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ARTICLES

**GIVING EVERY CHILD A CHANCE:  
THE NEED FOR REFORM AND  
INFRASTRUCTURE IN INTERCOUNTRY  
ADOPTION POLICY**

**Rachel J. Wechsler\***

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.<sup>1</sup> Intercountry adoption,<sup>2</sup> the “process by which a married couple or single individual of one country adopts a child from another country,”<sup>3</sup> took hold following World War II when many members of Western nations learned

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\* J.D., University of Pennsylvania; M.Sc., Oxford University; B.S., Cornell University (Hons.). The author sincerely thanks Professor Gideon Parchomovsky for his mentorship and insightful comments throughout the writing process. This article would also not have been possible without the unending support of Amy Wechsler and Steven Evers.

<sup>1</sup> Ethan B. Kapstein, *The Baby Trade*, 82 FOREIGN AFF. 118, 115 (2003).

<sup>2</sup> Also called international adoption, transnational adoption, and cross-country adoption.

<sup>3</sup> Notesong Srisopark Thompson, *Hague is Enough?: A Call for More Protective, Uniform Law Guiding International Adoptions*, 22 WIS. INT'L L.J. 441, 442

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.<sup>4</sup> In the 1980s, it was estimated that more than one million families were interested in adoption in the United States alone.<sup>5</sup> 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,<sup>6</sup> and an increase in infertility. Infertility rates have increased because of a tendency to attempt childbearing at later ages<sup>7</sup> and environmental contaminants such as PCBs in food, air, and water that have led to significant decreases in sperm count.<sup>8</sup>

However, in recent years, the number of children adopted from abroad into U.S. families has dropped significantly.<sup>9</sup> 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.<sup>10</sup> Currently, Americans are adopting fewer than 18,000 foreign-born orphans a year,<sup>11</sup> which is the lowest number since 1999.<sup>12</sup> If this trend reflected a decrease in the number of aban-

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(2004) (citing CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, INTERCOUNTRY ADOPTION GUIDELINES 97 (1980)).

<sup>4</sup> Thompson, *supra* note 3, at 446.

<sup>5</sup> Bridget M. Hubing, *International Child Adoptions: Who Should Decide What Is In The Best Interests of the Family?*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 655, 659 (2001) (citing Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1166 n.5 (1991)).

<sup>6</sup> *Id.*

<sup>7</sup> Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 433 (2004).

<sup>8</sup> Gabriela Marquez, *Transnational Adoption: The Creation and Ill Effects of an International Black Market Baby Trade*, 21 J. JUV. L. 25, 26 (2000) (citing LORI CARANGELO, STATISTICS OF ADOPTION 24 (Lori Carangelo ed., 2000) (1999), available at <http://www.amfor.net/statistics.html>).

<sup>9</sup> *Adoptions of Foreign Kids Decline in U.S.*, ST. LOUIS POST-DISPATCH, Dec. 1, 2007, at A27.

<sup>10</sup> *Id.*

<sup>11</sup> *Overseas Adoption Roadblocks* (CNN television broadcast Dec. 30, 2008), available at <http://www.cnn.com/video/#/video/health/2008/12/30/am.verjee.adopting.overseas.cnn?iref=videosearch>.

<sup>12</sup> David Crary, *Foreign Adoptions at 9-year Low: China, Russia, Other Countries Add Restrictions*, REC. N. N.J., Nov. 28, 2008, at A26; David Crary, *Foreign*

doned 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<sup>13</sup> and receiving nations.<sup>14</sup> For example, in 2007, China enacted regulations disqualifying foreign adoption applicants who were single, overweight, over the age of fifty,<sup>15</sup> or recently divorced.<sup>16</sup> Even more extreme, Romania adopted a ban on virtually all international adoptions in January of 2005.<sup>17</sup> This prohibition is not in the best interest of Romania's many children living in institutions, but rather is a self-serving political policy enacted in an attempt to gain European Union ("EU") membership.<sup>18</sup> Sending countries' restrictions cannot be entirely attributed to their own governments because receiving nations have played a role in many of these policy decisions. For example, the EU pushed for the aforementioned Romanian ban on intercountry adoption, and EU experts even helped Romania craft the law.<sup>19</sup> Also, receiving countries have at times 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 sought to adopt.<sup>20</sup>

The result of hindering or halting the intercountry adoption process is the increased suffering of institutionalized and homeless children whose basic needs remain unmet. Although cor-

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*Adoption Take Big Dip: 12% Drop in Past Year Guatemala, China Top Countries Now, But New Restrictions Ahead*, SEATTLE TIMES, Nov. 18, 2008, at A4.

<sup>13</sup> *Adoptions of Foreign Kids Decline in U.S.*, *supra* note 9; Hubing, *supra* note 5, at nn.28 & 29. Sending nations are adoptees' native countries. Conversely, receiving nations are the prospective parents' home countries.

<sup>14</sup> Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L L.J. 179, 241-42 (2003).

<sup>15</sup> Calum MacLeod, *Foreign Adoptions from China Fall: More Chinese Adopting; Fewer Children Available*, USA TODAY, Nov. 21, 2007, at 1A.

<sup>16</sup> *The Adoption Morass*, ST. LOUIS POST-DISPATCH, Aug. 13, 2007, at C8.

<sup>17</sup> Molly S. Marx, Comment, *Whose Best Interests Does It Really Serve? A Critical Examination of Romania's Recent Self-Serving International Adoption Policies*, 21 EMORY INT'L L. REV. 373, 374 (2007).

<sup>18</sup> *Id.* at 389.

<sup>19</sup> *Romania Curbs Foreign Adoptions*, BBC NEWS, June 15, 2005, available at <http://news.bbc.co.uk/2/hi/europe/3810425.stm>.

<sup>20</sup> Gina Barton, *Couple Hope Baby Will Be Theirs*, MILWAUKEE J. SENTINEL, May 27, 2002.

ruption and other problems that tend to occur in the intercountry adoption process are far from ideal, they are arguably the lesser of 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 young age.<sup>21</sup> Over the years, intercountry adoption has proven to be an effective solution to the chronic problem of orphaned children. Therefore, it is time for the international community to increase the efficiency of and supervision over this process.

This essay is both descriptive and normative in nature. It aims to describe the current intercountry adoption regime along with its problems, and to propose a much-needed solution. At the outset, this essay explains the great need for intercountry adoption while highlighting empirical research on child development. Secondly, it gives an overview of past and present international adoption policy. Thirdly, this essay describes the problems that exist under 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 one another 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 insti-

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<sup>21</sup> JOAN HEIFETZ HOLLINGER, *Intercountry Adoption: A Frontier Without Boundaries*, in *FAMILIES BY LAW: AN ADOPTION READER* 216 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004).

tution upon children's development. Together, these components underscore the need for an international effort to improve and streamline the intercountry adoption system.

### A. *Supply and Demand*

Each year, millions of children find themselves without families, homes, or care.<sup>22</sup> Most of these children live in developing countries wrought with poverty, war, political turmoil, and/or natural disasters that, consequently, do not have adequate resources to care for them.<sup>23</sup> For example, in China alone, there are upwards of 150,000 street children, a figure that continues to rise.<sup>24</sup> Worldwide, the number of homeless children was estimated at 100 million in the mid-1990s, which is the most recent statistic.<sup>25</sup> As previously noted, 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.<sup>26</sup>

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, have led to a decrease in the supply of domestic children available for adoption.<sup>27</sup> 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.<sup>28</sup> This includes a decline in the proportion of teenage pregnancies from fifteen

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<sup>22</sup> Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 187 (1994).

<sup>23</sup> *Id.*; 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).

<sup>24</sup> Kun Li, *Zhenzhou Centre Reaches Out with Care and Support for Street Children*, UNICEF NEWSLINE, Aug. 24, 2006, [http://www.unicef.org/protection/china\\_35431.html](http://www.unicef.org/protection/china_35431.html).

<sup>25</sup> Uché U. Ewelukwa, *Litigating the Rights of Street Children in Regional or International Fora: Trends, Options, Barriers and Breakthroughs*, 9 YALE HUM. RTS. & DEV. L.J. 85, 92 (2006).

<sup>26</sup> Kapstein, *supra* note 1, at 118.

<sup>27</sup> Marx, *supra* note 17, at 373-75.

<sup>28</sup> Press Release, Centers for Disease Control and Prevention, *Pregnancy Rate Drops for U.S. Women Under Age 25* (Apr. 14, 2008), available at <http://www.cdc.gov/media/pressrel/2008/r080414.htm>.

percent of overall pregnancies in 1990 to twelve percent in 2004,<sup>29</sup> which is a contributing factor in the falling number of available domestic children, since teenage women are the group most likely to put their children up for adoption.<sup>30</sup> Moreover, there has been a corresponding rise in the demand for adoptable children in developed nations due to an increase in infertility rates and a widening of the definition of 'family' to include homosexual couples and blended relationships.<sup>31</sup> Currently in the U.S., the demand for healthy infants to adopt outstrips the supply.<sup>32</sup> In 2003, fewer than 14,000 children were given up for adoption in the U.S.<sup>33</sup> The ratio of prospective adopters to Caucasian, American infants available for adoption is approximately six to one.<sup>34</sup> This proportion is probably even higher than estimated because many Americans who would like to adopt do not even attempt to do so because they are intimidated by the process and fear high costs.<sup>35</sup> International adoption provides a logical solution to remedy both the supply and demand side problems: the large number of abandoned children in certain countries and the great demand for adoptable children in others.<sup>36</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. VA. L. REV. 459, 475 n.96 (1999).

<sup>31</sup> Kapstein, *supra* note 1, at 117.

<sup>32</sup> Kara Beth Stein, *Chapter 754: California's Response to Adoption Facilitator Fraud*, 38 McGEORGE L. REV. 136, 138 (2007) (citing Trish Maskew, *Ethica: A Voice for Ethical Adoption*, in ADOPTION REG. AND CONSUMER PROTECTION 1 (2004) (on file with the McGEORGE L. REV.)).

<sup>33</sup> CHILD WELFARE INFORMATION GATEWAY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, VOLUNTARY RELINQUISHMENT FOR ADOPTION (2005), available at [http://www.childwelfare.gov/pubs/s\\_place.pdf](http://www.childwelfare.gov/pubs/s_place.pdf).

<sup>34</sup> 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); Papke, *supra* note 30, at 474 (stating that there are too few healthy, white infants to accommodate the great demand).

<sup>35</sup> Samuels, *supra* note 34, at 521 (citing ADAM PERTMAN, ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA 34 (2000)).

<sup>36</sup> Liu, *supra* note 22, at 189; Marx, *supra* note 17, at 374-75; Amy Grillo Kales, *The Intercountry Adoption Act of 2000: Are Its Laudable Goals Worth Its Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?*, 36 GEO. WASH. INT'L L. REV. 477, 479 (2004).

B. *Effects of Living in an Orphanage on a Child's Well-being*

A major justification for the necessity of intercountry adoption is the extensive research concluding that the institutional environment, particularly with prolonged exposure, has detrimental effects on children's intellectual and socio-emotional development.<sup>37</sup> Perhaps even more worrisome than a failure to fully meet children's physical needs is the fact that, 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.<sup>38</sup> These conditions, which fail to provide children with the stability, sensitivity, and stimulation necessary for normative development, are key contributors 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 upon 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.<sup>39</sup> 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.<sup>40</sup>

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<sup>37</sup> Sharon Landesman, *Institutionalization Revisited: Expanding Views on Early and Cumulative Life Experiences*, in HANDBOOK OF DEVELOPMENTAL PSYCHOPATHOLOGY 455-62 (Michael Lewis & Suzanne M. Miller eds., Plenum Press 1990); Barbara Tizard, *Early Experience and Later Social Behavior*, in THE FIRST YEAR OF LIFE (David Shaffer & Judy Dunn eds., 1979); Wayne Dennis, CHILDREN OF THE CRECHE (1973); JOHN BOWLBY, CHILD CARE AND THE GROWTH OF LOVE (2d ed. 1965).

<sup>38</sup> Shannah Tharp-Taylor, *The Effects of Early Social Deprivation on Children Reared in Foreign Orphanages*, Feb. 11, 2003, at 9, available at ERIC, ED475594.

<sup>39</sup> *Id.* at 4.

<sup>40</sup> Panayiota Vorria et al., *Comparative Study of Greek Children in Long-Term Residential Group Care and in Two-Parent Families: II. Possible Mediating Mechanisms*, 39 J. CHILD PSYCHOL., 237, 237-45 (1998); Barbara Tizard & Judith Rees, *The Effect of Early Institutional Rearing on the Behavior Problems and Affectional Relationships of Four-Year-Old Children*, 27 J. CHILD PSYCHOL. & PSYCHIATRY 61, 61-73 (1975) [hereinafter Tizard & Rees, *Institutional Rearing*]; Barbara



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.<sup>41</sup> 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.<sup>42</sup> The social environment that exists in orphanages, particularly in 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 supporting long-term survival, such as digestion, growth, and energy storage, are redirected to the immediate problem through the metabolization of 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 children's development.<sup>43</sup> One possible consequence of this extended activation is an increased risk for psychopathology. Research results demonstrate that clinical depression and post-traumatic stress disorder are associated with disturbances in basal and stress activity of the hypothalamic-pituitary-adrenocortical ("HPA") system<sup>44</sup> (the core of the mammalian stress system<sup>45</sup>).

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Tizard & Judith Rees, *A Comparison of the Effects of Adoption, Restoration to the Natural Mother, and Continued Institutionalization on the Cognitive Development of Four-Year-Old Children*, 45 CHILD DEV. 92, 92-99 (1974) [hereinafter Tizard & Rees, *Comparison*]; René Spitz, *Hospitalism—An Inquiry into the Genesis of Psychiatric Conditions in Early Childhood*, 1 PSYCHOANALYTIC STUDY CHILD 53, 53-74 (1945).

<sup>41</sup> Megan R. Gunnar & Carol L. Cheatham, *Brain and Behavior Interface: Stress and the Developing Brain*, 24 INFANT MENTAL HEALTH J. 195, 195-211(2003).

<sup>42</sup> Allan Munck, Paul M. Guyre & Nikki J. Holbrook, *Physiological Functions of Glucocorticoids in Stress and Their Relation to Pharmacological Actions*, 5 ENDOCRINOLOGY REV. 25, 25-44 (1984).

<sup>43</sup> Gunnar & Cheatham, *supra* note 41, at 200.

<sup>44</sup> See Lotta Arboreliu et al., *Increased Responsiveness of Presumed 5-HT Cells to Citalopram in Adult Rats Subjected to Prolonged Maternal Separation Relative to Brief Separation*, 176 PSYCHOPHARMACOLOGY 248-55 (2004).

<sup>45</sup> See E. Ron De Kloet et al., *Brain Corticosteroid Receptor Balance in Health and Disease*, 19 ENDOCRINOLOGY REV. 269, 269-301 (1998).

Furthermore, research comparing glucocorticoid ("GC") (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 GC circadian rhythms, while not one member of the former group had a normal rhythm.<sup>46</sup> Significantly, the atypical noon peak of GC levels found in the institutionalized children was positively correlated with physical and developmental delays.<sup>47</sup>

In addition, 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 growing into capable and well-adjusted adults.<sup>48</sup> Attachments are patterns of interaction, or bonds, that children have with their primary caregivers. Early attachments between children and caretakers are crucial to normative development<sup>49</sup> and these bonds are often correlated with stable relationships throughout the lifetime.<sup>50</sup> According to Attachment Theory, psycho-social bonds can take several forms:<sup>51</sup> secure attachment, insecure avoidant attachment, and insecure resistant attachment.<sup>52</sup> Securely attached infants consider their primary caregiver a safe base from which to explore the world and are distressed when their caregiver is out of sight. Insecure avoidant babies do not seek their primary caregiver specifically and can be comforted by strangers, while insecure resistant infants are ambivalent in their actions towards their 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 their at-

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<sup>46</sup> Mary Carlson & Felton Earls, *Psychological and Neuroendocrinological Sequelae of Early Social Deprivation in Institutionalised Children in Romania*, 807 ANNALS N.Y. ACAD. SCI. 419-428 (1997).

<sup>47</sup> *Id.* at 423-24.

<sup>48</sup> Dillon, *supra* note 14, at 237.

<sup>49</sup> Tharp-Taylor, *supra* note 38, at 3.

<sup>50</sup> Everett Waters et al., *Attachment Security in Infancy and Early Adulthood: A Twenty Year Longitudinal Study*, 71 CHILD DEV. 684, 684-89 (2000).

<sup>51</sup> MARY D. AINSWORTH ET AL., PATTERNS OF ATTACHMENT 1-29 (1978); 1 JOHN BOWLBY, ATTACHMENT AND LOSS (1969).

<sup>52</sup> See Mary D. Salter Ainsworth & Barbara A. Wittig, *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., 1969).

tachment figure.<sup>53</sup> This type of attachment is associated with child maltreatment,<sup>54</sup> maternal alcoholism and depression,<sup>55</sup> high marital conflict,<sup>56</sup> and prolonged or repeated separation from the primary caregiver.<sup>57</sup>

The type of bonds between infants and their caregivers depends upon the degree to which the caregivers are sensitive and responsive to infants' needs and desires. A high level of sensitivity is associated with a secure attachment, and the latter three patterns result from a lack or disruption 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 secure attachments to one primary caregiver. The results are poor mental health consequences, undesirable behavioral outcomes,<sup>58</sup> and delays in cognitive and socio-emotional development.<sup>59</sup> 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 an orphanage, the institutionalized children had a significantly higher rate of disorganized attachment patterns as compared to the control group.<sup>60</sup> In another

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<sup>53</sup> Mary Main & Judith Solomon, *Procedures for Identifying Infants as Disorganized/Disoriented During the Strange Situation*, in ATTACHMENT IN THE PRE-SCHOOL YEARS: THEORY, RESEARCH AND INTERVENTION 121-60 (Mark T. Greenberg et al. eds., Univ. of Chicago Press 1990).

<sup>54</sup> Vicki Carlson et al., *Disorganized/Disoriented Attachment Relationships in Malreated Infants*, 25 DEV. PSYCHOL. 525, 525 (1989).

<sup>55</sup> Elizabeth K. DeMulder & Marian Radke-Yarrow, *Attachment with Affectively Ill and Well Mothers: Concurrent Behavioral Correlates*, 3 Dev. & Psychopathology 227, 227-42 (1991).

<sup>56</sup> Margaret Tresch Owen & Martha J. Cox, *Marital Conflict and the Development of Infant-Parent Attachment Relationships*, 11 J. FAM. PSYCHOL. 152 (1997).

<sup>57</sup> 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).

<sup>58</sup> E.g., Peter Fonagy & Mary Target, *Attachment and Reflective Function: Their Role in Self-Organization*, 9 DEV. & PSYCHOPATHOLOGY 679, 679-700 (1997); Peter Fonagy et al., *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 et al. eds., Analytic Press 1995).

<sup>59</sup> Tharp-Taylor, *supra* note 38, at 28, 30-31.

<sup>60</sup> See Panayiota Vorria et al., *Early Experiences and Attachment Relationships of Greek Infants Raised in Residential Group Care*, 44 J. CHILD PSYCHOL. & PSYCHIATRY & ALLIED DISCIPLINES 1208 (2003).

comparison study, the rate of secure attachments among Romanian adoptees was lower than the normative rate, regardless of age at adoption or time spent in an orphanage.<sup>61</sup> These attachment difficulties are likely related to the high number of caregivers children are exposed to while in an orphanage, high staff turnover, 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 caregivers by the age of four-and-a-half.<sup>62</sup> In these same institutions, as is the case 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.<sup>63</sup>

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 children's conduct problems has been found to be directly related to the level of deprivation in their social environment.<sup>64</sup> Furthermore, the length of children's institutionalization periods is positively correlated with the frequency of their conduct problems.<sup>65</sup> In a research study comparing children who had been reared in institutions until being placed in foster care at approximately three years of age with 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.<sup>66</sup> One possible explanation for the problems identified among children living in orphanages is that, although atypical for non-institutionalized children, they

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<sup>61</sup> Sharon Marcovitch et al., *Determinants of Behavioural Problems in Romanian Children Adopted in Ontario*, 20 INT'L J. BEHAV. DEV. 17, 25 (1997).

<sup>62</sup> E.g., Tizard & Rees, *Institutional Rearing*, *supra* note 40; Tizard & Rees, *Comparison*, *supra* note 40, at 24.

<sup>63</sup> Tizard & Rees, *Institutional Rearing*, *supra* note 40.

<sup>64</sup> Tharp-Taylor, *supra* note 38, at 25-26.

<sup>65</sup> Marcovitch et al., *supra* note 61.

<sup>66</sup> William Goldfarb, *The Effects of Early Institutional Care on Adolescent Personality*, 14 CHILD DEV. 213, 222 (1943).

are adaptive for the particular institutional context.<sup>67</sup> Moreover, young, institutionalized children may learn these atypical behaviors from their older peers after observing the latter group's effectiveness at getting its needs met.<sup>68</sup>

In addition to physical and socio-emotional problems, cognitive delays are commonly found among children who experience institutional care.<sup>69</sup> 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 controls.<sup>70</sup> Institutionalized children's IQ scores tend to be both negatively correlated with duration of institutionalization and positively correlated with age at institutionalization.<sup>71</sup> 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.<sup>72</sup> These restrictions, however, can block children's cognitive activity and development.<sup>73</sup>

### 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.<sup>74</sup> Though the difference between intercountry adoptees' backgrounds and that of their

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<sup>67</sup> Tharp-Taylor, *supra* note 38, at 26.

<sup>68</sup> *Id.*

<sup>69</sup> JOHN BOWLBY, *MATERNAL CARE AND MENTAL HEALTH* (World Health Org. 1951); René A. Spitz, *The Role of Ecological Factors in Emotional Development in Infancy*, 20 *CHILD DEV.* 145 (1949); William Goldfarb, *Effects of Psychological Deprivation in Infancy and Subsequent Stimulation*, 102 *AM. J. PSYCHIATRY*, 18, 18-33 (1945).

<sup>70</sup> Vladimir M. Sloutsky, *Institutional Care and Developmental Outcomes of 6- and 7-year-old Children: A Contextualist Perspective*, 20 *INT'L J. BEHAV. DEV.* 131, 131 (1997).

<sup>71</sup> *Id.* at 141.

<sup>72</sup> *Id.* at 149.

<sup>73</sup> *Id.*

<sup>74</sup> Hollinger, *supra* note 21, at 217.

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."<sup>75</sup> There is also no scientific evidence demonstrating harm to adoptees or their adoptive families from a multicultural upbringing. In contrast, there is a multitude of research finding that living in an orphanage has harmful effects upon children. Furthermore, there is an abundance of resources, ranging from support groups to educational tours of adoptees' birth countries, available to address the complex issue of adoptees' cultural identities.<sup>76</sup>

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 argue that international adoption negatively affects their country's morale because it connotes a public admission that its government cannot care for its own children.<sup>77</sup> 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.<sup>78</sup> As a result of this attempt to eliminate foreign adoption, approximately 17,000 children are languishing in public orphanages throughout South Korea.<sup>79</sup> In addition to 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 coun-

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<sup>75</sup> Dillon, *supra* note 14, at 200.

<sup>76</sup> Hollinger, *supra* note 21, at 217.

<sup>77</sup> Lisa M. Katz, Comment, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT'L L. REV. 283, 291 (1995) (citing MARY KATHLEEN BENET, *THE POLITICS OF ADOPTION* 120 (1976); Elizabeth Bartholet, *International Adoption: Overview*, in *ADOPTION LAW AND PRACTICE* § 10.04 [1] (Joan Hollinger ed., 2002)).

<sup>78</sup> Tamar Lewin, *South Korea Slows Export of Babies for Adoption*, N.Y. TIMES, Feb. 12, 1990, at B10.

<sup>79</sup> Crystal J. Gates, *China's Newly Enacted Intercountry Adoption Law: Friend or Foe?*, 7 IND. J. GLOBAL LEGAL STUD. 369, 392 (1999).

tries for natural resources and labor.<sup>80</sup> In a continuation of developed nations' exercise of power over developing nations, the latter perceive the former as using international adoption as a means of satisfying its own citizens' desires for children while simultaneously confirming sending countries' inadequacy and inferiority.<sup>81</sup> Also, opponents argue that intercountry adoption is simply used to treat symptoms of social and economic issues in sending countries, and prevents these countries from having to address the underlying problems that result in burgeoning numbers of homeless children.<sup>82</sup>

Another argument opponents often assert is that international adoption is normally accompanied by illegal practices such as baby-selling, kidnapping, and financial exploitation on the part of adoption "facilitators."<sup>83</sup> 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: first, it does not acknowledge that a dramatic decrease in the supply of children, along with fewer choices for families desperate to adopt, will likely increase the financial incentives of illegal adoptions; second, it overlooks the possibility for creative regulatory solutions to the problem of corruption in intercountry adoption that would allow the adoptive 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 markedly reduce the corruption problem.

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<sup>80</sup> Curtis Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, 28 GA. J. INT'L & COMP. L. 319, 325 (2000).

<sup>81</sup> *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)); see also 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).

<sup>82</sup> Bartholet, *supra* note 77.

<sup>83</sup> Kleem, *supra* note 80.



In contrast to opponents of intercountry adoption, supporters prioritize "the children, their individual situations, and what is best for [the] . . . [children's] needs."<sup>84</sup> Although the issues that opponents of intercountry adoption assert, such as national pride and cultural heritage, are important concerns, 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 institutional life.<sup>85</sup> Through intercountry adoption, children receive *inter alia*, shelter, food, clothing, education, and affection, which are often not adequately available in their home countries, particularly in institutional settings. As an additional benefit, international adoption allows individuals and families desiring a child to fill a void in their lives caused by an inability to reproduce naturally. The intercountry adoption system, as both supporters and opponents of the practice acknowledge, is far from perfect. As such, there is much potential for improvement through the implementation of new regulations and infrastructure.

## II. THE EVOLUTION OF INTERNATIONAL INTERCOUNTRY ADOPTION REGULATIONS

Currently, the governments of both sending and receiving nations set intercountry adoption policies, which have resulted in great variation among countries, despite the principles embodied in international agreements to which many such states have become parties. One reason for this policy variation is that the international treaties, though increasingly specific, lengthy, and authoritative over the years, are still too vague to produce standardized outcomes. In spite of significant progress towards delineating 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

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<sup>84</sup> Katz, *supra* note 77, at 292.

<sup>85</sup> Dillon, *supra* note 14, at 198.



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 in 1924, 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.<sup>86</sup> This rather brief and simple document entitles children to five rights, stated in general terms: the right to be provided with the physical and spiritual means for normal development, the right to adult help and protection, 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.<sup>87</sup> The text of the declaration that is relevant to intercountry adoption states that "the orphan . . . must be sheltered and succored."<sup>88</sup> Adoption into a loving household satisfies this right, regardless of the adoptive family's location, because it can rescue orphans from unhealthy environments and provide them with shelter and other protections.

B. *United Nations 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.<sup>89</sup> The UN Declaration sets forth general rights to which all children are entitled, including the right to free basic education, social security, and op-

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<sup>86</sup> Timothy John Fitzgibbon, Comment, *The United Nations Convention on the Rights of the Child: Are Children Really Protected? A Case Study of China's Implementation*, 20 LOY. L.A. INT'L & COMP. L. REV. 325, 329 (1998).

<sup>87</sup> *Geneva Declaration of the Rights of the Child*, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

<sup>88</sup> *Id.*

<sup>89</sup> Declaration of the Rights of the Child, GA Res. 1386 (XIV), 14th Sess., (Nov. 20, 1959).

portunities “to enable [them] to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.”<sup>90</sup> While not mentioning intercountry adoption explicitly, Principle 6 acknowledges a state’s responsibility to provide care to “children without a family and . . . adequate means of support.”<sup>91</sup> Intercountry adoption is one of the means a state can utilize to satisfy its responsibilities under Principle 6, 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 of 1965 was the first international effort to standardize intercountry adoption procedures.<sup>92</sup> The agreement allocates authority among the states of the adopter and of the adoptee. The power to grant adoptions is vested in the adopter’s state,<sup>93</sup> while the adoptee’s state has authority over “consents and consultations,” other than those relating to the adopter and his family.<sup>94</sup> Furthermore, both the adopter and adoptee’s states can annul or revoke an adoption in accordance with their internal laws.<sup>95</sup> However, the Convention was a failed attempt to establish common procedures because it only had three signatories:<sup>96</sup> Austria, Switzerland, and the United Kingdom.<sup>97</sup> Perhaps the Convention’s vagueness led to its lack of acceptance. For example, it fails to define “consent” and “abandonment” in relation to orphan sta-

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Katz, *supra* note 77, at 288.

<sup>93</sup> Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, art. 3, Nov. 15, 1965, 1107 U.N.T.S. 38.

<sup>94</sup> *Id.* art. 5.

<sup>95</sup> *Id.* art. 7.

<sup>96</sup> JOHN MURPHY, INTERNATIONAL DIMENSIONS IN FAMILY LAW 185 (2005).

<sup>97</sup> Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 18 HASTINGS INT’L & COMP. L. REV. 121, 149 (1994).

tus.<sup>98</sup> Another issue could have been skepticism about whether a unified jurisdictional scheme could actually be implemented.<sup>99</sup> This concern likely stems in part from Article 15 of the Convention since it allows contracting parties to disregard the agreement when observance with its provisions would be contrary to their public policy.<sup>100</sup>

#### 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 become parties to the European Convention,<sup>101</sup> though there are no non-members among the eighteen states that ratified or acceded to the treaty.<sup>102</sup> 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 children and adoptive parents, and Article 14 which deals with the communication of adoption information among the competent authorities of different nations when children and prospective adoptive parents do not live in the same state.<sup>103</sup> However, the treaty appears more favorable towards intercountry adoption when compared to various other international agreements that contain a presumption in favor of domestic adoption because the European Convention does not include such a bias. More generally, the treaty is pro-adoption because it includes a prohibition on restricting the number of children that any one person or family

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<sup>98</sup> Howard E. Bogard, Comment, *Who Are the Orphans? Defining Orphan Status and the Need for an International Convention on Intercountry Adoption*, 5 EMORY INT'L L. REV. 571, 592 (1991).

<sup>99</sup> *Id.*

<sup>100</sup> Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, *supra* note 93, art. 15.

<sup>101</sup> European Convention on the Adoption of Children, art. 22, Apr. 24, 1967, E.T.S. No. 58, 7 I.L.M. 211.

<sup>102</sup> Council of Europe, European Convention on the Adoption of Children, Status as of May 26, 2008, <http://conventions.coe.int>.

<sup>103</sup> European Convention on the Adoption of Children, *supra* note 101, arts. 11, 14.

can adopt, regardless of the capacity to have biological children.<sup>104</sup>

The European Convention is paradoxically progressive and antiquated at the same time. It is a pioneer in listing specific inquiry requirements for the adoption process. Unlike previous instruments, it considers the “child’s viewpoint with respect to the proposed adoption,”<sup>105</sup> but it is notably traditional in its assertion that state laws may require biological parents to provide a dowry for the child.<sup>106</sup> Despite this questionable latter provision and its relatively narrow reach (only European nations are signatories),<sup>107</sup> the European Convention represents progress towards providing more protections for internationally-adopted children, particularly because of the requirement that states investigate the abilities and characteristics of prospective adopters along with the children’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.

#### 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.<sup>108</sup> Twelve countries in the Western hemisphere signed the agreement, but only half of them ratified it.<sup>109</sup> Though conflict of laws is the treaty’s main focus, it nonetheless provides various substantive protections to adoptees. For example, Article 8 allows national adoption au-

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<sup>104</sup> *Id.* art. 12.

<sup>105</sup> *Id.* art. 9(1)(f).

<sup>106</sup> *Id.* art. 10(2).

<sup>107</sup> Council of Europe, *supra* note 102, pmb1.

<sup>108</sup> Inter-American Convention on Conflicts of Laws Concerning the Adoption of Minors art. 3, May 24, 1984, O.A.S.T.S. No. 62, 24 I.L.M. 460.

<sup>109</sup> Inter-American Convention on Conflicts of Laws Concerning the Adoption of Minors Reservations, May 24, 1984, O.A.S.T.S. No. 62, 24 I.L.M. 460, *available at* <http://www.oas.org/juridico/english/sigs/b-48.html> [hereinafter Inter-American Convention Reservation].

thorities 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.<sup>110</sup> Furthermore, states must interpret the Convention in favor of children's best interests pursuant to Article 19, and Article 13 requires adoptees' consent to convert a simple adoption into "full adoption, adoptive legitimation, or similar institutions," provided they are above the age of fourteen.<sup>111</sup> Analogous to the European Convention, the Inter-American Convention allows for states that are not OAS members to become parties to the treaty (Article 23). However, to date none have done so.<sup>112</sup>

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 a global attempt to protect "the large number of children who are abandoned or become orphans."<sup>113</sup> The resolution recalls the UN Declaration on the Rights of the Child and reaffirms its assertion 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.<sup>114</sup> It is strange that the UN favors a temporary foster situation for homeless and orphaned children in this Declaration over a per-

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<sup>110</sup> Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, *supra* note 108, art. 8.

<sup>111</sup> *Id.* arts. 13, 19.

<sup>112</sup> *Id.* art. 23; Inter-American Convention Reservation, *supra* note 109.

<sup>113</sup> Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85, Annex, U.N. Doc. A/RES/41/85/Annex (Dec. 3, 1986).

<sup>114</sup> *Id.* arts. 17-24.

manent, stable adoption simply because the latter is in a different country. Although it is ideal for a child to have continuity in his cultural environment, he would 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 these issues or identifying specific solutions. 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.”<sup>115</sup> The Declaration neither defines the pertinent legal and social interests 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 meaningful steps towards improving them.

#### G. *UN Convention on the Rights of the Child (1989)*

The UN Convention on the Rights of the Child of 1989 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 particular care to the child.”<sup>116</sup> As the first Convention relating to intercountry adoption, it presumptively carries more weight than the previous UN instruments which were mere declarations. In other words, the previous instruments simply declared existing law and did not have the legal status of

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<sup>115</sup> *Id.* art. 21.

<sup>116</sup> Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/44/49 (Nov. 20, 1989).

a treaty,<sup>117</sup> in contrast with conventions, which have the characteristics of treaties.<sup>118</sup> 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."<sup>119</sup> Yet, a country can bind itself to UN Conventions if it signs and ratifies them in its domestic legal system.<sup>120</sup>

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 they cannot be suitably cared for in their birth countries.<sup>121</sup> This is a somewhat negative approach to international adoption because the Convention treats it as a last resort, particularly when 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."<sup>122</sup> Moreover, since there is no provision requiring the available options in a particular case to be weighed against one another, a child could 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

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<sup>117</sup> Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. Doc. A/RES/44/25/Annex (Nov. 20, 1989), *reprinted in* INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS, 1945-1995 232 (Irving Sarnoff ed., 1997).

<sup>118</sup> *Id.*

<sup>119</sup> DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS, 44 (2001); INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS, 1945-1995 xvi (Irving Sarnoff ed., 1997).

<sup>120</sup> United Nations Treaty Collection, Treaty Reference Guide, <http://untreaty.un.org/English/guide.asp> (last visited Mar. 11, 2009).

<sup>121</sup> Convention on the Rights of the Child, *supra* note 116, art 21(b).

<sup>122</sup> *Id.* art. 20(3).

best interests of the child” as “a primary consideration.”<sup>123</sup> 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.<sup>124</sup> Even if states are capable of accomplishing this task, they have little incentive to do so in light of cross-border adoption’s profitability.<sup>125</sup>

Article 21(c) underscores the importance of ensuring that the quality of care children receive within foreign families is sufficiently high and aims to protect children against exploitation in the intercountry adoption process. The Article states that a child adopted internationally must be provided with “safeguards and standards equivalent to those existing in the case of national adoption,”<sup>126</sup> which would actually only have a beneficial effect if the standards and protections that apply to domestic adoptions are adequate. For example, provision 21(c) does not help internationally-adopted children from countries with national adoption systems that are rife with corruption and inefficiency. 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.<sup>127</sup> Akin to the UN Declaration on Adoption, the Convention does not define the types or amounts of financial gain that would be considered “improper.” This notion is relevant because even good-faith intercountry adoptions typically implicate large sums for administrative, and legal work, and travel.

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<sup>123</sup> *Id.* arts. 3(1), 21.

<sup>124</sup> Kapstein, *supra* note 1, at 121.

<sup>125</sup> *Id.*

<sup>126</sup> Convention on the Rights of the Child, *supra* note 116, art. 21.

<sup>127</sup> *Id.*



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.<sup>128</sup> Although far from comprehensive, the Convention does set forth important principles for protecting children in the intercountry adoption process. The instrument was widely adopted, and interestingly, the U.S. and Somalia are the only nations that have not ratified it.<sup>129</sup>

#### H. *African Charter on the Rights and Welfare of the Child* (1990)

In 1990, 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 entered into force in 1999.<sup>130</sup> Currently, twenty-one African nations have ratified the document.<sup>131</sup> The African Charter takes a somewhat unfavorable approach to intercountry adoption because Article 24 only allows its use as a last resort, specifically, in situations where children cannot be placed in foster or adoptive homes in their birth countries.<sup>132</sup> Although the African Charter also limits intercountry adoptions to nations which have ratified the International Convention on the Rights of the Child or the African Charter,<sup>133</sup> most countries have in fact signed onto the former.<sup>134</sup> However, the U.S., a major receiving country, is not a party to either instrument, which could deprive African orphans of the opportunity for a loving home that the U.S. would otherwise provide.<sup>135</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> Kurtis A. Kemper, Annotation, *Construction and Application of the United Nations Convention on the Rights of the Child*, 28 *I.L.M.* 1148 (1989) – *Global Cases and Administrative Decisions*, 20 *A.L.R. FED.2D* 95 (2007).

<sup>130</sup> African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49.

<sup>131</sup> University of Minnesota, Human Rights Library, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999, ratification information, <http://www1.umn.edu/humanrts/in-tree/afchilratifications.html> (last visited May 12, 2008).

<sup>132</sup> *Id.* art. 24.

<sup>133</sup> *Id.*

<sup>134</sup> Kemper, *supra* note 129.

<sup>135</sup> *Id.*; Speak Africa, Status of Ratification of the African Charter on the Rights and Welfare of the Child, [http://www.speakafrika.org/status\\_ratification\\_af](http://www.speakafrika.org/status_ratification_af)

The African Charter prioritizes the best interests of children.<sup>136</sup> However, as is the case with other international instruments, the African Charter does not define the term “best interests.” Also notable is the requirement that the judicial and administrative proceedings consider views of children who are capable of expressing themselves.<sup>137</sup> This is a progressive feature of the African Charter because, unlike various other instruments, children are empowered with influence over their own fate.

### I. *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993)*

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (“Hague Convention”) of 1993 is a multilateral treaty that sets a framework for norms and procedures governing intercountry adoptions.<sup>138</sup> Its purpose is to unify the diverse adoption procedures across the globe<sup>139</sup> and safeguard children’s fundamental rights, including protection from child abduction, sale, and trafficking.<sup>140</sup> The Hague Convention governs all intercountry adoptions between the seventy-six nations<sup>141</sup> that are signatories, 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

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frican\_charter\_rights\_and\_welfare\_child (last visited Mar. 8, 2009); University of Minnesota, *supra* note 131.

<sup>136</sup> African Charter on the Rights and Welfare of the Child, *supra* note 130, art. 4.

<sup>137</sup> *Id.*

<sup>138</sup> Peter H. Pfund, *Introductory Note* to Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 32 I.L.M. 1134, 1134 (1993).

<sup>139</sup> JEREMY ROSENBLATT, INTERNATIONAL CONVENTIONS AFFECTING CHILDREN 87 (2000).

<sup>140</sup> Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption art. 1, May 29, 1993, 1870 U.N.T.S. 167.

<sup>141</sup> The World Organization for Cross-border Co-operation in Civil and Commercial Matters, Hague Conference on Private International Law, Status Table, Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69#nonmem](http://www.hcch.net/index_en.php?act=conventions.status&cid=69#nonmem) (last visited May 12, 2008).

been exhausted.<sup>142</sup> 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 occurring within its borders, and communicate with CA's of other states when facilitating the intercountry adoption process and furthering the treaty's objectives.<sup>143</sup>

The Hague Convention is much more specific and comprehensive in its approach to intercountry adoption than earlier germane agreements. This signals progress towards guaranteeing all internationally adopted children minimum standards of care and safeguards. For example, the Hague Convention specifies procedural steps in the intercountry adoption process, down to the content of reports that the sending and receiving countries compile and exchange.<sup>144</sup> 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 comprehensively than previous global instruments. First, 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."<sup>145</sup> Second, the Hague Convention addresses the problem of corruption associated with consent in the intercountry adoption process.<sup>146</sup> Article 4 states that the consent of the necessary "persons, institutions and authorities," as well as that of the children (with regard to their "age and degree of maturity"), shall not be "induced by payment or compensation of any kind."<sup>147</sup>

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<sup>142</sup> Marx, *supra* note 17, at 388.

<sup>143</sup> Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, *supra* note 140, arts. 6, 14-20; Kapstein, *supra* note 1, at 123.

<sup>144</sup> Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, *supra* note 140, art. 15.

<sup>145</sup> *Id.* art. 32.

<sup>146</sup> *Id.* art. 4.

<sup>147</sup> *Id.*

Another progressive feature of the Hague Convention is that it specifically takes children's preferences into account. The instrument does this in two places, noting the importance of first considering the children'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 a CA determines that the continued placement of children with prospective adoptive parents is not in the children's best interests.

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 and developing countries to implement. Specifically, these countries are unable to handle the administrative burdens associated with the Hague Convention's implementation requirements because many lack monetary resources and a functioning government bureaucracy.<sup>148</sup> This is a serious issue because poor and developing nations tend to have both the highest number of orphans and the greatest amount of corruption.<sup>149</sup> The circumstances in these nations tend to result in one or both of the following consequences: many unregulated adoptions, corruption, and exploitation of children and families for 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. Clearly, neither state of affairs serves the best interests of children. For example, Guatemala switched from the former situation to the latter in recent years.<sup>150</sup> Prior to governmental regulation, intercountry adoptions amounted to a \$100 million-a-year business for Guatemalan notaries, who charged an average of \$30,000 per child.<sup>151</sup> Recently, however, Guatemala agreed to abide by the Hague Convention. As a result, the number of intercountry adoptions

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<sup>148</sup> Dillon, *supra* note 14, at 239.

<sup>149</sup> See Lindsay K. Carlberg, Note, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved with Good Intentions?*, 17 IND. INT'L & COMP. L. REV. 119, 147 (2007).

<sup>150</sup> Olga R. Rodriguez, *New Rules Slow Adoptions from Guatemala: A Crackdown on the System Has Americans Wondering Whether They Can Get Kids*, ORLANDO SENTINEL, Nov. 22, 2007, at A30.

<sup>151</sup> *Id.*

from Guatemala will decrease because the government does not possess the resources to handle the great amount of cases that the notary industry had managed. In addition, the treaty's requirements for inspection of each adoption case take time and effort.<sup>152</sup> The Guatemalan government only has seven inspectors who not only handle adoption approvals, but also deal with family issues such as domestic violence and child neglect.<sup>153</sup>

In addition to Guatemala, Ethiopia is an impoverished country that has been popular among Americans seeking to adopt in recent years. Like Guatemala, it has extremely limited resources to monitor intercountry adoptions.<sup>154</sup> 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.<sup>155</sup>

As highlighted in the Guatemala and Ethiopia examples, the Hague Convention actually places heavier burdens upon impoverished sending states than upon receiving states, which tend to be wealthier in comparison. The Convention requires the former to regulate the process of matching children with adoptive parents, protect the rights of the children and their biological parents, investigate ways for children to remain in their birth countries, and combat illegal adoption practices.<sup>156</sup> In light of the burden the Hague Convention places upon impoverished nations, financial and institutional barriers make it difficult for the instrument to solve the problems it was developed to address.

A second major criticism of the Hague Convention is the lack of an international supervisory body to ensure the compliance of contracting states.<sup>157</sup> The agreement leaves enforcement to each nation's CA, yet each country has the sole

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Jane Gross & Will Connors, *Ethiopia Ranks 5th for U.S. Adoptions: Some Say the Nation's Process is Faster, Has Fewer Hurdles*, N.Y. TIMES, June 10, 2007, at A19.

<sup>155</sup> *Id.*

<sup>156</sup> Kimberly A. Chadwick, Comment, *The Politics and Economics of Intercountry Adoption in Eastern Europe*, 5 J. INT'L LEGAL STUD. 113, 140 (1999) (citing ELIEZER D. JAFFE, INTERCOUNTRY ADOPTIONS: LAWS AND PERSPECTIVES OF "SENDING" COUNTRIES 218 (1995)).

<sup>157</sup> Kleem, *supra* note 80, at 319-48.

authority to accredit its CA.<sup>158</sup> 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.<sup>159</sup> Therefore, it is doubtful that the parties to the treaty are fully compliant with the Convention, 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 with respect to 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.<sup>160</sup> 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.<sup>161</sup> The process of adopting internationally is also becoming increasingly difficult as sender country regulations tighten and the costs of adoption rise.<sup>162</sup> Ethiopia is one of the new preferred countries for adop-

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<sup>158</sup> *Id.* at 334.

<sup>159</sup> *Id.* at 334-39.

<sup>160</sup> Hollinger, *supra* note 21, at 215.

<sup>161</sup> *Id.* at 216.

<sup>162</sup> Bart Eisenberg, *Road to Foreign Adoptions Gets Rockier: Tighter Regulations, Rising Costs, and Changing Attitudes Increase Hurdles for Those Seeking Children from Other Lands Family*, CHRISTIAN SCI. MONITOR, Feb. 28, 1990, at 13.

tion, partially because of its relatively cheap adoption cost of \$20,000, which is affordable compared to the prices of adopting from other nations.<sup>163</sup> The numerous problems in the current intercountry adoption system present 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 currently precluded from doing so due to the prohibitively high costs of intercountry adoption. The average cost of adopting an infant from another country ranges from \$18,000 to \$30,000 in initial fees, excluding other costs such as travel and medical expenses.<sup>164</sup> The money is usually paid to "intermediaries, lawyers, facilitators, bureaucrats, notaries, nondescript officials of all kinds, and the natural mother."<sup>165</sup> Another issue is the common requirement that parents seeking to adopt internationally spend a significant amount of time in the foreign country from which they wish to adopt. This requirement is not only expensive, but may also be impracticable since many individuals have job obligations that preclude long-term travel. Despite deferral tax credits of approximately \$10,000 per intercountry adoption, the costs, which not only include agency and administrative fees, but also home studies, background investigations, and travel, continue to block middle- and lower-income families from adopting internationally.<sup>166</sup>

#### B. *Inefficiency*

Intercountry adoption is a very lengthy and often frustrating process. Inefficiency is one of the reasons for the considerable amount of time the process entails. Usually, the adoption process requires extremely lengthy waiting periods.<sup>167</sup> Moreo-

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<sup>163</sup> Gross & Connors, *supra* note 154.

<sup>164</sup> Letter from Jeanne Ketola, Executive Director, Special Connections International, to the U.S. Dep't of State, Adoption Regulation Docket Room (Feb. 24, 2005), available at [http://travel.state.gov/family/adopt\\_comments/word/special\\_connections\\_international\\_comments.doc](http://travel.state.gov/family/adopt_comments/word/special_connections_international_comments.doc).

<sup>165</sup> Anthony D'Amato, *Cross-Country Adoption: A Call to Action*, 73 NOTRE DAME L. REV. 1239, 1246 (1998).

<sup>166</sup> Hollinger, *supra* note 21, at 218.

<sup>167</sup> Marx, *supra* note 17, at 380.



ver, various sending nations require one or both prospective adoptive parents to reside in their countries for an allotted period of time before allowing the adoption.<sup>168</sup> 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 example, Americans who have adopted children abroad must also complete the requisite 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.<sup>169</sup> Sending countries with duplicative requirements include Vietnam, Russia, and Bulgaria, which require prospective adoptive parents to travel to their country on two separate occasions as a prerequisite to adopting one of their orphans.<sup>170</sup>

Moreover, conflicts between the laws of sending and receiving countries can cause lengthy delays and, at times, render the attempted adoption impossible. This problem commonly occurs when the receiving nation has stricter adoption eligibility standards than the sending country.<sup>171</sup> Even in the absence of conflicting adoption laws, the average waiting time for intercountry adoptions stills averages between one and three years.<sup>172</sup> During the period when adoptions are pending approval, children miss out on the opportunity to form secure attachments with caregivers at an earlier age, arguably resulting in long-term negative consequences for the children’s development.

### C. Corruption

Another major problem with the current international adoption system is widespread corruption. “Baby-selling,”

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<sup>168</sup> Hubing, *supra* note 5, at 685.

<sup>169</sup> Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIM. LAW. 181, 189 (1996).

<sup>170</sup> Jeff D. Opdyke, *Adoption’s New Geography — Changes in Global Rules Make Process Even Tougher, Costlier; Bolivia, Brazil May Open Up*, WALL ST. J., Oct. 14, 2003, at D1.

<sup>171</sup> Stacie I. Strong, *Children’s Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT’L L.J. 163, 174-75 (1995).

<sup>172</sup> Adoption Online, Adoption Education Center, Intercountry Adoption, <http://www.adoptiononline.com/aecintercountry.cfm> (last visited May 16, 2008).



“baby-snatching” (child abduction), child trafficking, and bribery are very common corruption schemes under the existing intercountry adoption regime.<sup>173</sup> As the price of intercountry adoption rises, so does the economic incentive for theft and other forms of corruption.<sup>174</sup> Child traffickers typically earn between \$5000 and \$25,000 per infant,<sup>175</sup> 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 Paraguayan adoption procedures suggested that many of the country’s infants that foreigners adopted were either sold or stolen.<sup>176</sup> Another example is a child trafficking ring in China that was uncovered in 2005, which had abducted or purchased approximately one thousand children.<sup>177</sup> The traffickers had sold the babies to Chinese orphanages for amounts ranging from \$400 to \$538 per child. In turn, the purchasing orphanages placed most of the children with foreign families in exchange for mandatory contributions of \$3000 per child.<sup>178</sup> In February 2006, nine individuals in China were convicted of trafficking and twenty-three local government officials were fired for their involvement.<sup>179</sup>

Furthermore, sending countries’ agencies, officials, and citizens are not the only parties that have been accused of running corrupt intercountry adoption schemes. Rather, individuals from receiving countries have also been involved in corrupt practices. For example, a child trafficking enterprise was discovered in Cambodia in 2002.<sup>180</sup> Two American owners of a U.S. adoption agency had led the enterprise through which they

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<sup>173</sup> Marx, *supra* note 17, at 378 (citing Curtis Kleem, Note, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoption*, 28 GA. J. INT’L & COMP. L. 319, 325 (2000)).

<sup>174</sup> D’Amato, *supra* note 165, at 1247.

<sup>175</sup> Kapstein, *supra* note 1, at 119.

<sup>176</sup> Diana Jean Schemo, *The Baby Trail: A Special Report; Adoptions in Paraguay: Mothers Cry Theft*, N.Y. TIMES, Mar. 19, 1996, at 1.

<sup>177</sup> 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.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 CUMB. L. REV. 619, 632 (2004-05).

collected approximately eight million dollars from American adoptive parents.<sup>181</sup> In this scheme, Cambodian children were taken from their birth parents under false pretenses. Many parents were told that they could have their children back at any time, that they would be sent money and photos of their children for the rest of their lives or that, upon reaching the age of maturity, their children could petition for them to immigrate to the U.S.<sup>182</sup> The two Americans leading the enterprise were prosecuted for conspiracy to commit visa fraud, conspiracy to launder money, and structuring.<sup>183</sup> However, these individuals were not charged for child trafficking in the U.S. because U.S. law does not prohibit child trafficking for the purposes of adoption.<sup>184</sup>

In cases where 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. Nonetheless, this amount serves as an adequate baby-selling motivator for desperate parents in impoverished countries. For example, a baby-selling racket in a poor Indian village involved women who sold their infant daughters for approximately \$20 per child because female children were less useful to Indian families in comparison to male children.<sup>185</sup> Similarly, the child trafficking enterprise uncovered in Cambodia paid birth parents between \$20 and \$200 per child along with a fifty-kilogram bag of rice.<sup>186</sup> These prices amount to just a small percentage of the adoption fees that adoptive parents in receiving countries are willing to pay. Due to the large returns associated with 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

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<sup>181</sup> *Id.* at 633.

<sup>182</sup> *Id.* at 633-34.

<sup>183</sup> Structuring is the organization of transactions in a manner that will illegally avoid government-mandated reporting and record-keeping requirements, such as dividing large transactions into smaller ones to avoid regulator scrutiny. *Id.* at 632-33.

<sup>184</sup> *Id.* at 634.

<sup>185</sup> Raymond Bonner, *For Poor Families, Selling Baby Girls Was Economic Boon*, N.Y. TIMES, June 23, 2003, at A3.

<sup>186</sup> Maskew, *supra* note 180, at 634.

temporary or permanent moratoriums on private adoptions of their orphans,<sup>187</sup> leaving many children to languish in institutions.<sup>188</sup> For instance, the Romanian government declared an official moratorium on intercountry adoption in June 2001<sup>189</sup> in response to EU concerns over corruption and child trafficking.<sup>190</sup> The Romanian 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.<sup>191</sup> The moratorium was replaced on January 1, 2005<sup>192</sup> with Law 272, which essentially forbids intercountry adoptions of Romanian children.<sup>193</sup> 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.<sup>194</sup> Furthermore, the law prohibits all intercountry adoptions of children under the age of two.<sup>195</sup> As a result, the vast majority of the 10,000 Romanian children abandoned in hospitals annually<sup>196</sup> and approximately 40,000 orphans in the country<sup>197</sup> are not eligible for the opportunity to have stable family lives through intercountry adoption. According to an investigation recently conducted by Mental Disability Rights International, many unadopted orphans are left to suffer

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<sup>187</sup> Pamela Anne Quiroz, *Color-blind Individualism, Intercountry Adoption and Public Policy*, 34 J. SOC. & SOC. WELFARE 57, 62 (2007).

<sup>188</sup> Gates, *supra* note 79, at 369-70.

<sup>189</sup> *MEPs Call for International Adoptions from Romania*, U.S. FED. NEWS, July 11, 2006, available at 2006 WLNR 12001941.

<sup>190</sup> *World Briefing Europe: Romania: Closing the Door on Foreign Adoptions*, N.Y. TIMES, Apr. 19, 2006, at A6; *World Briefing Europe: Romania: Adoption Dispute with Europeans*, N.Y. TIMES, Feb. 5, 2004, at A6.

<sup>191</sup> *MEPs Call for International Adoptions from Romania*, *supra* note 189.

<sup>192</sup> *Id.*

<sup>193</sup> Elisabeth Rosenthal, *Law Backfires, Stranding Orphans in Romania*, N.Y. TIMES, June 23, 2005, at A6.

<sup>194</sup> *Romania Implements Law Restricting International Adoptions*, SE. EUR. TIMES, Apr. 1, 2005, available at [http://www.setimes.com/cocoon/setimes/xhtml/en\\_%20GB/features/setimes/features/2005/01/04/feature-01](http://www.setimes.com/cocoon/setimes/xhtml/en_%20GB/features/setimes/features/2005/01/04/feature-01); *Romania Curbs Foreign Adoptions*, BBC NEWS, June 15, 2004, <http://news.bbc.co.uk/2/hi/europe/3810425.stm>.

<sup>195</sup> *Romania Implements Law*, *supra* note 194.

<sup>196</sup> Rosenthal, *supra* note 193.

<sup>197</sup> *Romania Implements Law*, *supra* note 194.

indefinitely in government-run institutions,<sup>198</sup> where the staff commonly abuse and neglect them.<sup>199</sup>

Like Romania, Georgia instituted a moratorium on foreign adoptions that resulted in dire consequences. The Georgian President declared an adoption freeze in January 1997<sup>200</sup> both for reasons of nationalism<sup>201</sup> and suspected corruption in the intercountry adoption process.<sup>202</sup> As a consequence of this policy, several orphans who had been approved for international adoption prior to the moratorium died of otherwise treatable illnesses while enduring miserable conditions in Georgian orphanages.<sup>203</sup>

In addition to moratoriums on the part of various sending nations, the U.S. has also 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.<sup>204</sup> Similarly, the U.S. State Department has refused to process new adoptions from Guatemala as of April 1, 2008 because this sending country has not yet implemented all of the safeguards required under the Hague Convention.<sup>205</sup>

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<sup>198</sup> Rosenthal, *supra* note 193.

<sup>199</sup> Craig S. Smith, *Romania's Orphans Face Widespread Abuse, Group Says*, N.Y. TIMES, May 10, 2006, at A3.

<sup>200</sup> Tyler Marshall, *U.S. Presses Georgia to Send Orphans*, L.A. TIMES, July 18, 1997, at A4.

<sup>201</sup> Alessandra Stanley, *A Baby's Death in Georgia Revives Fight Over Foreign Adoptions*, N.Y. TIMES, Aug. 16, 1997, at 4 [hereinafter Stanley, *A Baby's Death*]; Alessandra Stanley, *Hands Off Our Babies, A Georgian Tells America*, N.Y. TIMES, June 29, 1997, at 1 [hereinafter Stanley, *Hands Off*].

<sup>202</sup> Alessandra Stanley, *Issue of Foreign Adoption Follows Shevardnadze to Washington*, N.Y. TIMES, July 16, 1997, at A5 [hereinafter Stanley, *Issue of Foreign Adoption*]; Stanley, *Hands Off*, *supra* note 201, at 11.

<sup>203</sup> Stanley, *A Baby's Death*, *supra* note 201, at 14; *News Summary*, N.Y. TIMES, July 16, 1997, at A2.

<sup>204</sup> Gina Barton, *Many Families in Limbo After U.S. Halts Cambodian Adoptions*, MILWAUKEE J. SENTINEL, June 4, 2002.

<sup>205</sup> *Citizenship and Immigration Services Announces Changes to Guatemala Adoptions*, U.S. FED. NEWS, Apr. 1, 2008, available at 2008 WLNR 8858995.

D. *Wide Degree of Variation in Adoption Laws 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 others must be completed in the receiving country.<sup>206</sup> The complexities of deciphering the varying procedural requirements for different countries result in factors such as cost and convenience driving 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 usually finalized within nine months.<sup>207</sup> When a country offers a reduced waiting time, the number of intercountry adoptions from that nation will likely skyrocket, while other nations with fewer resources and a greater number of children living in orphanages will experience lower interest in their adoptable orphans from prospective foreign adopters as a result.

E. *Lack of Enforcement of Current Regulations*

Achieving compliance with international law is a substantial challenge because of the lack of enforcement authority and appropriate enforcement mechanisms.<sup>208</sup> Since the GA does not have the ability to create binding law, 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 requires its signatories to identify CAs that are responsible for implementing the Convention's regulations. However, enforcement of the CA's duties is nearly impossible in poor nations where the CA's resources are typically scarce and the CA was the often ineffective

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<sup>206</sup> Hollinger, *supra* note 21, at 217.

<sup>207</sup> Rodriguez, *supra* note 150.

<sup>208</sup> Hubing, *supra* note 5, at 679.

body in charge of overseeing international adoptions in the first place, prior to the Hague Convention.

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.<sup>209</sup> 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. This consent is unlikely because states tend to prefer to settle disputes through diplomatic means rather than more formally through the ICJ.<sup>210</sup>

#### 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 still insufficient. Greater measures are 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, it lacks the infrastructure for implementing the Convention's directives, particularly for poor and less-developed nations. The pervasive problems present in intercountry adoption today, thirteen years after the Convention entered into force,<sup>211</sup> are evidence that additional mechanisms are needed to monitor and facilitate the intercountry adoption process.

A solution to the problems of the current intercountry adoption 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 appli-

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<sup>209</sup> *Id.*

<sup>210</sup> Hubing, *supra* note 5, at 679 (citing LINDA MALONE, INTERNATIONAL LAW: THE PROFESSOR SERIES 110 (1998)).

<sup>211</sup> The World Organization for Cross-border Co-operation in Civil and Commercial Matters, *supra* note 141.

cations from prospective adoptive parents, investigating applicants to ensure that they will provide a healthy and nurturing environment for adoptees, storing data on worldwide orphans, investigating children's backgrounds to confirm 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. This proposed agency would be similar to the World Trade Organization ("WTO"), in which the decision-makers are member governments rather than a board of directors.<sup>212</sup> 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 the 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 all other representatives support. 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 or put up for adoption annually. This is an important feature because it will encourage all countries that engage in intercountry adoption to participate, and also to avoid motivating unethical conduct (e.g., pressuring birth mothers to put 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 encountered in the current system. First, 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 database and the international agency would possess the power to authorize the adoptions. This, in turn, would eliminate the need for coordination between facilitators and agencies in sending and receiving coun-

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<sup>212</sup> See World Trade Organization, Understanding the WTO: The Organization, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org1\\_e.htm#council](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm#council) (last visited Mar. 12, 2009).



tries 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 promulgates, rather than the often repetitive and time-consuming requirements of multiple agencies and governments that exist in the current system. Thus, with a single regulatory body governing the process, families will no longer have to navigate multiple bodies of law, which will increase efficiency and lower costs.

Furthermore, by significantly decreasing 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 through the international agency will be substantially lower. The new system would ensure that prospective adoptive parents are not taken advantage of by individuals with a profit motive because candidates seeking to adopt would directly apply to the international agency. In addition, the new system would serve to prevent adopters from having to put their trust and money in the hands of adoption facilitators and questionable foreign agencies and bureaucrats. To address the issue of timing as a motivation for corruption, 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. Thus, the desperation that is one of the factors currently fueling the black market for babies will no longer exist.

The proposed international agency would provide the children of all nations with the same opportunity to be adopted into a loving and stable family, irrespective of their birth country's resources. As explained earlier, poor, developing countries lack the resources to monitor and process intercountry adoptions. The result is widespread corruption that leaves many adoptable children languishing within their country's poorly-run 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 flow from 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 eliminate the corruption problems that exist in the current system. Transparency allows for easy monitoring and public scrutiny, thereby making it difficult for corruption to occur. 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. This proposed incentive structure for participation resembles that which was utilized for the drafting of the Hague Convention.<sup>213</sup> By involving both sending and receiving nations in the drafting of the treaty creating the agency, 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.<sup>214</sup> Unlike the ICJ, which only litigates cases between states,<sup>215</sup> the international

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<sup>213</sup> Pfund, *supra* note 138, at 1134.

<sup>214</sup> Hubing, *supra* note 5, at 679.

<sup>215</sup> *Id.*

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 private parties, which include prospective adoptive parents, biological parents, and adoptees. The legal need to protect these parties is particularly necessary 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. Potential funding sources include the UN, participating nations (based on a sliding scale related to the countries' abilities to contribute), corporations, private philanthropists and 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.<sup>216</sup> The combined cost of the two tribunals is \$100 million per year,<sup>217</sup> which are funds that could be partially or completely reallocated to support the intercountry adoption agency and family court. Considering that the physical and psychological well-being of millions of children is at stake, there is an urgent need for funding institutions to make intercountry adoption an international priority.

## CONCLUSION

Intercountry adoption has received a great deal of international attention in recent years, in large part due to the

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<sup>216</sup> Press Release, Security Council, Security Council Splits Prosecutorial Duties For Rwanda, Yugoslavia Tribunals, Unanimously Adopting Resolution 1503, U.N. Doc. SC/7859 (Aug. 28, 2003).

<sup>217</sup> Michael Voss, *Sierra Leonians Face UN Court*, BBC News, Mar. 21, 2002, <http://news.bbc.co.uk/2/hi/africa/1885357.stm>.

problems of the current system. Despite attempts to create international agreements and regulations for the process, the system continues to be 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 the system 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 fulfill their basic physical and psychological needs through international families eager to adopt them. The numerous problems in the current system have given rise to a great need for the practical solution of an international agency and family court to manage intercountry adoptions. This new system would increase efficiency and transparency, decrease costs, eradicate discrimination, and better protect the rights of adoptive parents, adoptees, and birth mothers. Most importantly, the new system would give each orphaned and homeless child a chance to grow up in a stable and loving environment, which would truly fulfill the paramount international goal of promoting the "best interests of the child."