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## Regulating Corruption in Intercountry Adoption

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# Notes:

## Regulating Corruption in Intercountry Adoption

### ABSTRACT

*The current regulatory system for intercountry adoption has failed parents, children, and governments. Impoverished parents and children have been exploited by crooked adoption agencies, orphanage directors, and bureaucrats looking to profit from well-meaning prospective parents who will pay significant fees in order to adopt. While the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption lays a good foundation for catching and eliminating this corruption, it has not been fully implemented in many developing countries that lack the necessary resources and infrastructure. Some critics want to give up on or significantly modify the Hague Convention's framework. However, the best way to see the principles of the Hague Convention realized and to deter corrupt practices is to shift some of the administrative burden in intercountry adoption to the better-resourced receiving states. Specifically, this Note recommends that receiving states should have more power to monitor the operations in less developed sending states and to act unilaterally when they detect corruption.*

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## I. INTRODUCTION

Throughout its relatively brief history, intercountry adoption has been the subject of much praise, criticism, and general controversy.<sup>1</sup>

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1. See HAGUE CONF. ON PRIVATE INT'L L., THE 1993 HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION: INFORMATION BROCHURE 4 (2012), <https://assets.hcch.net/upload/brochure33en.pdf> [<https://perma.cc/2PPZ-2J7N>] (archived Feb. 13, 2019) [hereinafter INFORMATION BROCHURE] ("By the 1980s, it was recognised that this phenomenon was creating serious and complex human and legal problems . . . ."); Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ADAC. MATRIM. LAW. 181,

Proponents of intercountry adoption view it as an opportunity for hopeful parents and children to mutually benefit, rather than each waiting—perhaps indefinitely—to be matched from within the smaller pools of available children or parents in their own countries.<sup>2</sup> Additionally, the building of cross-cultural families is viewed as a positive for the parents and children involved and for society more generally.<sup>3</sup>

On the other hand, critics view transnational adoption as further entrenching unhealthy power dynamics between wealthier countries and developing countries.<sup>4</sup> Corrupt adoption practices in the poorer sending countries have fortified this narrative. More and more allegations have arisen in recent decades suggesting that many of the infants and toddlers adopted through intercountry-adoption processes were not actually orphaned children in need of a home.<sup>5</sup> Instead, many of these children were made “adoptable” by financial incentives targeting destitute parents or by trafficking, kidnapping, or forced pregnancy.<sup>6</sup> Journalist E.J. Graff has gone as far as to suggest that “many international adoption agencies work not to find homes for needy children but to find children for Western homes.”<sup>7</sup> The current challenge in regulating intercountry adoption is finding a system that eliminates corruption but does not unnecessarily hinder adoptions.

The aim of this Note is to discuss practical ways the current regime can better embody the principles set forth in the international conventions governing adoption. With this objective in mind, this Note offers pragmatic criticism of some of the more prominent proposals without evaluating the numerous theoretical positions often associated with the subject.<sup>8</sup> Part II briefly describes the development of

182–83 (1996) [hereinafter Bartholet, *Propriety, Prospects and Pragmatics*] (outlining common criticisms and positive views of international adoption).

2. See Bartholet, *Propriety, Prospects and Pragmatics*, *supra* note 1, at 183 (discussing the positive views of international adoption).

3. See *id.*

4. See *id.* at 182 (discussing the criticisms of international adoption). This view is especially understandable in light of how international adoptions tend to play out: a wealthy, Western family—often a white family—adopts a child from an impoverished area of a developing country—often a child of color—and brings the child “home” to be raised according to the lifestyle and traditions of the adoptive parents. *Id.*

5. See D. MARIANNE BLAIR ET AL., *FAMILY LAW IN THE WORLD COMMUNITY* 824 (3d ed. 2015) (“Many argue that the increased interest in transnational adoption and the instances of trafficking are no longer isolated, but instead have become endemic to the institution.”); E.J. Graff, *The Lie We Love*, FOREIGN POLICY (Oct. 6, 2009, 5:14 PM), <https://foreignpolicy.com/2009/10/06/the-lie-we-love/> [<https://perma.cc/4ZQZ-L87M>] (archived Feb. 13, 2019) [hereinafter Graff, *The Lie We Love*] (noting many of the infants and toddlers being adopted are not in need of adoption).

6. See Graff, *The Lie We Love*, *supra* note 5 (“As international adoptions have flourished, so has evidence that babies in many countries are being systematically bought, coerced, and stolen away from their birth families.”).

7. *Id.*

8. Several scholars have written in response to the abuses that have occurred in intercountry adoption. Much of the discussion has been concerned with interpreting general child and human rights principles to determine whether they mandate more or

intercountry adoption and the international instruments that seek to regulate it. Part III takes a deeper look at the patterns of corruption that have played out in intercountry adoption, using Guatemalan and Ethiopian adoptions as case studies for greater insight into the problem. Part IV analyzes some of the shortcomings of the current international framework, as well as some of the existing policy proposals for overcoming them. Specifically, it critiques existing proposals that suggest a total abandonment of the current framework as well as those that call for new systems that would increase the administrative burden on all already overburdened groups. Finally, Part V suggests that, to best reduce corruption, the wealthier developed countries in the intercountry-adoption system should take on more responsibility in monitoring and increasing transparency in intercountry adoptions.

## II. THE RISE OF INTERCOUNTRY ADOPTION AND INTERNATIONAL ATTEMPTS TO REGULATE IT

### A. A Brief History of Intercountry Adoption

Intercountry adoption first developed in Western countries following World War II as a way to meet the needs of children who were lost or separated from their families during the war.<sup>9</sup> The United Nations Children's Fund (UNICEF) International Child Development Center has referred to those early periods of intercountry adoption as "an ad hoc humanitarian response to the situation of children orphaned by war."<sup>10</sup> In the earlier years, people chose international adoption in furtherance of altruistic, humanitarian, and missionary efforts following global crises.<sup>11</sup>

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less intercountry adoption. See generally, e.g., Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1 GLOB. POL'Y 91 (2010) [hereinafter Bartholet, *Human Rights*]; Sara Dillon, *Making Legal Regimes for Intercountry Adoptions 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 (2003); David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 CAP. U. L. REV. 413 (2007) [hereinafter Smolin, *Poverty*]. This note does not purport to add to that discussion.

9. See BLAIR ET AL., *supra* note 5, at 803 ("Intercountry adoption developed in the United States and other western nations following World War II to address the needs of children orphaned or displaced by the war and its aftermath."); PETER CONN, *ADOPTION: A BRIEF SOCIAL AND CULTURAL HISTORY* 116 (2013) (telling the history of the first interracial intercountry adoption agency); Barbara Stark, *When Genealogy Matters: Intercountry Adoption, International Human Rights, and Global Neoliberalism*, 51 VAND. J. TRANSNAT'L L. 159, 174 (2018) ("International adoption began after World War II in the United States with Pearl S. Buck's big-hearted project to save children in a chaotic, desperately poor, post-war China.").

10. Dawn Watkins, *Intercountry Adoption and the Hague Convention: Article 22 and Limitations upon Safeguarding*, 24 CHILD & FAM. L.Q. 389, 390 (2012).

11. See CONN, *supra* note 9, at 116–17 (discussing some of the earlier advocates of intercountry adoption and the sources of their motivation); see also BLAIR ET AL., *supra*

The number of intercountry adoptions steadily rose in the decades following World War II, increasing significantly in the 1990s.<sup>12</sup> The period leading up to and during the 1990s saw an increase in both the number of parents looking to adopt and the number of adoptable children.<sup>13</sup> The rise in Western demand is largely associated with societal changes that took place in the 1960s.<sup>14</sup> For one thing, increased access to contraception and abortions reduced unplanned pregnancies in Western countries.<sup>15</sup> Additionally, more prospective parents were looking to adopt as more women delayed having children to the point of outwaiting their fertility.<sup>16</sup> The increase in adoptable children is likely tied to China opening its doors to intercountry adoption in 1992, coupled with the surplus of adoptable children in China as a result of its one-child policy enacted in 1979.<sup>17</sup> The increase is also tied to the number of children who were orphaned during the AIDS crisis.<sup>18</sup> In 2004, over forty-five thousand children were adopted via intercountry adoption.<sup>19</sup>

note 5, at 824 (noting that “most international adoption facilitators prior to the mid-1980s were philanthropic or missionary organizations”).

12. See BLAIR ET AL., *supra* note 5, at 803 (discussing the reasons for the increase in adoptions in the 1990s); CONN, *supra* note 9, at 112–13 (discussing the rise of adoptions).

13. See Jessica L. Singer, *Intercountry Adoption Laws: How Can China’s One-Child Policy Coincide with the 1993 Hague Convention on Adoption?*, 22 SUFFOLK TRANSNAT’L L. REV. 283, 283 (1998) (“The number of international adoptions world-wide has increased dramatically in the past fifty years.”); Watkins, *supra* note 10, at 390–91 (discussing the increase in international adoptions); see also BLAIR ET AL., *supra* note 5, at 803 (saying the increased desire of western families to adopt internationally, together with conditions in developing nations, prompted greater willingness to place children of developing nations abroad).

14. See Watkins, *supra* note 10, at 390–91 (discussing a “dwindling supply of infants available for domestic adoption”); Graff, *The Lie We Love*, *supra* note 5 (noting news story of evangelical couple adopting Korean War orphans swept nation).

15. See Watkins, *supra* note 10, at 390 (mentioning societal changes in the 1960s); Graff, *The Lie We Love*, *supra* note 5 (“Thanks to contraception, abortion, and delayed marriages, the number of unplanned births in most developed countries has declined in recent decades.”).

16. See Watkins, *supra* note 10, at 390; Graff, *The Lie We Love*, *supra* note 5 (“Some women who delay having children discover they’ve outwaited their fertility . . .”).

17. Singer, *supra* note 13, at 283; see Stav Ziv, *China’s One-Child Policy and American Adoptees*, NEWSWEEK (Nov. 3, 2015, 2:22 PM), <http://www.newsweek.com/what-if-chinese-adoptees-and-end-one-child-policy-390130> [https://perma.cc/X2SG-4NX5] (archived Feb. 9, 2018) (stating that “[m]ore than 85,000 children have been adopted from China and raised in the U.S. since China formally opened its doors to international adoption in 1992”).

18. See CONN, *supra* note 9, at 113 (“The AIDS crisis has produced an estimated 15 million orphans around the world.”); see also BLAIR ET AL., *supra* note 5, at 803 (discussing the increase in international adoption).

19. See BLAIR ET AL., *supra* note 5, at 803 (“At its peak, over 45,000 children were placed worldwide in 2004 through intercountry adoption.”); Bartholet, *Human Rights*, *supra* note 8, at 95 (“At its peak in 2004, international adoption placed some 45,000 children.”).

In more recent years, however, the number of intercountry adoptions has declined.<sup>20</sup> In a little over a decade, the number of intercountry adoptions in the United States—the country that receives the most internationally adopted children—dropped from 22,989 in 2004 to only 5,370 in 2016.<sup>21</sup> Professor Marianne Blair suggests that this decrease might be explained by “tighter restrictions in both sending and receiving countries, as well as the development of domestic adoption systems and a growing antipathy towards international placement in many traditional sending nations.”<sup>22</sup> However, many explanations offered for this dramatic decline reference the widely publicized corruption in the adoption processes of developing countries.<sup>23</sup>

### B. *International Agreements Addressing Intercountry Adoption*

In the earlier years of intercountry adoption, international placements were only regulated to the extent that the countries involved created their own laws and processes relating to adoption.<sup>24</sup> As a result, the legal framework varied greatly depending on which countries were involved in the adoption.<sup>25</sup> By the 1970s, as the practice grew more common and allegations of corruption became more frequent, the pressure for international governance grew.<sup>26</sup>

20. See BLAIR ET AL., *supra* note 5, at 803 (saying the trend of increased international adoption has been reversing); Stark, *supra* note 9, at 162 (noting a decline in intercountry adoptions despite the fact that “[t]here are more babies and children in orphanages, so-called orphanages, on the street, on the market, or on their own than ever before”).

21. *Intercountry Adoption, Adoption Statistics*, BUREAU OF CONSULAR AFFAIRS, U.S. DEPT OF STATE, <https://travel.state.gov/content/adoptionsabroad/en/about-us/statistics.html> (last visited Feb. 14, 2019) [<https://perma.cc/FV7W-59V6>] (archived Oct. 23, 2017) [hereinafter *Statistics*].

22. BLAIR ET AL., *supra* note 5, at 803; see also G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, Dec. 31, 1993, *offprt. From Proceedings of the Seventeenth Session* (1993), Tome II, <https://assets.hcch.net/upload/expl33e.pdf> [<https://perma.cc/CTS8-2FZ9>] (archived Oct. 30, 2017) (noting that, even at the time the Hague Convention was being developed, states of origin were weary of giving the impression that they were unable to care for their children).

23. See, e.g., David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnaping, and Stealing Children*, 52 WAYNE L. REV. 113, 200 (2006) [hereinafter Smolin, *Child Laundering*] (discussing the failings of the international adoption system that encourage child laundering); Stark, *supra* note 9, at 201–02 (“Some would-be parents may have been deterred by the moratoria...which made it harder to find a child. Others may have been deterred by widespread publicity about the same problems that triggered the moratoria; i.e., corruption, child abduction, and babies and families falling through the cracks.”).

24. See Watkins, *supra* note 10, at 391–92 (“There was no international oversight or regulation . . .”).

25. See *id.*

26. See *id.* at 392–93 (“By the early 1970s, concerns were being expressed about the lack of adequate safeguards for children who became the subjects of ICA.”).

The international community responded to this pressure with three major conventions:<sup>27</sup> the United Nations Convention on the Rights of the Child (UN CRC);<sup>28</sup> the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol);<sup>29</sup> and the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Convention).<sup>30</sup>

Every intercountry adoption involves two distinct state actors: (1) a “state of origin” (or “sending state”), the country from which children are adopted; and (2) a “receiving state,” the country where adoptive parents accept children for permanent placement in their homes.<sup>31</sup> While, recently, many sending and receiving nations have made efforts to better regulate intercountry adoption domestically,<sup>32</sup> many of these laws and regulations are guided by the frameworks and principles laid out in the international conventions.<sup>33</sup> The first two conventions—the UN CRC and the Optional Protocol—primarily address adoption in passing, as they speak to broader, more general themes.<sup>34</sup> Of these three instruments, the Hague Convention is the only one which deals directly and exclusively with intercountry adoption.<sup>35</sup> For this reason, some scholars see the Hague Convention as the most promising tool in

27. See BLAIR ET AL., *supra* note 5, at 834–35 (saying the “three conventions form the centerpiece for current international regulation of intercountry adoption”).

28. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UN CRC].

29. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227 [hereinafter Optional Protocol].

30. Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 [hereinafter Hague Convention].

31. See *id.* art. 2.

32. See Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349, 350–51 (2005) [hereinafter Blair, *Safeguarding*] (“Both sending and receiving nations, including the United States, have also devoted considerable attention during the last decade to domestic legislative and regulatory reform of their transnational adoption practices.”).

33. See BLAIR ET AL., *supra* note 5, at 834–35 (saying the three major conventions are the “centerpiece” for adoption regulation); see also Stark, *supra* note 5, at 177 (suggesting that adoption law is governed by national laws coordinated by international instruments and that national adoption laws are also subject to international human rights law).

34. See UN CRC, *supra* note 28, art. 21 (addressing intercountry adoption directly in only one of the fifty-four articles to the convention); Optional Protocol, *supra* note 29, art. 3 (mentioning adoption only in a single subpart of a provision).

35. See BLAIR ET AL., *supra* note 5, at 806 (“The most widely-ratified global convention devoted exclusively to international adoption is the Hague Intercountry Adoption Convention . . .”). Some have conceived of the Hague Convention as a response to the CRC article 21 which calls for additional international agreements to further promote the best interests of children in intercountry adoption. UN CRC, *supra* note 28, art. 21(e); see BLAIR ET AL., *supra* note 5, at 836 (“The international community answered the CRC’s invitation to establish a global convention devoted specifically to regulating international adoption by creating the Hague Intercountry Adoption Convention . . .”).



existence for overcoming the bribery and corruption that have traditionally plagued intercountry-adoption processes.<sup>36</sup>

### 1. The United Nations Convention on the Rights of the Child

The UN CRC was adopted on November 20, 1989 and entered into force on September 2, 1990.<sup>37</sup> The convention covers a variety of topics that are all grounded in the same standard: “the best interests of the child.”<sup>38</sup> The UN CRC addresses adoption briefly and in general terms.<sup>39</sup> Although the convention acknowledges intercountry adoption as a possible means of care for a child, Article 21(b) of the UN CRC limits the incidence of international placements.<sup>40</sup> It only allows the consideration of international placement in cases where “the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.”<sup>41</sup> The UN CRC does, however, raise an important element of safe and appropriate intercountry adoptions: the requirement that “the placement does not result in improper financial gain for those involved in it.”<sup>42</sup> Indeed, the latter two controlling conventions expound upon this principle.<sup>43</sup>

Rather than establishing any concrete legal framework, the UN CRC suggests ideals regarding what intercountry adoption (as well as domestic adoption) should look like.<sup>44</sup> Parties to the UN CRC are directed to “ensure that the adoption of a child is authorized only by competent authorities” and “ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption.”<sup>45</sup> Some attribute the creation of a more concrete legal framework in the Hague Convention to the UN

36. See Stark, *supra* note 9, at 178.

37. UN CRC, *supra* note 28.

38. See *id.* art. 21.

39. *Id.* (“Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration.”); see BLAIR ET AL., *supra* note 5, at 835 (“The Convention of the Rights of the Child, the first global convention to address intercountry adoption, sets a general tone but contains relatively few directives.”).

40. UN CRC, *supra* note 28, art. 21(b).

41. *Id.*

42. *Id.* art. 21(d).

43. See Optional Protocol, *supra* note 29, arts. 2–3 (prohibiting and requiring criminal penalties for the “sale of children”); Hague Convention, *supra* note 30, art. 32 (defining which costs are permissible and which are not).

44. See UN CRC, *supra* note 28, arts. 21(a), (c). Former Cambridge Professor Andrew Bainham describes the UN CRC as “valuable as general statements of what is required from states and to what children may be thought to be entitled by the international community, these principles are stated at a broad level of generality and do not provide sufficient detail on what action the state is required to take. . . .” Andrew Bainham, *International Adoption from Romania—Why the Moratorium Should Not Be Ended*, 15 CHILD & FAM. L.Q. 223, 231 (2003).

45. UN CRC, *supra* note 28, arts. 21(a), (c).

CRC's generality and lack of practical direction for countries participating in international adoptions.<sup>46</sup>

## 2. The UN Optional Protocol on the Convention for the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

The Optional Protocol to the UN CRC, which was signed in 2000 and entered into force in 2002, only addresses adoption by criminalizing certain acts.<sup>47</sup> Specifically, it requires ratifying states to penalize individuals and entities who “improperly induc[e] consent . . . for the adoption of a child in violation of applicable international legal instruments on adoption.”<sup>48</sup> The Optional Protocol does not, however, suggest any specific changes to the current adoption system or how that system operates.

Professor Marianne Blair suggests that the implementation of this Optional Protocol in the adoption context may be hindered in the United States, the largest adopting nation, because of two interpretations set out in the United States' reservation<sup>49</sup> to the Optional Protocol.<sup>50</sup> First, she points out that, according to the reservation, the United States interprets the term “sale of children” as only pertaining to transactions that involve payment or consideration where an individual who lacks “a lawful right to custody of the child thereby obtains de facto control over the child.”<sup>51</sup> Second, she highlights that “improperly inducing consent” is defined in a way that covers only the “knowing and willful inducement of consent by offering or providing ‘compensation for the relinquishment of parental

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46. See e.g., BLAIR ET AL., *supra* note 5, at 836 (“The international community answered the CRC’s invitation to establish a global convention devoted specifically to regulating international adoption by creating the Hague Intercountry Adoption Convention . . . .”); Dillon, *supra* note 8, at 203 (“In one sense, the Hague Convention is itself the child of the U.N. Convention on the Rights of the Child . . . .”).

47. See Optional Protocol, *supra* note 29, art. 3 (listing criminalized activity involving children); see also BLAIR ET AL. *supra* note 5, at 835 (saying the Optional Protocol largely only covers the crime of trafficking).

48. Optional Protocol, *supra* note 29, art. 3.

49. The United Nations describes a “reservation” to a convention as “a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the treaty in their application in that state.” *Reservation*, U.N. EDUC., SCI. & CULTURAL ORG., <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/reservation/> (last visited Feb. 15, 2019) [<https://perma.cc/57ZT-BNW4>] (archived Feb. 26, 2018).

50. BLAIR ET AL., *supra* note 5, at 835–36; see *United States Reservation*, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, art. 3, May 25, 2000, 2171 U.N.T.S. 227, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11-c&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-c&chapter=4&clang=_en) (last visited Jan. 18, 2018) [hereinafter *United States Reservation*].

51. *United States Reservation*, *supra* note 50, art. 3; BLAIR ET AL., *supra* note 5, at 835–36.

rights.”<sup>52</sup> Thus, she and others have observed that this language appears to only criminalize inducements for parental consent but does not reach the trafficking of children from any person or institution other than a parent.<sup>53</sup> If these suspicions are right, the Optional Protocol will have limited effect in intercountry adoptions where the United States is a party and children are wrongfully trafficked from hospitals, institutions, the street, or relatives other than parents.<sup>54</sup>

### 3. The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption

In a memorandum prepared in November 1989, the Hague’s Permanent Bureau acknowledged the insufficiency of the then-existing legal instruments that governed intercountry adoptions.<sup>55</sup> The Bureau noted four specific requirements it felt needed to be addressed at the international level: (1) the establishment of legally binding standards for international adoption; (2) a system of supervision to ensure that these standards are being met; (3) the establishment of channels of communication between the authorities of sending and receiving states; and (4) cooperation between sending and receiving nations.<sup>56</sup> The Hague Convention, championed by the Hague’s Permanent Bureau, was the legal instrument ultimately born of these desires.<sup>57</sup>

Indeed, the three primary objectives set forth in Article 1(a)–(c) of the Hague Convention are consistent with the initially sought requirements. The Hague Convention seeks to: (a) establish safeguards to ensure that the best interests and fundamental rights of the child are accounted for in intercountry adoptions; (b) establish a system of cooperation amongst contracting states to further ensure the first objective; and (c) recognize the legitimacy of adoptions made pursuant to the convention among contracting parties.<sup>58</sup> It sets forth the specific legal standards and procedures to be observed in all intercountry adoptions between parties to the Hague Convention.<sup>59</sup> Unlike the UN

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52. *United States Reservation*, *supra* note 50, art. 3; BLAIR ET AL., *supra* note 5, at 835–36.

53. BLAIR ET AL., *supra* note 5, at 835–36; *see* Smolin, *Child Laundering*, *supra* note 23, at 200 (“The federal regulation may in fact be creating a safe harbor for child trafficking and negligence.”).

54. *See* Smolin, *Child Laundering*, *supra* note 23, at 200 (stating that US agencies must be held legally accountable for who they partner with to secure adoptions).

55. *See* Parra-Aranguren, *supra* note 22, ¶ 7 (discussing international legal instrument needs).

56. *See id.*

57. *See id.* ¶ 1-29 (mentioning the Hague’s Permanent Bureau’s ongoing help in establishing the Hague Convention).

58. Hague Convention, *supra* note 30, art. 1.

59. *See* Dillon, *supra* note 8, at 202–03 (saying the Hague Convention is “an agreement on the standards to be observed where intercountry adoption occurs . . .”); Ingi Iusmen, *The EU and International Adoption from Romania*, 27 INT’L J.L. POL. & FAM. 1, 4 (2013) (discussing the Hague Convention’s legal status). The former Secretary General of the Hague Conference on Private International Law described the convention

CRC, the Hague Convention is narrow in scope and has a practical focus.<sup>60</sup>

Representatives from over fifty countries drafted the Hague Convention, and both states of origin and receiving states had the opportunity to advocate for their interests during the drafting process.<sup>61</sup> Since the convention entered into force, more than ninety states—including the United States—have ratified it.<sup>62</sup> The preamble to the Hague Convention reveals that the countries involved created the framework based on their shared belief that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment.”<sup>63</sup> Many scholars have observed that the language of the preamble—particularly the phrase “recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin”—seems to rank intercountry adoption as preferable to other forms of domestic care such as foster care or institutionalization.<sup>64</sup> The Hague Conference’s Guide to Good Practice No. 1 on the Implementation and Operation of the Convention (Guide No. 1) seems

as aiming to create “the right conditions under which adoption may take place across borders in the context of ongoing globalisation.” 1993 HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION: 25 YEARS OF PROTECTING CHILDREN IN INTERCOUNTRY ADOPTION, THE HAGUE CONVENTION ON PRIVATE INTERNATIONAL LAW PERMANENT BUREAU 8 (2018), <https://assets.hcch.net/docs/ccbf557d-d5d2-436d-88d6-90cddb78262.pdf> [<https://perma.cc/Z9V3-R8F3>] (archived Feb. 15, 2019) [hereinafter 25 YEARS].

60. See Dillon, *supra* note 8, at 202–03 (“It is important to note that the Hague Convention is not a human rights convention per se; it is an agreement on the standards to be observed where intercountry adoption occurs . . . .”); Lusmen, *supra* note 59, at 4 (“While the CRC is a broader convention on the general principles constitutive of the human rights of children, the Hague Convention has a narrower focus, namely it specifies the procedures and standards that should guide legal [intercountry adoption] . . .”).

61. See BLAIR ET AL., *supra* note 5, at 806; Parra-Aranguren, *supra* note 22, ¶ 9-29 (discussing the various drafting meetings and which countries participated).

62. BLAIR ET AL., *supra* note 5, at 806 (saying the convention “currently boasts a membership of over ninety contracting nations, including the United States”).

63. Hague Convention, *supra* note 30.

64. *Id.*; see BLAIR ET AL., *supra* note 5, at 806 (saying the preamble says that intercountry adoption provides an opportunity for a child who cannot find a suitable family in his or her state to find a permanent family); Bartholet, *Human Rights*, *supra* note 8, at 94 (suggesting that international adoption serves the child’s best interests because of the child’s central right to a family). *But see* Richard Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption*, 55 N.Y. L. SCH. L. REV. 733, 737 (2010–2011) (stating there is a preference for domestic adoption and intercountry adoption is a last resort); Dillon, *supra* note 8, at 213–15 (“[T]he Hague Convention makes concrete the right of any child to an ethical adoption, where the national law in the country of origin allows intercountry adoption.”); David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. LOUISVILLE L. REV. 441, 448 (2010) [hereinafter Smolin, *Hague Convention*] (emphasizing that “the Convention does not in any way mandate that ratifying nations place children in intercountry adoption when no family environment is available for the child within the country of origin” nor does it “create a right of an institutionalized child to intercountry adoption in absence of a domestic adoptive placement.”).

to affirm this interpretation, explaining, “if there is a lack of suitable national adoptive families or carers, it is, as a general rule, not preferable to keep children waiting in institutions when the possibility exists of a suitable permanent family placement abroad.”<sup>65</sup> If this is the case, this prioritization of intercountry adoption represents an important departure from Article 21(b) of the UN CRC, which only permits consideration of international placement when other forms of care, including foster care and possibly institutionalization, are unavailable in the child’s country of origin, and a shift in the international attitude regarding intercountry adoption.<sup>66</sup>

Article 2 of the Hague Convention limits its scope to circumstances where a child that is habitually resident in a state of origin “has been, is being, or is to be moved” to a receiving state for the purpose of creating a permanent parent–child relationship, where both the state of origin and receiving state are parties to the Hague Convention.<sup>67</sup> The convention divides the tasks associated with intercountry adoption between states of origin and receiving states.<sup>68</sup> To generalize, receiving states are responsible for ensuring potential adoptive families are qualified to adopt, and states of origin are responsible for ensuring that the child is adoptable and that the consent of the biological parents was properly received.<sup>69</sup> The countries that typically have access to the greatest resources—largely the Western receiving states—are required to do less than the sending countries, which tend to have much higher instances of poverty and less governmental infrastructure to carry out the assigned tasks.<sup>70</sup>

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65. *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention Guide to Good Practice*, Guide No. 1, HAGUE CONF. ON PRIVATE INT’L LAW, 30 (2008) [hereinafter Guide No. 1] (explaining that “a temporary home in the country of origin in most cases is not preferable to a permanent home elsewhere,” and “[i]nstitutionalisation as an option for permanent care, while appropriate in special circumstances, is not as a general rule in the best interests of the child”). It is worth noting, however, that Guide No. 1 purports to make this shift by simply applying the “best interests” of the child analysis laid out in the UN CRC. *See id.*

66. UN CRC, *supra* note 28, art. 21(b). Interestingly, the Hague Conference itself claims that “[t]he 1993 Hague Convention gives effect to Article 21 of the *United Nations Convention on the Rights of the Child* by adding substantive safeguards and procedures to the broad principles and norms laid down in the Convention on the Rights of the Child.” INFORMATION BROCHURE, *supra* note 1, at 5; *see also* 25 YEARS, *supra* note 59, at 10 (discussing the safeguards and procedures).

67. Hague Convention, *supra* note 30, art. 2. In so framing the reach of the convention, its drafters declined to extend it to cover the adoption of refugee children who do not qualify as “habitually resident” in the sending state. *See* Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L.J. 243, 249 (1994) [hereinafter Carlson, *Emerging Law*]. This exclusion makes sense in light of Professor Barbara Stark’s observation that “[m]ost children in crisis are only temporarily separated from parents, or other family members, who will care for them once they are reunited.” Stark, *supra* note 9, at 175.

68. *See* Carlson, *Emerging Law*, *supra* note 67, at App. A (discussing which parties are responsible for each task).

69. Hague Convention, *supra* note 30, arts. 4–5.

70. *See* Stark, *supra* note 9, at 178 (“implementing the Convention requires infrastructure, including mechanisms to ensure accurate record-keeping, that many

Another important provision of the Hague Convention is Article 6's mandate that each contracting state designate a "central authority" to discharge the duties imposed by the convention.<sup>71</sup> This central authority is a centralized governmental body tasked with overseeing all of the intercountry-adoption processes in that state and ensuring ethical compliance.<sup>72</sup> However, Articles 9 and 22 allow the functions of a central authority to be "performed by public authorities or by bodies accredited under Chapter III," which includes private agencies.<sup>73</sup> Some responsibilities of central authorities may even be carried out by bodies or persons who are unaccredited, so long as they meet certain minimum standards and are supervised by "the competent authorities of that State."<sup>74</sup> These competent authorities can be central authorities, other public authorities including executive or judicial entities, or even nonpublic accredited bodies.<sup>75</sup> Thus, the Hague Convention rejects the proposal that intercountry adoptions be facilitated only by public authorities.<sup>76</sup>

### III. THE CURRENT STATE OF INTERCOUNTRY ADOPTION AND THE NEED FOR REFORM

While the Hague Convention establishes safeguards and a structure of cooperation for the practice of intercountry adoption, not every country is in compliance with its standards. For one thing, several countries—including several that act as states of origin—have not ratified the Hague Convention and, thus, are not bound by the standards it announced. Even in countries that have ratified the convention, corruption still exists.<sup>77</sup>

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sending states lack"); see also Guide No. 1, *supra* note 65, at Annex 2–8 ("The Convention places heavy burdens of responsibility on States of origin . . .").

71. Hague Convention, *supra* note 30, art. 6(1); see also Susann M. Bisignaro, *Intercountry Adoption Today and the Implications of the 1993 Hague Convention Tomorrow*, 13 DICK. J. INT'L L. 123, 142 (1994) ("The most beneficial, yet controversial, provision of the Convention mandates the establishment of a 'Central Authority' in each Contracting State . . . . By funneling all intercountry adoptions through one Central Authority per state, it is hoped that legitimate adoptions will be facilitated and illegal activity suppressed.").

72. See Hague Convention, *supra* note 30, art. 6 ("Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.").

73. *Id.* arts. 9, 22.

74. *Id.* art. 22.

75. INFORMATION BROCHURE, *supra* note 1, at 6.

76. See Carlson, *Emerging Law*, *supra* note 67, at 251 (establishing that the convention allows for the involvement of private agencies).

77. See Stark, *supra* note 9, at 199 ("In addition, there have been allegations of corruption in China, Russia, and South Korea. Some of these cases involved agencies lying to parents, telling them, for example, that their children would be educated in America and would send for their parents when they were older.") (footnotes omitted); Graff, *The Lie We Love*, *supra* note 5 (discussing corruption in international adoption).

While different states face different challenges in regulating intercountry adoption, the following pattern has repeated itself time and time again. Many international adoption programs start out as genuine humanitarian efforts involving a handful of adopters.<sup>78</sup> As word of successful adoptions from a specific nation spreads—often accompanied by press depicting the terrible situations of children in that nation waiting to be adopted—interest among Western adoptive parents grows.<sup>79</sup> While the “supply” of children in need of a home decreases, the “demand” of Western families increases, “leading to that obvious two-part capitalist solution: increased prices and increased production.”<sup>80</sup> With hopeful adoptive parents ready to pay a significant sum to take home a healthy baby, opportunistic middlemen find ways to “produce” adoptable babies by defrauding and coercing birthparents, and buying or even abducting healthy children.<sup>81</sup> Eventually, the adoption-governing entities of the often under-resourced sending nations reach a point where they can no longer effectively oversee the behavior of everyone involved in the adoption process.<sup>82</sup> It is not until the state of origin and receiving states become aware of the corruption that attempts to stop it begin.<sup>83</sup> Unfortunately, stopping the corruption frequently entails stopping intercountry adoptions altogether for at least a period, eliminating the possibility of a home abroad for children who could actually benefit from one.<sup>84</sup>

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78. See E.J. Graff, *They Steal Babies, Don't They?*, PAC. STANDARD (Nov. 24, 2014), <https://psmag.com/news/they-steal-babies-dont-they-international-adoption-schuster-institute-95027> [<https://perma.cc/A5MX-46ST>] (archived Jan. 18, 2018) [hereinafter Graff, *They Steal Babies*] (“Many poor nations’ international adoption programs started, as in the Ethiopia that Greene portrayed, with a few genuinely humanitarian adoptions, saving children from desperate circumstances.”).

79. See *id.* (“[O]nce word spread among hopeful Western parents that healthy little ones were coming quickly out of a particular country, far more people would sign up than a small, poor country could effectively manage.”).

80. *Id.*

81. See *id.* (“In the case of inter-country adoptions, far too often, orphans were “produced” by unscrupulous middlemen who would persuade desperately poor, uneducated, often illiterate villagers whose culture had no concept of permanently severing biological ties to send their children away—saying that wealthy Westerners would educate their children and send them home at age 18, or would send a monthly stipend, or some other culturally comprehensible fostering plan.”).

82. See *id.* (discussing the scenario in the Democratic Republic of the Congo, where “numbers were escalating faster than the government could oversee the adoption industry.”).

83. See *id.* (“[I]n some countries, humanitarian adoptions metastasize into a corrupt mini-industry shot through with fraud, expanding dramatically and becoming a source of income for unscrupulous locals and government officials—until developed countries, appalled, stop permitting adoptions from that country...”); see also Dillon, *supra* note 8, at 243 (establishing that once it becomes known that there are issues, countries will often stop international adoptions out of reputation concerns).

84. See Dillon, *supra* note 8, at 243 (claiming that receiving nations often will stop intercountry adoptions); Graff, *They Steal Babies*, *supra* note 78 (“[U]ntil developed countries, appalled, stop permitting adoptions from that country, thereby marooning the children who do need new families abroad.”).

It is worth noting that not all states of origin have faced large-scale corruption.<sup>85</sup> Professor David Smolin has observed that in three of the countries that send the most children to the United States—China, Russia, and South Korea—intercountry adoptions proceeded generally free of scandal.<sup>86</sup> He proposes that in countries where there are “substantial numbers of children abandoned or relinquished for reasons other than poverty, there is unlikely to be much incidence of buying or kidnaping children in order to supply ‘orphans’ for adoption.”<sup>87</sup> In China, he explains, the population-control policies and cultural preference for sons led to an availability of many Chinese girls for adoption abroad.<sup>88</sup> In South Korea, Professor Smolin speculates that most children are relinquished due to the stigma attached to single motherhood rather than out of desperate poverty.<sup>89</sup> In Russia, various social problems led to a large number of institutionalized children available for adoption, keeping Russian adoptions generally free of child trafficking.<sup>90</sup>

Similarly, not all adoption agencies in sending states behave unethically.<sup>91</sup> The challenge for receiving states and prospective adoptive parents is distinguishing between the agencies that act honorably and those that do not, especially in non-Hague Convention countries where the state of origin is not bound by any international standards of accreditation for adoption service providers.<sup>92</sup>

Guatemala and Ethiopia are two countries that have experienced corruption due to poorly or under-regulated transnational adoption practices.<sup>93</sup> Both countries most commonly act as states of origin,<sup>94</sup> and both have experienced freezes on intercountry adoption because of

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85. See BLAIR ET AL., *supra* note 5, at 829 (“Not all sending nations have been plagued by large-scale scandals.”).

86. Smolin, *Child Laundering*, *supra* note 23, at 127–28.

87. *Id.* at 127.

88. *Id.*

89. *Id.*

90. BLAIR ET AL., *supra* note 5, at 829.

91. See Graff, *They Steal Babies*, *supra* note 78 (noting that in only “some countries humanitarian adoptions metastasize into a corrupt mini-industry shot through with fraud.”) (emphasis added).

92. See *id.* (listing Ethiopia as an example not governed by the Hague Convention).

93. There are, however, many more countries where intercountry adoption practices have been plagued by corruption and parents and children have been manipulated for financial gain. See Stark, *supra* note 9, at 199 (listing also Cambodia, Nepal, Vietnam, and India as having “widespread trafficking;” Haiti, Sierra Leone, Congo, Uganda as having a smaller extent of trafficking; and China, Russia, and South Korea as countries which have faced “allegations of corruption”).

94. See *Statistics*, *supra* note 21 (listing the numbers of adoptions from 1999 to 2017); see also *Country Profile for Intercountry Adoption, State of Origin, Guatemala*, HAGUE CONF. ON PRIVATE INT’L LAW, July 2014, <https://www.hcch.net/en/publications-and-studies/details4/?pid=6221&dtid=42> (last visited Feb. 25, 2019) [hereinafter *Guatemala*] (outlining information related to adoptions from Guatemala).



corruption.<sup>95</sup> Neither Guatemala nor Ethiopia had ratified the Hague Convention at the time the exploitation was occurring, though Guatemala has since signed and ratified it.<sup>96</sup> Although they had not signed onto the Hague Convention during their adoption crises, major receiving countries who *had* ratified it—including the United States—continued to participate in adoptions from these countries. Additionally, the adoption scandals that occurred in Guatemala and Ethiopia have been publicized and written about to a greater extent than those in other countries. This is likely due to the scale of the corruption and the drastic results it led to in both places.

### A. *The Guatemalan Adoption Crisis*

Guatemala fell victim to such corruption from the 1980s into the 2000s.<sup>97</sup> During those years, roughly three thousand Guatemalan infants, relinquished directly from their birthmothers, were placed through intercountry adoption annually.<sup>98</sup> In Guatemala, as in many developing countries, there has long been a concern that the children in greatest need are not those who are being adopted.<sup>99</sup> In 1999, a UN Special Rapporteur of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography visited Guatemala to evaluate its adoption practices and found that infants and children were being trafficked for the purpose of intercountry adoption “on a large scale.”<sup>100</sup> The rapporteur confirmed that poor neighborhoods were scouted for eligible babies and parents were frequently coerced into giving up their children for money.<sup>101</sup>

Private attorneys, who worked around legal barriers to place children in adoptive homes without subjecting themselves to exacting government supervision, facilitated much of this operation.<sup>102</sup> These

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95. See BLAIR ET AL., *supra* note 5, at 827 (describing Western countries refusal to adopt from Guatemala following reports of exploitation); *Suspension of Adoptions from Ethiopia*, U.S. DEP'T OF STATE (May 2, 2017), <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/ethiopia-adoption-notice-2may2017.html> [<https://perma.cc/H6RF-W5MG>] (archived Feb. 28, 2018) [hereinafter *Suspension of Adoptions*] (describing Ethiopia's self-imposed suspension of all intercountry adoptions).

96. *Guatemala*, *supra* note 94.

97. See BLAIR ET AL., *supra* note 5, at 826–27 (discussing a “pattern of systemic fraud” in Guatemala); Blair, *Safeguarding*, *supra* note 32, at 366–71 (providing information of corruption in Guatemala); Dillon, *supra* note 8, at 251–52 (describing the situation in Guatemala).

98. See Dillon, *supra* note 8, at 251 (“Under its system, approximately 3,000 infants relinquished by birthmothers have been adopted abroad yearly, mostly to the United States.”).

99. See *id.* at 252 (but also noting that “few doubt that there are many children in Guatemala who are in urgent need of family care”).

100. BLAIR ET AL., *supra* note 5, at 826–27; Blair, *Safeguarding*, *supra* note 32, at 366–68.

101. BLAIR ET AL., *supra* note 5, at 826–27.

102. See *id.*; Blair, *Safeguarding*, *supra* note 32, at 367–68 (“A network of nurseries, known as “casas cunas” (crib houses), and foster placement for infants awaiting private placement for adoption have been created by private attorneys, who in

attorneys typically earned between \$15,000 and \$20,000 per successful adoption of a child.<sup>103</sup> At one point, the attorney general of Guatemala alleged that the “network of baby traffickers” included some of the most powerful public figures, including the president of the Guatemalan Supreme Court, who evaded prosecution through manipulation of the court system and judges.<sup>104</sup> Other studies of the situation reached similarly dismal conclusions.<sup>105</sup>

By the late 1990s, the problem grew so out of hand that the United States, Canada, and the United Kingdom started to require DNA testing for all adopted Guatemalan children.<sup>106</sup> Yet, this did not slow the rates of intercountry adoptions sourced by Guatemala.<sup>107</sup> In the ten years between 1998 and 2008, almost thirty thousand Guatemalan children were adopted in the United States alone through private facilitators.<sup>108</sup> Many private attorneys insisted even then that the majority of adoptions were the result of extreme poverty and not kidnapping or trafficking.<sup>109</sup> It was not until the mid-2000s that receiving states started to ban adoptions from Guatemala due to these concerns.<sup>110</sup> The United States was the last of the large, Western adopters to stop receiving Guatemalan children, instituting a ban in 2008.<sup>111</sup> Since 2010, the annual number of Guatemalan children adopted by American families has not exceeded fifty.<sup>112</sup> In 2016, there were only two American–Guatemalan adoptions.<sup>113</sup>

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Guatemala are able to facilitate extrajudicial private adoptions with minimal governmental supervision.”) (footnotes omitted).

103. BLAIR ET AL., *supra* note 5, at 827.

104. LAURA BRIGGS, *SOMEBODY’S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION* 191 (2012).

105. See BLAIR ET AL., *supra* note 5, at 827 (“A UNICEF study the following year reached similar conclusions. Multiple reports surfaced of women and girls intentionally becoming pregnant in order to receive adoption fees.”); see also Johanna Oreskovic & Trish Maskew, *Red Thread or Slender Reed: Deconstructing Prof. Bartholet’s Mythology of International Adoption*, 147 *BUFF. HUM. RTS. L. REV.* 71, 118 (2009) (alleging that as the number of Guatemalan adoptions went up, so did allegations of women becoming pregnant and placing children in adoption for payment),

106. BLAIR ET AL., *supra* note 5, at 827.

107. See *id.* (noting that “adoptive placements to the United States from Guatemala rose from 250 in 1990 to 4,727 in 2007”).

108. See *id.* (noting that “[i]n 2006 alone, Americans adopted one out of every 110 children born in Guatemala, and stolen babies were often discovered among the children who were placed.”).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Statistics, supra* note 21. Placements initiated before the moratorium were still being resolved by the two governments. See BLAIR ET AL., *supra* note 5, at 827 (saying the United States was “awaiting implementation of a Hague-compliant adoption process before resuming new placements”).

113. *Statistics, supra* note 21.

## B. Troubles with Ethiopian Intercountry Adoption

### 1. When and to What Extent Ethiopian Intercountry Adoption Was Compromised

The rise and decline of intercountry adoption in Ethiopia followed the common trend of humanitarianism escalating to disorder and exploitation.<sup>114</sup> In 2001, there were 165 adoptions of Ethiopian children into US homes.<sup>115</sup> On December 22, 2002, the *New York Times Magazine* ran the headline “What Will Become of Africa’s AIDS Orphans?” for an article by reporter Melissa Fay Greene.<sup>116</sup> Greene described the horrific stories of children who had been orphaned by the AIDS crisis and who were undesirable for adoption in their own country because of the stigma associated with the disease.<sup>117</sup> Greene wrote that an estimated “million” children had been orphaned and held out intercountry adoption as a shimmering beacon of hope for these destitute children.<sup>118</sup>

Those familiar with intercountry-adoption policy could easily predict the effect this article would have; the US ambassador to Ethiopia at the time even wrote to the US secretary of state that “[b]ecause of recent articles . . . we anticipate explosive growth in the adoption industry, and no letup in the number of individuals attempting to cash in on the process.”<sup>119</sup> By 2006, the U.S. Embassy in Ethiopia sent word to the U.S. Department of State that “Ethiopia is the fastest growing source country for adoptions by American citizens, and the rapid growth mimics the troubling pattern of programs that were eventually closed because of fraud concerns.”<sup>120</sup>

In the following years, international adoptions from Ethiopia continued to increase, perhaps aggravated by the fact that there were fewer Chinese children available for adoption<sup>121</sup> and Guatemalan adoptions were slowing due to fraud and corruption.<sup>122</sup> Intercountry adoptions from Ethiopia reached their peak in 2010 when 2,511 children were adopted in the United States alone (compared to only

114. See Graff, *They Steal Babies*, *supra* note 78 (discussing problems with adopting from Ethiopia and saying the U.S. has no regulatory authority in Ethiopia when things go wrong).

115. *Id.*

116. *Id.*

117. See *id.* (discussing Greene’s article and its premise).

118. *Id.*

119. *Id.*

120. *Id.*

121. Professor Smolin suggests that “the large (and increasing) numbers of intercountry adoptions [in China] over the last decade have begun to exhaust the number of babies and toddlers who are legally available for adoption.” Smolin, *Child Laundering*, *supra* note 23, at 128.

122. See Graff, *They Steal Babies*, *supra* note 78 (noting that Guatemalan adoptions in the United States were limited due to “systematic fraud and corruption.”),

165 a decade before).<sup>123</sup> The rise in international adoptions from Ethiopia led to a parallel increase in the number of private adoption agencies licensed in Ethiopia.<sup>124</sup> In 2003, Ethiopia had licensed only three agencies to facilitate intercountry adoptions.<sup>125</sup> This number grew to twenty-four in early 2007, and by 2008 there were seventy licensed agencies facilitating adoptions from Ethiopia.<sup>126</sup>

Inspections by both US and Ethiopian officials, as well as reports from adoptive families, nonprofits, and some adoption agency officials, revealed that the increased demand for Ethiopian children had resulted in exactly the types of fraud and exploitation predicted.<sup>127</sup> Professor Marianne Blair summarizes the many allegations as including:

[S]olicitations and bribes to parents and families to place their children; falsified documents; middlemen actively buying and selling children; stash houses used to house children for only a few hours or days until they could be shipped to urban areas where no one would know their families; shakedowns from orphanage directors to agencies demanding cash or project funding for placements; payments to police to bring infants and young children to private agencies instead of government-run orphanages; and diversion of young children from domestic to international placement.<sup>128</sup>

One indicator of fraud was that nearly half of the adoptions were being sourced by a single Ethiopian province: Southern Nations, Nationalities, and People's Region (SNNPR). The abundance of children adopted out of this region suggested that some, if not many, were being "produced" through coercion and collusion with orphanages and even law enforcement.<sup>129</sup> A researcher for the U.S. Embassy in Ethiopia learned of allegations that orphanages in the SNNPR were bribing parents to give up their children without saying where the children would be going.<sup>130</sup>

123. *See id.* ("The number of children adopted each year had spiked dangerously, from 165 in 2001 to 2,511 in 2010, an exponential increase.")

124. *See* BLAIR ET AL., *supra* note 5, at 827 (saying there were over seventy licensed agencies).

125. Graff, *They Steal Babies*, *supra* note 78.

126. *Id.* The Hague's Guide to Good Practice No. 2 relating to the accreditation of non-governmental entities under the Hague Convention indicates that the accreditation of children should be tied to "the real needs of children." *Accreditation and Adoption Accredited Bodies: General Principles and Guide to Good Practice*, Guide No. 2, HAGUE CONF. ON PRIVATE INT'L LAW, 27, para. 83 (2012). The Guide further suggests that some Hague states of origin choose to limit the number of accredited bodies operating within their territory not because they do not have many children in need of homes, but because "the lack the capacity to assess eligibility for adoption." *Id.* at 42, para. 170. The concerns that (a) the number of accredited bodies operating in Ethiopia did not reflect the actual needs of the adoption system or that (b) Ethiopia lacked the capacity to effectively assess each child's eligibility for adoption make this increase in the number of licensed agencies particularly troubling.

127. BLAIR ET AL., *supra* note 5, at 827.

128. *Id.*

129. Graff, *They Steal Babies*, *supra* note 78.

130. *Id.*

In another area, Addis Ababa, it became clear that some institutions held out to be orphanages were really just “stash houses” where children were not cared for, but rather temporarily stored before they could be ferried to ignorant adoptive parents who were able to pay a significant adoption fee.<sup>131</sup> One investigator visited the Selenaat Orphanage in Addis Ababa and reported:

The orphanage is a 5 room house, but we did not see any evidence one would expect of accommodating children there: no beds, no toys, no nanny or other attendant, no clothes, no food stores. When questioned for what the house is used, [an orphanage employee] told us it is a temporary place for the children; that they stay for just for few hours or 1 day until they are transferred.<sup>132</sup>

A representative from an American adoption agency who worked in Addis Ababa spoke of orphanage directors “shaking down” adoption agencies and demanding more money per orphan.<sup>133</sup> The representative also spoke of orphanages refusing to allow children to be adopted by Ethiopian parents, despite the widely accepted international guideline—agreed upon by the UN CRC and the Hague Convention—that domestic adoption, when available, is to be given preference over international adoption.<sup>134</sup> This is almost certainly because orphanage directors can get higher payments from international adoptive parents than domestic ones.

Other parts of the country suffered from similar evils.<sup>135</sup> One orphanage even offered small business “grants” to young Ethiopian women, but further investigation revealed that those “grants” were only going to pregnant women who relinquished their babies.<sup>136</sup> Another orphanage, together with an adoption agency, pressured all the single parents in an entire township to “register” so those profiting from adoption could convince them to hand over their children.<sup>137</sup> These were the types of situations from which Ethiopia children were “matched” with Western families, almost all of whom believed they

131. *Id.*

132. *Id.*

133. *Id.*

134. *See id.*; *see, e.g.*, UN CRC, *supra* note 28, art. 21(b) (stating that inter-country adoption is considered only there are not options in “the child’s country of origin”); Hague Convention, *supra* note 30, at 1135 (“The Convention’s Preamble recognizes that the child, for the full and harmonious development of its personality, should grow up in a family environment and that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in its State of origin.”); *see also* Bartholet, *Human Rights*, *supra* note 8, at 92 (“UNICEF and many other international children’s organizations promote the idea that unparented children should be kept at almost all costs in their country of origin”). This principle is referred to as the “subsidiarity” principle. INFORMATION BROCHURE, *supra* note 1, at 5 (“[C]ontracting States recognise that a child should be raised by his or her birth family or extended family whenever possible. If that is not possible or practicable, other forms of permanent care in the State of origin should be considered.”).

135. *See* Graff, *They Steal Babies*, *supra* note 78.

136. BLAIR ET AL., *supra* note 5, at 827; Graff, *They Steal Babies*, *supra* note 78.

137. BLAIR ET AL., *supra* note 5, at 827; Graff, *They Steal Babies*, *supra* note 78.

were acting ethically or even altruistically.<sup>138</sup> Many adoptive parents remained ignorant of their children's beginnings until the children became able to express themselves in English—sometimes revealing that their biological parents were not deceased as the adoptive parents had been told.<sup>139</sup>

## 2. The International Response to Ethiopia's Adoption Problems

In 2008, the adoption staffers at the U.S. Embassy in Ethiopia began conducting surprise visits to American adoption agencies operating in Ethiopia and some Ethiopian orphanages with whom the agencies worked.<sup>140</sup> When the staffers became aware of suspicious activity, they reported it to the Ethiopian government, which had the authority to delicense the corrupt agencies.<sup>141</sup> In July 2008, the Ethiopian foreign minister revealed to a US ambassador that the Ethiopian government was considering stopping intercountry adoptions altogether, having "concluded that middlemen were actively buying and selling children for intercountry adoptions."<sup>142</sup> The United States and the Joint Council on International Children's Services (JCICS), a nongovernmental organization, urged the government to delicense crooked adoption agencies without shutting down adoptions entirely.<sup>143</sup> The Ethiopian government agreed not to suspend all intercountry adoptions and conducted a review of all adoption service providers.<sup>144</sup> However, even after inspection, the government did not delicense any agencies, even those known to have behaved unethically.<sup>145</sup> Ethiopian officials told the U.S. Embassy that they blamed Ethiopian orphanages rather than American adoption agencies for the corruption, but felt the Ethiopian federal government had too little control over regional and local governments to make effective changes at those levels.<sup>146</sup> Despite the United States' attempts to regulate its own agencies in Ethiopia, corruption persisted.<sup>147</sup>

Following the peak level of intercountry adoptions in 2010, the Ethiopian government's Ministry of Women, Children, and Youth Affairs (MOWCYA), which governed adoptions throughout Ethiopia, resolved to fight the corruption by dramatically slowing down adoptions.<sup>148</sup> In other countries, like Guatemala, Vietnam, and Cambodia, the United States had endorsed halting intercountry

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138. See Graff, *They Steal Babies*, *supra* note 78 (discussing the fallacy that millions of healthy children are waiting in orphanages for adoption).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

adoptions as a way to deal with corruption, but with regard to Ethiopia, it felt that the government *did* take the problem seriously and wanted to partner with Ethiopian officials in cleaning up the system.<sup>149</sup>

In 2011, the US and Ethiopian governments entered into a new process together.<sup>150</sup> The process, called PAIR (Pre-Adoption Immigration Review), involved the authorization of the U.S. Citizenship and Immigration Services (USCIS) to conduct investigations into each child's eligibility for adoption before the child was legally adopted in an Ethiopian court.<sup>151</sup>

This new arrangement did contribute to a decrease in the number of intercountry adoptions.<sup>152</sup> By 2016, US parents adopted only 182 Ethiopian children.<sup>153</sup> The number of licensed adoption agencies in Ethiopia also declined, and intercountry-adoption proponents hoped that this new system would mean that a complete moratorium was no longer a possibility.<sup>154</sup>

### 3. Recent Developments in Ethiopia

In 2017, the status of intercountry adoption in Ethiopia took a surprising turn.<sup>155</sup> On April 21, 2017, the Ethiopian Prime Minister's Office declared that it was immediately suspending all intercountry adoptions.<sup>156</sup> On May 26, 2017, the U.S. Department of State issued an update saying that MOWCYA would resume processing intercountry-adoption cases but would "only issue negative letters," meaning it intended to decline all applications for overseas adoptions.<sup>157</sup> The Department of State further explained that this policy would apply to "all intercountry adoption cases, regardless of their stage in the process or the nationality of the adoptive parents," and noted that there had been no formal communication between the Ethiopian government and US officials concerning the suspension.<sup>158</sup> The State Department also

149. *Id.*

150. BLAIR ET AL., *supra* note 5, at 828; Graff, *They Steal Babies*, *supra* note 78.

151. BLAIR ET AL., *supra* note 5, at 828; Graff, *They Steal Babies*, *supra* note 78.

152. *See Statistics*, *supra* note 21 (showing 2,511 adoptions from Ethiopia to the United States in 2010, 1,732 in 2011, 1,567 in 2012, 993 in 2013, 716 in 2014, 335 in 2015, and only 182 adoptions in 2016).

153. *Id.*

154. BLAIR ET AL., *supra* note 5, at 828; Graff, *They Steal Babies*, *supra* note 78.

155. *See Suspension of Adoptions*, *supra* note 95 (stating that the Ethiopian Prime Minister's Office declared an immediate suspension of intercountry adoptions).

156. *Id.*

157. *Update: Ethiopia Suspension of Adoptions*, U.S. DEPT OF STATE (May 26, 2017), <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/ethiopia-adoption-notice-26may2017.html> [<https://perma.cc/BHA4-ESWB>] (archived Feb. 28, 2018).

158. *Id.* (claiming the lack of communication was due to the Prime Minister's Office holding of "government-wide, minister-level meetings with various Ethiopian government ministries throughout the month of May").

used the May 26, 2017 update to recommend that prospective parents consider other countries for international adoptions.<sup>159</sup>

In June 2017, MOWCYA issued the necessary documents to begin the immigration process for some Ethiopian children that had already been legally adopted by American parents.<sup>160</sup> However, the status of many intercountry adoptions remained unclear.<sup>161</sup> This resulted in some prospective adoptive parents waiting over a year for the appropriate regional office to issue the documents required for adopted children to travel to their new homes.<sup>162</sup> In November, the Ethiopian government made clear that it would only complete adoptions that had reached a certain point in the administrative process.<sup>163</sup> This meant that the adoptions of parents who had been matched with a child, but had not reached the requisite point in the paperwork, were called off completely.<sup>164</sup>

All the while, adoption agencies continued to make new referrals in Ethiopia and encouraged adoptive parents to accept them.<sup>165</sup> In response to this practice, the U.S. Department of State issued another adoption notice, expressing its frustration with these adoption agencies and stating outright that “[t]he Embassy has received no information indicating that the Ethiopian Ministry of Women and Youth Affairs’ decision will change even if regional processing or court processing continues to occur.”<sup>166</sup> This practice was especially problematic because the adoption agencies often required significant, nonrefundable fees and sometimes required adoptive parents to pay monthly fees to provide for the needs of the Ethiopian child with whom

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159. *Id.*

160. *See Update on Suspension of Adoptions from Ethiopia*, U.S. DEP’T OF STATE (June 16, 2017), <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/ethiopia-adoption-notice-16june2017.html> [https://perma.cc/LXQ4-6D8N] (archived Feb. 28, 2018).

161. *See id.* (“The State Department has not received information from the Ethiopian government about which additional cases may be allowed to continue. To date, the Ethiopian government has not released an official statement on the suspension or the future of intercountry adoption from Ethiopia.”).

162. *Ethiopia Adoption Notice: Delays in Processing Adoptions*, U.S. DEP’T OF STATE (Sept. 29, 2017), <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/ethiopia-adoption-notice-29sept2017.html> [https://perma.cc/C9M3-RHVA] (archived Feb. 28, 2018).

163. *Ethiopia Adoption Notice: Latest Information Regarding Adoptions*, U.S. DEP’T OF STATE (Nov. 8, 2017), <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/ethiopia-adoption-notice-08nov2017.html> [https://perma.cc/BB49-DSP8] (archived Feb. 28, 2018) (explaining that “the ONLY adoption cases that the government of Ethiopia will allow to proceed to completion under Ethiopia’s current law are cases with a completed Form I-604 determination OR cases that have a Form I-604 determination that is currently pending with the U.S. Embassy in Addis Ababa”).

164. *Id.*

165. *Ethiopia Adoption Notice: Additional Information Concerning New Referrals*, U.S. DEP’T OF STATE (Dec. 12, 2017), <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/ethiopia-adoption-notice--additional-information-concerning-new-.html> [https://perma.cc/D3WX-5CCD] (archived Feb. 28, 2018).

166. *Id.*



they had been matched.<sup>167</sup> If these “adoptions” were carried out to the point of finalization in a regional court, the adoptive parents may assume legal and financial responsibility for a child they would never be permitted to bring home due to MOWYCA’s withholding of necessary documents.<sup>168</sup>

On January 9, 2018, the Ethiopian Parliament passed new legislation banning all intercountry adoptions.<sup>169</sup> The state-run Ethiopian News Agency (ENA) cited concerns over abuse by foreign families as the reason for the ban.<sup>170</sup> Specifically, the ENA said that intercountry adoption had made Ethiopian children “vulnerable to identity crisis, psychological problems and violation of rights.”<sup>171</sup> That is, Ethiopian legislators cited concerns that their native children were being mistreated in their new homes overseas, and made no formal reference to corrupt adoption practices as the reason for the law.<sup>172</sup> Many news sources have connected the ban to the conviction of a US couple for the death of their thirteen-year-old daughter who had been adopted from Ethiopia.<sup>173</sup> The girl, Hana Williams, died in 2011 of hypothermia and malnutrition after she had been forced to remain outside on a cold rainy night.<sup>174</sup> Despite concerns about the mistreatment of Ethiopian adoptees, some Ethiopian lawmakers still worried that the domestic childcare resources in Ethiopia would be unable to effectively handle the aftermath of the ban.<sup>175</sup>

167. *Id.*

168. *Id.*

169. *Ethiopia Adoption Notice: Ethiopia Passes Legislation Banning Intercountry Adoption*, U.S. DEPT OF STATE (Jan. 11, 2018), <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/ethiopia-adoption-notice--ethiopia-passes-legislation-banning-in.html> [<https://perma.cc/PA9V-YXY8>] (archived Feb. 28, 2018).

170. Bijan Hosseini, *Ethiopia bans foreign adoption*, CNN (Feb. 3, 2018), <https://www.cnn.com/2018/01/11/africa/ethiopia-foreign-adoption-ban/index.html> (quoting ENA concerns that children adopted by foreign families had been exposed to “various crimes and social crisis in the country they grew up in”).

171. *Id.*

172. *Id.*

173. *See, e.g., Ethiopia Bans Foreign Adoptions*, BBC NEWS (Jan. 10, 2018), <http://www.bbc.com/news/world-africa-42635641> [<https://perma.cc/GD7H-GFQJ>] (archived Feb. 25, 2019) (saying the death and homicide case led to a discussion about international adoption); Hosseini, *supra* note 170; Elias Meseret, *Ethiopia’s Lawmakers Approve Ban on Foreign Adoptions*, AP NEWS (Jan. 10, 2018), <https://www.apnews.com/b83a81d497d044b117406bcb4b10216> [<https://perma.cc/6FBF-2HJG>] (archived Feb. 25, 2019) (“But the death in the U.S. in 2011 of an Ethiopia-born girl, with her adoptive mother convicted of homicide by abuse, led to an outcry back home, with Ethiopia that year reducing foreign adoptions by 90 percent.”).

174. Doug Stanglin, *Prosecution says adopted girl died in ‘house of horrors,’ USA TODAY* (Sept. 6, 2013), <https://www.usatoday.com/story/news/nation/2013/09/06/ethiopian-adopted-hana-williams-mount-vernon-washington-state-house-of-horrors-trial/2776027/> [<https://perma.cc/AEU9-8J7P>] (archived Feb. 24, 2018).

175. Meseret, *supra* note 173.

#### IV. WHY THE CURRENT LEGAL FRAMEWORK FALLS SHORT OF PREVENTING THESE CRISES

##### A. *The Imbalance of Resources and Obligations between Sending and Receiving States*

As of 2018, ninety-nine countries have become members to the Hague Convention.<sup>176</sup> Of the seventy-six countries that have filed Hague profiles, twenty-five operate as receiving states, thirty-eight operate as states of origin, and thirteen operate as both.<sup>177</sup> Nearly every nation operating as a receiving state is located in western Europe, with the additions of the United States, Canada, Australia, and New Zealand.<sup>178</sup> The only exceptions are a few eastern European countries, a handful of countries that operate as both sending and receiving states, and Venezuela.<sup>179</sup> The states of origin are largely eastern European nations, South and Central American nations, African nations, and South and Southeast Asian nations.<sup>180</sup> Intercountry-adoption scholars have framed the relationship between most sending and receiving states as “a linkage between developing nations and rich nations.”<sup>181</sup>

While there are exceptions, the vast majority of states of origin lack the financial resources and governmental infrastructure to carry out the tasks assigned to them by the Hague Convention.<sup>182</sup> The Hague Conference itself admitted, as recently as 2018, that many states lack “the necessary resources to implement an efficient child protection system.”<sup>183</sup> Some states avoid the Hague Convention altogether, never acceding to it. Lack of finances and infrastructure that are required for successful implementation are two reasons some countries avoid

176. *Status Table, 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONF. ON PRIVATE INT’L LAW, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69> (last visited Mar. 1, 2019) [<https://perma.cc/G7H6-P983>] (archived Feb. 25, 2019) [hereinafter *Status Table*].

177. *Country Profiles—State Responses*, HAGUE CONF. ON PRIVATE INT’L LAW, <https://www.hcch.net/en/publications-and-studies/details4/?pid=6221&dtid=42> (last visited Mar. 1, 2019) [<https://perma.cc/6UH9-TTMT>] (archived Feb. 25, 2019) (clicking on each individual country will reveal that country’s profile).

178. *Id.*

179. *Id.*

180. *Id.* Note that no nations under Islamic law are members to the convention because adoption is not recognized by Islamic law.

181. Smolin, *Poverty*, *supra* note 8, at 436; see also Bartholet, *Propriety, Prospects and Pragmatics*, *supra* note 1, at 182–83 (“It can be viewed as the ultimate form of exploitation, the taking by the rich and powerful of the children born to the poor and powerless.”).

182. See Dillon, *supra* note 8, at 201 n.67 (“It is undoubtedly difficult for countries with little in the way of governmental and administrative infrastructure to meet the costs of implementing the Hague Convention.”).

183. 25 YEARS, *supra* note 60, at 15.

ratification.<sup>184</sup> For others, the difficulty advancing the goals of the Hague Convention on their own leads many sending nations to turn to private actors for assistance with the administrative burden.<sup>185</sup> Articles 9 and 22 of the convention allow the fulfillment of many steps in the process by actors accredited by the state of origin's central authority or even unaccredited persons.<sup>186</sup> This reliance on the assistance of private agencies incentivizes sending states to do as Ethiopia did and refuse to delicense agencies accused of suspicious behavior.<sup>187</sup>

Despite these resource discrepancies, a simple evaluation of the text of the Hague Convention suggests that the administrative burden placed on states of origin is greater than that placed on receiving states.<sup>188</sup> Receiving states are first tasked with determining that prospective adoptive parents are "eligible" and "suited to adopt."<sup>189</sup> Second, they are responsible for ensuring that the adoptive parents have received appropriate counseling.<sup>190</sup> Third, and finally, the receiving states must determine that the child to be adopted will actually be authorized to permanently reside in their country.<sup>191</sup>

States of origin, on the other hand, must: (1) establish that the child is suitable for adoption; (2) consider permanent placements within their state and determine that intercountry adoption is truly in the best interests of the child; (3) ensure that the biological parents were appropriately counseled and informed of the effects of their decision, and that their consent was freely given, given in the correct legal form, not induced by compensation of any kind, not later withdrawn, and given only after the birth of the child; and (4) ensure that the child has been appropriately counseled and informed of the effects of the adoption, that his or her wishes have been considered, and that the child's consent (where required) was given freely, in the correct form, and not induced by any kind of compensation.<sup>192</sup> Sending countries are responsible for overseeing every stage in the process where corruption has tended to occur: namely, ensuring that children are "adoptable" and that consents to the adoption were properly received.

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184. Caeli Elizabeth Kimball, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 DENV. J. INT'L L. & POL'Y 561, 573 (2005).

185. See Dillon, *supra* note 8, at 239 (discussing the allowance of "facilitators" to run the adoption system because implementation is difficult).

186. Hague Convention, *supra* note 30, arts. 9, 22.

187. See Graff, *They Steal Babies*, *supra* note 78 (detailing the large growth in adoption agencies in Ethiopia from three in 2000 to more than seventy in 2008).

188. Compare Hague Convention, *supra* note 30, art. 5 (listing three tasks for receiving states), with *id.* art. 4 (listing ten tasks for states of origin).

189. *Id.* art. 5(a).

190. *Id.* art. 5(b).

191. *Id.* art. 5(c).

192. *Id.* art. 4.

### B. *The Role of Private Adoption Agencies in Intercountry Adoption*

The Hague Convention's standards for allowing nongovernmental actors to carry out various steps in the intercountry-adoption process are exceedingly vague. Article 10 states that "[a]ccreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted."<sup>193</sup> Article 22 provides that unaccredited bodies or persons may also carry out many of the procedural requirements for adoptions so long as they "meet the requirements of integrity, professional competence, experience and accountability of that State," and "are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption."<sup>194</sup> Yet nowhere does the Hague Convention give any guidance as to what minimum standards of competence, integrity, and experience should be.<sup>195</sup>

Article 11 does direct that accredited bodies "pursue only non-profit objectives," and Article 32 states that "[n]o one shall derive improper financial or other gain from an activity related to intercountry adoption."<sup>196</sup> However, Article 32 also provides that persons involved in the adoption are entitled to "reasonable professional fees" and remuneration so long as it is not "unreasonably high in relation to services rendered."<sup>197</sup> Again, the Hague Convention fails to give guidance as to what constitutes a "reasonable fee" and which fees are "unreasonably high."<sup>198</sup>

To answer some of these questions surrounding accredited bodies, the Hague's Permanent Bureau published a Guide to Good Practice No. 2 (Guide No. 2) in 2012 concerning "Accreditation and Adoption Accredited Bodies."<sup>199</sup> Guide No. 2 explains that nonaccredited bodies and persons permitted to perform some duties under Article 22 are not bound by all the same requirements as accredited bodies.<sup>200</sup> Specifically, Guide No. 2 states that nonaccredited persons are not bound by the "non-profit objectives" requirement of Article 11(a).<sup>201</sup> It explicitly states that Article 22 nonaccredited bodies "may undertake adoptions for profit."<sup>202</sup> Professor Dawn Watkins summarized the reaction of many to this revelation: "The fact that individuals operating on a 'for profit' basis can be involved in a Hague-compliant [intercountry adoption] is shocking."<sup>203</sup> Professor Watkins correctly points out that allowing adoptions to occur on a for-profit basis goes

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193. *Id.* art. 10.

194. *Id.* art. 22.

195. *See id.* arts. 10, 22.

196. *Id.* arts. 11(a), 32.

197. *Id.* art. 32.

198. *See id.*

199. Guide No. 2, *supra* note 126.

200. *Id.* at 126, para. 632.

201. *Id.*

202. *Id.*

203. Watkins, *supra* note 10, at 399.

directly against the Hague Convention's stated objective in Article 1(b) to "prevent the abduction, the sale of, or traffic in children."<sup>204</sup> This interpretation of Article 11(a) opens an enormous back door for private actors in the intercountry-adoption process to avoid scrutiny even when they are making a profit off of each adoption they procure.<sup>205</sup>

The Hague Convention itself and Guide No. 2 give rise to concerns that the state in which a body is authorized or accredited—very frequently the state of origin—holds the majority of power for determining if it will stay authorized or accredited. Receiving states have more of a role in making the initial accreditation determination. Article 12 of the Hague Convention requires that "[a] body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both states have authorised it to so do." It is unclear from the terms of the convention itself whether the same is required for nonaccredited persons or bodies,<sup>206</sup> but Guide No. 2 suggests that dual approval is still preferred.<sup>207</sup> Additionally, in its "Model Criteria for Accreditation of Bodies in Receiving States," Guide No. 2 recommends not allowing accredited bodies to commence their work in the state of origin until they have been duly authorized by the receiving state as well.<sup>208</sup>

However, in trying to proscribe the best practices for accreditation and monitoring of private bodies involved in adoption, even Guide No. 2 leaves several oversight powers solely in the hands of the state that accredited the body to begin with.<sup>209</sup> The Model Criteria provide that accredited bodies should be open to inspection at any time by the competent authorities of the state in which they are accredited.<sup>210</sup> The Model Criteria also provide that accreditation may be revoked or suspended by the competent authority of the state of origin if it has, in some way, violated the principles of the Hague Convention or the laws or regulations of that state.<sup>211</sup> Thus, even the Model Criteria leave no room for the receiving state to conduct investigations into the agencies that are processing the adoptions of children to their countries, nor the power to terminate the accreditation so long as the state of origin has no objection to its continued operation.

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204. *Id.* at 399–400 (citing Hague Convention, *supra* note 30, art. 1(b)).

205. Prof. David Smolin points out another problem with tying intercountry adoptions to financial incentives: "[p]ersons who financially benefit from the intercountry adoption system become invested in the lack of alternative systems" such as child and human welfare systems. David M. Smolin, *The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties*, 2013 UTAH L. REV. 1065, 1076 (2013).

206. Watkins, *supra* note 10, at 404.

207. Guide No. 2, *supra* note 126, at 130, para. 655.

208. *Id.* at annex 1, para. 3.4(a).

209. *Id.* at annex 1, para. 4.2.

210. *Id.*

211. *Id.* at annex 1, para. 3.6.

### C. Existing Policy Proposals

#### 1. Full Moratoria

One response to corruption in intercountry adoption is to ban this form of adoption altogether, either temporarily or permanently. While a seemingly dramatic approach, this has often been the response of sending or receiving nations when reports of corruption have surfaced—not only in Guatemala and Ethiopia, but in other nations as well.<sup>212</sup> The 2001 moratorium on international adoptions from Romania led some to write in favor of maintaining the ban indefinitely.<sup>213</sup> One early argument in favor of the ban was that the child welfare system in Romania could only be reformed if intercountry adoptions were halted.<sup>214</sup> In other words, some thought that the availability of intercountry adoption lowered the urgency of repairing a broken child welfare system, leaving the many children who would not be adopted in devastating conditions.<sup>215</sup> Another concern was that intercountry adoption was too influenced by outside influences like adoption lobbies and political factors to tell if promoting adoption abroad was really in the best interests of the children.<sup>216</sup> Professor Andrew Bainham advocated for an even bolder argument in favor of a permanent moratorium in Romania.<sup>217</sup> Bainham argued that “children are abandoned *precisely because* of the availability of international adoption.” He posited that if intercountry adoption were banned, parents would no longer have an incentive to surrender their children to others for money.<sup>218</sup> Bainham further argued that international adoption diverts resources away from domestic adoption as well as more useful preventive measures via social welfare programs.<sup>219</sup>

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212. See, e.g., Azzam Ameen, *Sri Lankan baby trade: Minister admits illegal adoption trade*, BBC (Sept. 21, 2017), <https://www.bbc.com/news/world-asia-41339520> [<https://perma.cc/DT2M-YBKK>] (archived Apr. 10, 2019) (“Sri Lanka temporarily banned intra-country adoptions in 1987 when one ‘baby farm’ was raided, and 20 newborns were found inside.”); Iusmen, *supra* note 59, at 8–10 (detailing the circumstances which led to the moratorium on international adoptions from Romania in 2001).

213. See, e.g., Bainham, *supra* note 44, at 234–35 (“Romania has made substantial strides towards a child protection system which should ultimately result in the total closure of large-scale institutions.”); Iusmen, *supra* note 59, at 8–10 (discussing Romania’s moratorium on international adoptions).

214. See Iusmen, *supra* note 59, at 8–9 (“[T]he system could not be reformed if children did not become part of the system because they had been sent abroad.”).

215. *Id.*

216. See *id.* at 20–21 (“[I]t appears that *exogenous* factors, such as adoption lobbies, and *endogenous* processes, such as the EU’s embrace of a child’s rights agenda, provided the EU with the rationale to endorse a pro-ICA role and scope inside the Union . . .”).

217. Bainham, *supra* note 44, at 234–35.

218. *Id.* at 235.

219. *Id.*

Other scholars have found this view of intercountry adoption extreme.<sup>220</sup> Professor Elizabeth Bartholet, a major proponent of intercountry adoption, argues that even if there are abuses in the intercountry-adoption system, “shutting down international adoption is *wrong*.”<sup>221</sup> She feels that the harm that would occur for the many children who could be helped with intercountry adoptions is not worth these other goals.<sup>222</sup> She goes as far as to argue that intercountry adoption serves not only the interests of the children and the adoptive parents, but also the birth parents who want the best for their children.<sup>223</sup>

## 2. The “Aid Rule”

Professor David Smolin proposed another solution to corruption in intercountry adoption: what he calls the “Aid Rule.”<sup>224</sup> He would require “family preservation assistance” be offered to birth parents living on \$1 per day before they could legitimately relinquish their children to be eligible for intercountry adoption.<sup>225</sup> The family preservation assistance is financial assistance to be given to parents considering relinquishing their children in order to eliminate the number of birth parents who want to raise their children but allow them to be adopted out of financial desperation.<sup>226</sup> Smolin accurately points out the “particular irony” that many adoptive parents spend nearly \$30,000 on adopting a child from another birth country when several hundred dollars would be enough to allow the birth parents to continue caring for the child.<sup>227</sup> Even some adoptive parents have expressed doubts over whether it would be better to give the money spent on the adoption to the child’s birth family.<sup>228</sup>

Smolin argues that many impoverished parents would be inclined to keep their children, thereby limiting the number of children who are “sold” in intercountry adoption contrary to the objectives of the Hague Convention, if they were given even minimal amounts of aid to afford their basic needs.<sup>229</sup> He argues that any consent from those in extreme

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220. See, e.g., Bartholet, *Human Rights*, *supra* note 8, at 92–93 (arguing that despite its faults international adoption is good).

221. *Id.* at 96.

222. *Id.*

223. *Id.* at 99.

224. Smolin, *Poverty*, *supra* note 8, at 438 (explaining the “Aid Rule”).

225. *Id.* at 415.

226. *Id.*

227. *Id.* at 430–31.

228. See Jane Gross & Will Connors, *Surge in Adoptions Raises Concern in Ethiopia*, N.Y. TIMES, June 4, 2007, at A1, A16 (quoting an adoptive mother and father: “Should we just give all the money we’re spending on this to the children’s mother? . . . It was obvious the birth mother loved her children . . . She said to us, “Thank you for sharing my burden.””).

229. See Smolin, *Poverty*, *supra* note 8, at 430–31 (noting that the Preamble to the Hague Convention prioritizes children remaining with their natural families).

poverty should be subject to serious scrutiny.<sup>230</sup> He believes the “Aid Rule” would strengthen the system of intercountry adoption by reducing ethical concerns regarding the vulnerability of poor birth parents.<sup>231</sup>

Smolin proposes that the adoptive parents give the aid.<sup>232</sup> He suggests that an increase in the cost of an adoption for adoptive parents already spending tens of thousands on an adoption would be manageable and perhaps adoptive parents would appreciate the additional assurance.<sup>233</sup> He even suggests capping the fees of facilitators, another source of corruption, to offset some of the cost.<sup>234</sup>

While his idea makes sense in theory, practical considerations weigh against its overall effectiveness. Smolin himself acknowledges that many will be skeptical of a suggestion that pumps more money into a system that is so easily corruptible by unethical financial incentives.<sup>235</sup> While Smolin is probably correct in assuming that many would be willing to pay,<sup>236</sup> tapping adoptive parents for more money cannot itself be an adequate solution. There are already substantial amounts of money in the system—of which the large majority is provided by adoptive parents and passed through private agencies. Smolin proposes solving this issue on a country-by-country basis, where each system is evaluated for the best method of acquiring and distributing aid.<sup>237</sup> Still, his proposed solution is not persuasive enough to ease the concern that more money in the intercountry-adoption system will likely lead to more people misusing the system for personal gain. It is also worth noting that the example solutions Smolin gives rest on the existence and administrative capacity of a family welfare system in the sending state.<sup>238</sup> While there can be no doubt that poverty plays a part in the corruption, many sending countries also lack the infrastructure to implement all the programs the international community asks them to implement. Smolin’s “Aid Rule” adds to the already too-large administrative burden on sending states.

230. See *id.* at 440–41 (comparing the consent of destitute parents to the consent of “some impoverished persons . . . to the use of their bodies (or their children’s bodies) for paid sexual services in order to feed themselves and their children.”).

231. See *id.* at 445 (noting that the Aid Rule’s transparency would alleviate some of the propensity for fraud in the current system).

232. *Id.*

233. *Id.*

234. *Id.*

235. See *id.* at 449 (“Given a history in which intercountry adoption ‘donations’ sometimes have been misappropriated, and become a part of the ‘price’ or motivation to obtain children illicitly, creating yet another kind of donation seems risky.”) (quoting Smolin, *Child Laundering*, *supra* note 23).

236. *Id.* at 445.

237. See *id.* at 452 (“The solution to this dilemma necessarily would have to vary with the particular circumstances of each significant sending nation.”).

238. See *id.* (suggesting that the family welfare systems operate independently from the intercountry adoption system, certify for every adoption that reasonable family preservation efforts were made and failed, and be free of financial incentive for making children available for international adoption).



### 3. A Global Effort to Regulate Intercountry Adoption

Other scholars have advocated for a global effort to combat corruption. There are two significant proposals that require a neutral, international entity: (1) a global fund to assist countries in implementing the requirements of the Hague Convention,<sup>239</sup> and (2) a regularly convening global body to assess needs and prescribe rules regarding intercountry adoption.<sup>240</sup>

#### a. A Global Assistance Fund

The Hague's Permanent Bureau has actually embraced the idea of a global fund to assist countries in the effective implementation of the Hague Convention.<sup>241</sup> Acknowledging the burdens of implementation on some under-resourced nations, the bureau developed the Intercountry Adoption Technical Assistance Programme (ICATAP) to aid the operation of the Hague Convention in these countries.<sup>242</sup> The Permanent Bureau operates ICATAP, sometimes in partnership with other knowledgeable individuals or groups.<sup>243</sup> According to the Hague's information brochure on the Hague Convention, assistance may include helping countries create and review necessary legislation and regulations, giving advice to central authorities, or offering training to relevant actors in the adoption process.<sup>244</sup> Prior to the creation of ICATAP, Professor Sara Dillon had suggested the establishment of a fund and proposed that it be funded by some percentage of adoption fees paid by the adoptive parents.<sup>245</sup> The Permanent Bureau, the central authorities of states with good practices, or an external consultant, sometimes in co-operation with UNICEF or International Social Services, provides ICATAP's technical assistance.<sup>246</sup>

239. See, e.g., Dillon, *supra* note 8, at 239–40 (“It seems clear that the Hague Convention requires the establishment of a fund.”).

240. See Blair, *Safeguarding*, *supra* note 32, at 401–02 (advocating for the development of a “small but permanent oversight body” to serve the needs of domestic and international policymakers); Dillon, *supra* note 8, at 254 (“International human rights principles, applied in light of the demands of the human psyche, require a global regime to deal with children without families.”).

241. INFORMATION BROCHURE, *supra* note 1, at 12 (noting that the Hague Convention Permanent Bureau established the “ICTAP . . . to provide assistance directly to the governments of certain States.”).

242. See *id.*

243. See *id.* (“[S]ubject to the availability of funding, ICATAP is operated directly by the Permanent Bureau, as well as in co-operation with international consultants and experts, and international organisations such as UNICEF.”).

244. *Id.* at 12–13 (also listing “help in developing the tools to achieve the above activities,” “providing judges with relevant training,” and “providing information and advice to States considering ratification or accession” as possible forms of assistance).

245. Dillon, *supra* note 8, at 239–40.

246. 25 YEARS, *supra* note 59, at 35.

The information brochure acknowledges that the operation of ICATAP is “[s]ubject to the availability of funding.”<sup>247</sup> While a global fund may well help developing countries better implement the provisions of the Hague Convention, reliance on donations of member states or even fees from adoptive parents leaves this suggestion vulnerable. In its 2010 report, the Hague Conference’s “Special Commission on the practical operation of the 1993 Hague Convention” (Special Commission) simultaneously recognized “the great value” of ICATAP and the “limited resources available to the Permanent Bureau to maintain ICATAP.”<sup>248</sup> Efforts to maintain ICATAP or create other assistance funds should be encouraged, but on their own they are not sufficient. A holistic approach to eliminating corruption in intercountry adoptions requires more than just the existence of funds for training.

#### b. A Global Intercountry Adoption Oversight Body

Another proposal for solving problems of corruption in intercountry adoption is the establishment of a global agency to oversee and study the operation of the Hague Convention’s principles.<sup>249</sup> Professor Dillon calls the current nationally based system “piecemeal” and “confusing.”<sup>250</sup> In her opinion, the current structure results in adoptions that are wrongly regulated in some states (leaving truly adoptable children without homes) and under-regulated in others (leading to corruption).<sup>251</sup> She, therefore, believes that a new global body must be developed to best represent the needs of children in intercountry adoption.<sup>252</sup>

Professor Marianne Blair also advocates for the creation of a global oversight body.<sup>253</sup> Blair is less critical of the current regime, but nevertheless finds that a small, permanent, and international oversight body would aid both domestic and international policymakers in reducing corruption.<sup>254</sup> Both Blair and Dillon suggest

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247. INFORMATION BROCHURE, *supra* note 1, at 12.

248. *Id.* at 21.

249. See Blair, *Safeguarding*, *supra* note 32, at 401–02 (“Both the prevention of trafficking and the implementation of strategies to encourage domestic placement without abandoning children to state care would be greatly enhanced by development of an international oversight body.”); Dillon, *supra* note 8, at 254 (“[A] separate, objective, and specialized agency . . . should be set up through a widely representative conference.”).

250. Dillon, *supra* note 8, at 254.

251. *Id.*

252. See *id.* (going so far as to say that a global regime is required by international human rights principles).

253. See Blair, *Safeguarding*, *supra* note 32, at 401–03 (concluding that an international oversight body could more adequately monitor criminally induced consent, fraud, or corruption and provide an avenue for quick and efficient response to international adoption crises).

254. See *id.* at 401–02 (noting that “prompt assessment of crises related to international adoption may not be easily addressed within [the current] framework” while a “small but permanent oversight body” could absolve those deficiencies).

that the international body would be concerned with fact finding and ongoing evaluation of whether the intercountry-adoption process is working effectively.<sup>255</sup>

Like the maintenance of a global fund, the creation of a multinational agency would likely be a positive resource for the system of intercountry adoption. Still, because corruption has tended to occur at the very ground level,<sup>256</sup> and because a smaller oversight body cannot practicably provide an effective check on every individual adoption that takes place, a global agency does not fully respond to the needs of the international adoption community.<sup>257</sup> Additionally, uncertainties surrounding the funding and the legitimacy of such an agency make it unlikely to succeed if individual countries are not making their own efforts.

## V. RECOMMENDATIONS TO REDUCE CORRUPTION IN INTERCOUNTRY ADOPTION

In order to function effectively, intercountry adoption must be regulated. As with all international conventions, the number of possible oversight bodies is limited. In intercountry adoption, possible monitoring entities are (a) the sending state, (b) the receiving state, (c) an international body, and (d) a private body or network of private bodies. It seems reasonable that states of origin maintain a significant level of supervision in intercountry adoption because they are the closest to possible sources of corruption. However, the devastating patterns exemplified in Guatemala, Ethiopia, and other nations affirm that states of origin, on their own, have not been able to hold off the exploitation of children and families. Consequently, their supervision should be supplemented by one of the other three bodies.<sup>258</sup> An

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255. See *id.* at 403; see also Dillon, *supra* note 8, at 254 (“There is an urgent need for a global agency to carry out rigorous empirical studies” on how many children need help, how they might be helped, and “how their needs fit in with potential adoptive families, in-country and abroad.”).

256. See BLAIR ET AL., *supra* note 5, at 826–27 (discussing the beginnings of corruption in Guatemala); Graff, *They Steal Babies*, *supra* note 78 (describing corruption at the orphanage and adoption agency level in Ethiopia).

257. It is also likely that non-Hague states would object to supervision by or participation with a global body.

258. The idea of complementing the oversight powers of a state with parallel powers from another body is not unheard of in international law. Cf. Jeffrey L. Bleich, *Complementarity*, 25 DENV. J. INT’L L. & POL’Y 281, 281 (1997) (introducing the idea that, in international criminal law, states have embraced the idea of complementary jurisdiction in criminal prosecutions for both domestic courts and the International Criminal Court); Britta Lisa Krings, *The Principles of ‘Complementarity’ and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?*, 4 GOETTINGEN J. INT’L L. 737, 750 (2012) (suggesting that this complementary jurisdiction serves to both “ensur[e] that State parties . . . keep their sovereign right to try crimes committed under their jurisdiction” and “actively fight against impunity by prosecuting a higher number of perpetrators.”).

international body, while theoretically a good option, would be difficult to fund and staff to a level that it is able to provide additional checks and approvals concerning every aspect of the adoption process each time. A private body would be no better. There would still be concerns about who pays for this private monitoring, and privatization has already led to much of the trouble in the intercountry-adoption sphere. Few adoption proponents would endorse further removing intercountry adoption from public scrutiny. Thus, the best option for supplementing the supervision of states of origin is passing some of their responsibilities to receiving states. Asking more of receiving states is not unreasonable given that the work would be spread out among each receiving state and the vast majority are Western states that already possess the resources and infrastructure to provide additional oversight.

Therefore, rather than completely modifying the process set out in the Hague Convention or pulling the plug on intercountry adoption altogether, receiving states should take on more responsibility in ensuring that all intercountry adoptions reflect the principles set forth in the Hague Convention. According to the Hague's own information brochure, the Hague Convention allows parties to "impose higher standards or requirements on their partner Convention State Parties."<sup>259</sup> Therefore, using receiving states to provide additional monitoring and checks seems to be perfectly permissible without modifying the Hague Convention so long as its explicit requirements are also being implemented.<sup>260</sup>

To best combat corruption and exploitation: (1) receiving states should enforce the Hague Convention principles in every intercountry adoption; (2) receiving states should provide a secondary check on the adoptability of a child and the legitimacy of parental consents; (3) private agencies must maintain the continued approval and authorization of not only the state of origin, but also the receiving state in order to continue participating in the adoption process; and (4) receiving states should be diligent in their postadoption communication with states of origin.

#### *A. Every Adoption Should Proceed Like a Hague Adoption*

Although the Hague Convention has been around for more than twenty-five years, its vision and structure have hardly been given a chance to play out in a vast number of intercountry adoptions. Many intercountry adoptions transpire between countries that are not both members to the Hague Convention, and the Hague principles rarely

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259. INFORMATION BROCHURE, *supra* note 1, at 9.

260. *See id.* (listing permissible options for State Parties under the Hague Convention).

play out in these situations.<sup>261</sup> To avoid devastating outbursts of corruption, receiving states must enforce the processes and principles of the Hague Convention in all intercountry adoptions, regardless of whether the state of origin is a party to the Hague Convention.<sup>262</sup> While this idea is not revolutionary, it is absolutely necessary to any functional proposition concerning the Hague Convention or intercountry adoptions more broadly.

The Hague's Guide No. 1 claims that the need for the Hague Convention to apply even in non-Hague adoptions is a generally accepted principle.<sup>263</sup> The Special Commission has repeatedly recommended that states which are parties to the Hague Convention should seek to apply its standards and safeguards even in adoptions with non-Hague states.<sup>264</sup> Even scholars with dramatically different ideas about intercountry adoption have advocated that Hague principles be applied across the board.<sup>265</sup> Professor Smolin cautions that, if this is not done, there may develop a "two-tier system" in which adoptions between Hague states run smoothly and agencies wishing to avoid harsher scrutiny open up in non-Hague countries.<sup>266</sup> The wide embrace this notion has received is evidence of its importance in ending corruption in intercountry-adoption practices. Where countries are not willing to adhere to the standards of the Hague Convention in their intercountry adoptions, Hague countries should refrain from adoptions with those countries. If non-Hague adoptions are not held to the same standards as far as is practicably possible, then all other recommendations are moot because there will always be a massive backdoor for noncompliance.

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261. See, e.g., *Statistics*, *supra* note 21 (displaying an interactive map that shows the number of U.S. adoptions in each nation—both Hague and non-Hague—between 1999 and 2016).

262. In situations where the sending state is a party to the Hague Convention and the receiving state is not, the sending state should also seek to enforce the Hague standards in its dealings with that state. However, because the vast majority of big receiving states are members to the convention, it seems most necessary to place the call on receiving states. See *Status Table*, *supra* note 176 (listing contracting parties to the convention and their ratification status regarding the convention).

263. Guide No. 1, *supra* note 65, at 134, para. 635.

264. See *INFORMATION BROCHURE*, *supra* note 1, at 21 ("The Special Commission reiterated the recommendation that Contracting States, in their relations with non-Contracting States, should apply as far as practicable the standards and safeguards of the Convention.").

265. See Dillon, *supra* note 8, at 240 ("Access to adoption from any particular country should be restricted to agencies willing to observe the spirit of the Hague Convention."); Smolin, *Hague Convention*, *supra* note 64, at 497 ("Hague receiving countries . . . must apply equally vigorous regulatory and investigative approaches to adoptions from both Hague and non-Hague countries.").

266. Smolin, *Hague Convention*, *supra* note 64, at 497.

B. *Receiving States Should Provide a Second Check as to Whether a Child Is Adoptable and Consents Were Properly Obtained*

Rather than leaving under-resourced sending nations to confirm alone that each child is truly adoptable and that parental consents were properly received, receiving states should aid sending states by monitoring and providing an additional check on these two important pieces of information.<sup>267</sup> This is not to say that receiving states should take over these responsibilities or that states of origin should no longer make the initial checks themselves. Instead, in the shared interests of processing only ethical adoptions and bolstering the legitimacy of the international adoption system, both sending and receiving states should embrace a secondary check by receiving states. Smolin even goes so far to say that “[a]n interpretation of the Hague Convention that prevents or discourages receiving nations from independently investigating and evaluating the history and status of ‘orphans’ would render the Convention itself counterproductive.”

Article 39(2) of the Hague Convention expressly allows member states to enter into agreements with each other “with a view to improving the application of the Convention in their mutual relations.”<sup>268</sup> The text does limit the scope of derogation to only certain procedural requirements *after* the child is deemed adoptable by the state of origin, but a secondary check after the initial determination may well fit within the bounds of this provision.<sup>269</sup>

This confirmation could take many forms, some requiring more effort on the part of receiving nations. At the very least, direct correspondence between the agency that actually interacted with the child’s biological parents and the authorities of the receiving state seems reasonable. If this correspondence leads to suspicion on the part of the receiving state, it should alert the state of origin, discuss how to proceed, and—ideally with the support of the state of origin, but unilaterally if that is not possible—take the next appropriate step. This could mean refusing to work with a certain agency or group of agencies for a time or indefinitely. Another possible check would be providing questionnaires directly to birth parents after consents have been obtained. These questionnaires need not be overly complicated to catch potentially fraudulent inducement of consent. A great start would simply be asking a few questions about who the biological parents interacted with throughout the process, what sort of agreement they believe to have entered into, and if they were compensated or pressured in any way before they gave their consent. The questionnaires could be created and processed by the receiving states, and distributed and

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267. In a more recent article, Professor Smolin also pointed out that it is improper for receiving nations to rely on sending nations to do most of the legwork in rooting out corruption and exploitation. *Id.* at 496.

268. Hague Convention, *supra* note 30, art. 39(2).

269. *See id.* (limiting derogation from only the provisions of Articles 14–16 and 18–21).

collected by either the public authorities of the state of origin or those of the receiving state.

Critics may argue that national-sovereignty concerns will keep states of origin from embracing this idea. However, history and experience show that developing states are willing to accept many kinds of assistance—for example, developmental aid, technical aid, or aid following a crisis. Additionally, any state interested in providing a safe, moral, and legitimate adoption process should be willing to embrace the added help. The Hague's Permanent Bureau urged, with regard to the Hague Convention, that “[c]o-operation is an ongoing process that States need to constantly rethink and improve to avoid misunderstanding, inconsistencies, poor co-ordination, and duplicative efforts.”<sup>270</sup> Further, while many of the pre-adoption procedures—including the “formal assessment of the child’s situation”—are ideally public procedures, the Hague Guide No. 2 acknowledges the reality that many states of origin lack the resources to undertake all the preadoption procedures on their own and often outsource these responsibilities to nongovernmental actors.<sup>271</sup> Thus, rather than directly monitoring the operation of public entities, receiving states will more often than not be providing a second check on the actions of private bodies, which lessens possible concerns regarding the sending state’s sovereignty.<sup>272</sup>

### *C. Private Agencies Must Maintain the Approval of Every Major Participant in the Adoption Process*

The examples from Guatemala and Ethiopia demonstrate that the exploitation of parents and children in intercountry adoption typically begins with individual orphanages and adoption agencies.<sup>273</sup> It is, therefore, incredibly important that only duly approved bodies be allowed to operate in the intercountry-adoption process. What continued approval looks like will naturally look different in partnerships between two Hague states and those where only one country is a party to the Hague Convention. Approval processes and requirements will also vary based on whether the private agency is functioning as an accredited body under Article 10<sup>274</sup> or as an unaccredited body under Article 32.<sup>275</sup>

270. 25 YEARS, *supra* note 59, at 16.

271. Guide No. 2, *supra* note 126, at 47, para. 206.

272. It also bears repeating that the authorities of the sending state do not lose any oversight or monitoring power. The goal is increased oversight at the ground level, and this will be best achieved by supplementing the checks of sending states not replacing them.

273. See BLAIR ET AL., *supra* note 5, at 826–28 (discussing the adoption agency corruption history in Guatemala and Ethiopia); Graff, *They Steal Babies*, *supra* note 78 (saying many agencies sent money from the U.S. to poor countries in ways that constitute fraud).

274. Hague Convention, *supra* note 30, art. 10.

275. *Id.* art. 32.

In relations between two states that are parties to the Hague Convention, there are more rules in place regarding the continued operation of private agencies. Article 12 of the Hague Convention speaks to the necessary approval of accredited bodies to participate in intercountry adoptions between two Hague states.<sup>276</sup> It announces that bodies that have been accredited in one contracting state may only act in another “if the competent authorities of *both* States have authorised it to do so.”<sup>277</sup> However, it is unclear from the text of the Hague Convention whether this authorization refers to the initial accreditation of a private entity or whether continuous approval is required.<sup>278</sup>

Guide No. 2 suggests that authorization may differ from accreditation.<sup>279</sup> It encourages receiving states to have separate processes for accrediting bodies under Article 10 and authorizing them to work in a particular state of origin under Article 12.<sup>280</sup> It prefers that receiving states make “an individualised assessment . . . of the suitability of an accredited body to act in a particular State of origin.”<sup>281</sup> This seems to suggest that the Hague Conference is in favor of receiving states having more of a say in which accredited bodies they work with in any given state of origin. Guide No. 2, though, states that a state of origin may suspend or cancel the authorization of a foreign accredited body to operate in its territory, but does not say the same about receiving states.<sup>282</sup> Further, Guide No. 2 states that receiving states “respect and support” the determinations of states of origin concerning how many and which bodies are accredited to work there.<sup>283</sup>

According to Article 11(c) of the convention, accredited bodies are subject to the supervision of the competent authorities of the state of accreditation.<sup>284</sup> This seems to suggest that states that have only authorized the accredited body to act in their state or another state, but have not actually accredited that body, lack supervisory power over it. Further, because supervision is delegated to “competent authorities” rather than to the central authority or “public authorities,” it is possible that the supervisory role could be delegated to a nonstate actor.<sup>285</sup> Indeed, Guide No. 2 encourages, but does not require, states to retain control of the supervision functions.<sup>286</sup>

276. *Id.* art. 12.

277. *Id.* (emphasis added).

278. *See id.* (referring only to “a body accredited in one Contracting State”)

279. *See* Guide No. 2, *supra* note 126, at 43, para. 176 (noting a degree of separation between Article 10 accreditation and Article 12 authorization).

280. *Id.*

281. *Id.* at 43, para. 177.

282. *Id.* at 64, para. 290.

283. *Id.* at 43, para. 178.

284. Hague Convention, *supra* note 30, art. 11(c).

285. *See id.* (saying an accredited body shall be “subject to supervision by competent authorities of that State”).

286. *See* Guide No. 2, *supra* note 126, at 64, para. 285 (listing certain good practices that states are encouraged to implement).



This confusing and fragmentary web of authorization and supervision is not enough to meet the needs of the intercountry-adoption community. For the best chance at catching corruption early on, either the sending or receiving state should have the power to (a) unauthorize or denounce the accreditation of any accredited body unilaterally, and (b) supervise the accredited bodies acting in their partner states. Some will argue that this is what the text of the Hague Convention and Guide No. 2 already require. Others may say that this is adding something to Guide No. 2 or the text. Regardless, it is necessary and helpful to specifically bring this point to the attention of both sending and receiving states. Because corruption has consistently taken place at the ground level of orphanages and private actors, the accredited bodies should be subject to as much supervision as possible given the available resources. Receiving states should leverage their administrative resources and supplement the monitoring that states of origin are already doing.<sup>287</sup> For this additional supervision to be of any use, both the sending and receiving states must have the ability to stop working with any private body when one of them becomes concerned that unethical practices are occurring—regardless of whether that body has been previously accredited and authorized to act in a particular state and which state actually accredited the body.

The Hague Convention does not speak to whether both countries' approval is required for nonaccredited bodies certified under Article 22.<sup>288</sup> The text only specifies that a contracting state may declare that an unaccredited body is permitted to take on some of the procedural requirements in the intercountry-adoption process so long as that body meets the professional and ethical requirements of that state.<sup>289</sup> For maximum effectiveness in rooting out fraud, these unaccredited bodies should be subject to the same supervision and authorization standards as accredited bodies. That is, either the sending or the receiving state should be able to unilaterally refuse working with that body in the intercountry-adoption process at any time.

In non-Hague countries, the authorization and supervision of private agencies will have to look different. Because accreditation and other approval procedures are sourced from the Hague Convention, these procedures will only exist in non-Hague countries to the extent that the domestic laws and regulations of that country require them. To enforce the same supervisory and continued approval requirements in non-Hague states, receiving states may need to enact legislation specifically addressing this. In 2012, the United States did just this with its Intercountry Adoption Universal Accreditation Act (UAA).<sup>290</sup>

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287. Some of the supervision could involve communicating with adoptive parents who can be great source of information about the operation of non-public actors. Guide No. 2 suggests that adoptive parents help "supervise" accredited bodies by providing feedback on the services provided throughout the adoption. *See id.* at 65, para. 291.

288. *See* Hague Convention, *supra* note 30, art. 22.

289. *Id.*

290. Intercountry Adoption Universal Accreditation Act of 2012, Pub. L. No.

The UAA amended the United States' Intercountry Adoption Act of 2000 to require that the provisions concerning accreditation of nonpublic entities in Hague Convention adoptions apply with equal force to non-Hague adoptions.<sup>291</sup> Although the UAA went into effect relatively late into Ethiopia's adoption crisis, there is some evidence that it had a positive effect in shutting down unethical adoption agencies. Journalist E.J. Graff suggested that "[w]hen that law came into effect, the adoption agencies that most troubled the U.S. Embassy in Addis Ababa shut their doors and went out of business."<sup>292</sup> Other receiving states should follow suit and pass laws requiring Hague Convention accreditation standards in non-Hague adoptions. Non-Hague states of origin may not like this move on the part of receiving states, but they will have to live with its effects if they want to participate in intercountry adoptions with Hague countries.

#### D. Greater Transparency and Follow-up Reporting by Receiving States

Finally, to alleviate the concerns of sending countries like Ethiopia who want to know that their nation's children are being well looked after in their new homes, receiving states should take care to comply to the greatest extent possible with the postadoption reporting requests and requirements of sending states. Engaging in follow-up meetings with adoptive parents or at least requiring adoptive parents or social workers to respond to surveys about the status of the adoption would increase transparency from receiving states to sending states. Another possibility for greater transparency would be permitting, but not requiring, states of origin to conduct a similar "second check" on the approval of prospective adoptive parents before the adoption occurs. That way, concerned countries could choose to investigate further without demanding more of states of origin that feel they do not have the desire or resources to conduct such a check.

Article 20 of the Hague Convention briefly mentions that respective central authorities should keep each other informed about the progress of the placement "if a probationary period is required."<sup>293</sup> However, ratifying countries are permitted to do more than Article 20 requires,<sup>294</sup> so adding to the postadoption reporting requirements of receiving states fits comfortably within the text of the Hague Convention.

Additionally, at a meeting of the Hague Special Commission in June 2010, the commission recommended that receiving states comply

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112-276, § 2, 126 Stat. 2466 (2013).

291. *Id.*

292. Graff, *They Steal Babies*, *supra* note 78.

293. Hague Convention, *supra* note 30, art. 20.

294. *See id.* art. 39(2) (allowing parties to enter into additional agreements "with a view to improving the application of the Convention in their mutual relations" and expressly allowing derogations from Article 20).

with the postadoption reporting requirements of sending states.<sup>295</sup> The Special Commission also requested that the Hague's Permanent Bureau, together with parties to the convention and other nongovernmental organizations, assemble information regarding the "selection, counselling and preparation of prospective adoptive parents" for the possible development of a Guide to Good Practice No. 3.<sup>296</sup> If the Special Commission proceeds with this project, the new guide could also be a resource for receiving states seeking ways to best handle postadoption procedures and communication.

## VI. CONCLUSION

While intercountry adoption has, at times, been the setting of devastating corruption, concerned individuals should not abandon hope. Accounts of what happened in countries like Guatemala and Ethiopia are disheartening, but they also give insight into the form and causes of corruption in the intercountry-adoption system. Further, the Hague Convention gives policymakers a great starting point for better regulating international adoptions. Because of the unequal distribution of responsibilities and resources between sending and receiving countries under the Hague Convention and the significant role that private bodies are permitted to play in the adoption process, the ideals of the Hague Convention are not being realized in many adoptions.

However, allowing and encouraging receiving states to leverage their greater financial and administrative resources in the intercountry-adoption context can remedy these and other concerns. Specifically, receiving states should be called upon to (a) apply the principles of the Hague Convention to all intercountry adoptions, (b) offer a second check on the adoptability of a child and necessary consents of biological parents, (c) provide additional supervision of private actors, and (d) give detailed and timely follow-up reports on the statuses of completed adoptions. These measures will help the standards of the Hague Convention to be better realized in the intercountry-adoption sphere.

*Jordan Bunn\**

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295. See INFORMATION BROCHURE, *supra* note 1, at 20 (indicating also that it may develop a model form to aid receiving states in this endeavor). The Special Commission also recommended that states of origin which are members to the Hague Convention limit the period of required post-adoption reporting by receiving states. *Id.*

296. See *id.* at 17 (noting that Guide No. 3 might specifically address (1) dealing with failed adoptions, and (2) the period of validity of home study reports).

\* J.D. Candidate, 2019, Vanderbilt University Law School; B.A., 2015, Wake Forest University. Thank you to Professor Timothy Meyer for your guidance on this note. Thank you to the editorial staff and executive board of the *Vanderbilt Journal of Transnational Law* for your time, attention to detail, and companionship. Finally, thank you to my friends and family for bringing joy and support into this season. I am so grateful for you.