would have one vote, regardless of how many children their citizens adopt

\textsuperscript{211} The World Organization for Cross-border Co-operation in Civil and Commercial Matters, \textit{supra} note 141.

\textsuperscript{212} Understanding the WTO: The Organization, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm#council (last visited March 12, 2009).
or put up for adoption annually. This is an important feature for encouraging all
countries that engage in intercountry adoption to participate, and also to avoid motivating
unethical conduct (e.g. pressuring birth mothers to give their children up for adoption) on
the part of any nation in an attempt to procure additional votes.

An international public agency responsible for intercountry adoptions would
lessen or even solve many of the problems of the current system. Firstly, this new system
would be much more efficient than the current intercountry adoption regime. All data
about orphans and prospective adoptive parents would be in one central place and the
international agency would possess the power to authorize the adoptions, which would
eliminate the need for coordination between facilitators and agencies in sending and
receiving countries along with duplicative requirements for adoptive families. In this
way, prospective adopters would only have to satisfy the conditions that the international
agency’s decision-making body sets, rather than the often repetitive and time-consuming
requirements of multiple agencies and governments that exist in the current system.
Thus, with a single body of regulations governing the process, families will no longer
have to navigate multiple bodies of law, which will increase efficiency and lower costs.

By significantly lowering the costs and increasing the efficiency of the
international adoption process, the problems of child trafficking and abduction would be
ameliorated because there would no longer be a financial incentive for these crimes.
Prospective adopters would no longer be willing to pay high fees for children, as the costs
of adopting will be substantially lower through the international agency. The new system
would ensure that prospective adoptive parents are not taken advantage of by individuals
with a profit motive because everyone seeking to adopt would apply directly to the
international agency, instead of having to put their trust and money in adoption facilitators and foreign agencies and bureaucrats. In terms of timing as a motivation for corruption, since the international agency would match the numerous children in need of homes with families desiring children more quickly and efficiently than most international adoptions are completed under the current regime, the desperation that is one of the factors currently fueling the black market for babies will no longer exist.

An international agency would provide the children of all nations with the same chance for a loving and stable family, regardless of their birth country’s resources. As explained earlier, poor, developing countries do not have the resources to monitor and process intercountry adoptions. The result is widespread corruption and many adoptable children left languishing in institutions. With the creation of an international agency, developing nations would be relieved of this burden and could then reallocate their limited resources to other areas where they are desperately needed.

The new system would also allow families who would like to adopt but cannot afford to pay high fees for intercountry adoption to fulfill their dreams of raising an adoptive child, thereby essentially eliminating the discrimination against less wealthy families that exists under the current regime. The lower costs of international adoption would be due to the aforementioned efficiency gains as well as an elimination of the high fees charged in the current system, which often include travel costs and payoffs to foreign officials or institutions. From a long-term perspective, making intercountry adoptions more efficient and less costly can address the world’s overpopulation problem by making adoption an attractive alternative to having biological children.
The international agency would need to be structured to ensure transparency in its operations, which would also ensure the elimination of the corruption problems during the processing of intercountry adoptions that exist in the current system. In addition, the agreement establishing the agency should specify regular intervals for internal and external audits with the results made available to the public in order to further combat corruption and inefficiency.

Both sending and receiving nations would need to be incentivized to give the agency the authority to handle their international adoptions. One way to encourage widespread participation is to involve both sending and receiving nations in the process of developing the agency’s structure and guidelines, as was done in the drafting of the Hague Convention.213 By involving both sending and receiving nations in the drafting of the treaty, both types of nations will be more likely to accept and ratify the end product.

In addition to the administrative body, there should be an international Family Court to adjudicate disputes relating to intercountry adoptions. In general, enforcement mechanisms in international law are severely inadequate.214 Unlike the International Court of Justice (ICJ), the principal UN judicial organ, which only litigates cases between states,215 the international Family Court should provide a means of relief for the private parties involved in the intercountry adoption process. There is a great need for legal protection for these parties, which include prospective adoptive parents, biological parents, and adoptees, particularly to address the corruption of which they are often victims in the current system. However, as the international agency becomes established,
it is expected that claims from these parties would decrease significantly due to the new system’s many safeguards against corruption and unethical conduct.

Both the international agency and Family Court would need adequate funding to efficiently handle adoption cases for many nations while ensuring that the children are placed in safe, loving homes. The agency would need to employ a large staff with qualified employees in every participating country to collect data and oversee the intercountry adoptions on a local level under the agency’s authority. Funding sources include the UN, participating nations (based on a sliding scale), corporations, private philanthropists, and small fees from adoptive parents. One source of UN funds that would not require additional contributions is the reassignment of the funds used to support the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) following their dissolution in 2010. The combined cost of the two tribunals is $100 million per year, which is funding that could be partially or completely reallocated to support the intercountry adoption agency and Family Court. In light of the fact that the physical and psychological wellbeing of millions of children is at stake, funding institutions for intercountry adoption should be set as an international priority.

V. Conclusion

Intercountry adoption has received a great deal of international attention in recent years, in large part due to the problems of the current system. Despite attempts to create

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international agreements and regulations for the process, it is plagued with corruption, inefficiency, and discrimination. In response to these problems, both sending and receiving nations have implemented hurdles to the international adoption process. From an ethical standpoint, though, the answer is not to halt or hinder intercountry adoptions, but rather to reform the current system and create the infrastructure necessary for it to function efficiently, transparently, and ethically. When adoptions are restricted, the millions of children in institutions and on the streets worldwide are deprived of the opportunity to have their basic physical and psychological needs met by families abroad who are eager to adopt them. In light of this great need on the part of both sending and receiving nations as well as the problems of the current system, a practical solution would be to establish an international agency and Family Court to conduct and oversee the intercountry adoption process. This new system would increase efficiency and transparency, decrease costs, eradicate discrimination, and better protect the rights of adoptive parents, adoptees, and birth mothers than the current regime. Most importantly, the new system would give each orphaned and homeless child a chance to grow up in a stable, loving environment, which would truly fulfill the international goal of promoting the “best interests of the child.”